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September 14, 2015

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Finance Docket No. 35842
New England Central Railroad Inc. – Trackage Rights Terms and
Conditions – Pan Am Southern LLC

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's Reply to New England Central Railroad, Inc.'s Motion for Supplemental Protective Order in Partial Response to Motion to Compel. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS TERMS AND CONDITIONS –
PAN AM SOUTHERN LLC**

**PAN AM SOUTHERN LLC'S REPLY TO NEW ENGLAND
CENTRAL RAILROAD, INC.'S MOTION FOR SUPPLEMENTAL PROTECTIVE
ORDER IN PARTIAL RESPONSE TO MOTION TO COMPEL**

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Attorneys for Pan Am Southern LLC

Dated: September 14, 2015

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**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS TERMS AND CONDITIONS –
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BACKGROUND AND SUMMARY

This proceeding is before the Board to resolve a dispute between New England Central Railroad (“NECR”) and Pan Am Southern LLC (“PAS”) concerning the proper compensation to be paid by PAS for its continued use of trackage rights over a line of railroad owned by NECR.¹ In this case, PAS has filed discovery seeking information necessary to evaluate and determine which of the Surface Transportation Board’s (“STB”) four approved SSW Compensation methodologies² are most appropriate before providing that evidence to the Board. PAS has

¹ The NECR line at issue was previously owned by PAS’s predecessor company, Boston & Maine Corporation (“B&M”). The Interstate Commerce Commission (“ICC”) approved various transactions whereby the line was taken from B&M, conveyed to Amtrak, then conveyed to B&M’s competitor, Central Vermont Railway (the predecessor of NECR), and then B&M was charged a rental fee to operate over what had previously been its own line. See National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C. 2d 761 (1988) and National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (“Amtrak II”), 6 I.C.C. 2d 539 (1990).

² Both PAS and NECR agree that the proper methodologies for setting compensation in trackage rights cases were set forth in St. Louis Southwestern Ry. Co. - Trackage Rights Compensation (“SSW I”), 1 ICC 2d 776, 1984 ICC LEXIS 347 (1984); and St. Louis Southwestern Ry. Co. Compensation - Trackage Rights (“SSW II”), 4 ICC 2d 668, 1987 ICC LEXIS 15 (1987)(collectively, “SSW Compensation”). The four approved methodologies are: (1) the

strenuously objected to producing any discovery not directly relevant to its “Value In Place” (“VIP”) methodology - an untested and unapproved methodology which NECR claims should be the only methodology.³

To prevent discussion and consideration of any other methodology, NECR has filed its “Motion for Preliminary Determination of Appropriate Methodology And For Protective Order” (“Methodology Motion”) and a Motion for Supplemental Protective Order in Partial Response to Motion to Compel (“August 24th Motion”)(collectively, “Motions”). In accordance with 49 CFR §1104.13(a), PAS hereby replies to the August 24th Motion. The Board should deny both Motions. NECR’s Motions are merely self-serving attempts to limit the evidence before the Board contrary to the public interest.

Most, if not all, of the information necessary for PAS to perform a SSW Compensation analysis is solely within NECR’s possession. Having reviewed and analyzed such information, NECR put forth its VIP approach and has requested the Board to find that only the VIP approach should be used. PAS merely seeks the same opportunity: to review the same information and put forth its methodology. As PAS has previously shown, other methodologies, especially the CE Approach, could be calculated if PAS were provided the necessary information. Indeed, the Board has previously noted there is no hard and fast rule regarding application of one methodology or another and that parties should be free to pursue any of the methodologies, or

Capitalized Earnings Approach (“CE”); (2) Replacement Cost New Less Depreciation (“RCNLD”); (3) the comparable line segments approach; and (4) the stand alone cost method (“SAC”).

³ NECR does not dispute that the other discovery requests are relevant and acknowledges that the revenue, earnings, and profitability information sought by PAS is directly relevant to the CE Approach. See August 24th Motion at 3.

even modifications to those methodologies.⁴ The analysis is fact specific and therefore highly dependent upon an analysis of all relevant information.

Given this standard, because NECR is the only party that possesses the necessary information for PAS to conduct an analysis of any of the methodologies and the primary purpose of discovery is to allow parties to seek broad information in order to develop its argument, PAS should be allowed to obtain discovery related to any of the elements of the SSW Compensation methodologies, evaluate that evidence, make its case for application of any of the four approved methodologies, and critically address application of VIP. NECR can then respond to PAS's evidence on rebuttal. NECR's "my way or the highway" position in a proceeding it initiated eschews this basic administrative litigation process, runs counter to fundamental fairness, and does not equitably balance the interests of PAS, NECR, and the shippers served by the line.⁵

ARGUMENT

I. NECR HAS FAILED TO ESTABLISH THAT THE VIP APPROACH SHOULD BE THE ONLY METHODOLOGY

Both parties acknowledge that there are four Board-approved methodologies; yet, NECR wants the Board to reject these approved methodologies, and instead employ NECR's newly contrived VIP approach, which NECR equates to a RCNLD approach, which it is not. NECR has refused to provide the necessary information for PAS to evaluate anything but the VIP

⁴ See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company, FD 26476 (Sub-No. 1), 1994 ICC LEXIS 175, *10 (ICC served Sept. 20, 1994) ("TP&W") where the Board said "[t]he parties should not feel constrained by [its] preliminary comments; [the parties] are free to respond and develop any methodology they consider appropriate."

⁵ The State of Vermont ("Vermont") has raised concerns that NECR's suggested approach may be an attempt to increase trackage rights compensation beyond market rates in order to reduce competition and adversely affect the public interest. See Vermont Secretary of Transportation Letter dated August 28, 2015.

approach.⁶ NECR's rationale for withholding this data, which it alone possesses, is based upon the belief that requiring the disclosure of the information necessary to conduct a CE Approach would require the disclosure of confidential and proprietary information regarding revenues, costs, and traffic. Further, NECR argues that there is no reason to require such information to be produced because NECR is under the mistaken belief that a CE Approach can't even be calculated. Finally, NECR objects to use of the other methodologies because the information used for such other methodologies would not, in its opinion, be as accurate as the VIP approach. These rationales do not support rejecting the application of any of the other methodologies and should not be the basis for refusing to provide otherwise relevant discovery.

A. The Board Should Reject NECR's Refusal to Produce Revenue, Earnings, and Traffic Information On The Basis Of The Confidentiality Of Such Information

NECR argues strenuously that it should be not be required to produce some of the information requested by PAS because such information is highly confidential and proprietary information concerning revenues, traffic, and earnings, an argument it has made before and repeats in its August 24 Motion. NECR makes this argument notwithstanding that there already is a Protective Order in place designed to ensure there is no improper disclosure or use of such information. As the Board has done before in numerous cases, where there is a protective order in place, it should reject any efforts to shield otherwise relevant information from disclosure.⁷

⁶ After months of resistance, NECR has finally provided workable spreadsheets containing the actual VIP numbers utilized by its experts, but continues to refuse to produce the workpapers. NECR continues to resist providing any information relevant to the CE Approach. It also refuses to provide any actual maintenance of way information. Instead, pointing to Mr. Meadows' verified statement, which reflects MOW costs based upon his expert opinion, not actual information. PAS seeks the actual MOW plans and costs and the information necessary to conduct a CE Approach.

⁷ NECR does not dispute that it possesses the relevant revenue, traffic, and earnings information necessary to perform a CE Approach analysis, it simply doesn't want to provide it.

As the Board held in Springfield Terminal,⁸ “even if the records contain confidential, proprietary, or commercially sensitive information, it is well-settled that a Protective Order ensures that such information will be used solely for the involved proceeding and not for other purposes” and therefore should be produced without redactions. The fact that an agreement or document may contain a confidentiality provision with a third party has likewise not been grounds for refusing to withhold otherwise relevant information.⁹ Accordingly, the simple fact that the revenue, earnings, and traffic information that PAS seeks to undertake a CE Approach analysis is competitive information cannot form the basis for the failure to produce the information.

B. NECR Has Not Established That CE Approach Cannot Be Undertaken So As To Justify Withholding Relevant Information

Most of the dispute involves whether PAS should be entitled to discovery directed at applying the CE Approach.¹⁰ It is important to note that NECR does not argue that the CE Approach is not an approved methodology or that the information PAS seeks is not directly related to undertaking such an analysis. NECR argues that the CE Approach is not possible, and

⁸ The Springfield Terminal Railway Company – Petition for Declaratory Order – Reasonableness of Demurrage Charges (“Springfield Terminal”), NOR 42108, STB 2010 STB LEXIS 242, at *8-*9 (STB served June 16, 2010), quoting Pennsylvania Power & Light Company v. Consolidated Rail Corporation, et al., Docket No. NOR 41295 (STB served Mar. 10, 1997).

⁹ Intermountain Power Agency v. Union Pacific Railroad Company, NOR 42136, 2012 STB LEXIS 260, at *10-*11, (STB served July 12, 2012). See also Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.; Motion for Protective Order, NOR 42110, 2008 STB LEXIS 612, at *9-10 (STB served Oct. 22, 2008)(Ordering parties to produce to opposing counsel copies of rail transportation contracts and related documents/information containing confidentiality provisions with third parties).

¹⁰ The Board actually prefers the CE Approach and has used that approach in several cases. See SSW II at *16-17 (Noting that while there are several valuation methods available, the Board prefers the CE Approach because the CE Approach best values the asset as a going-concern business with income-producing potential). Given this well documented preference for the CE Approach, NECR has a high burden to establish why PAS should not be provided with the information necessary to undertake such an analysis.

as such, the Board should rule that any discovery related to the CE Approach is irrelevant and issue the protective order. NECR is simply wrong; as previously shown by PAS, application of the CE Approach is possible if NECR provided PAS with the requested information, and in its August 24th Motion, NECR provided no evidence or expert opinion to rebut this point.

In the Methodology Motion, NECR contended that the CE Approach is not possible in this proceeding because (1) there are no line-specific earnings available for the trackage rights segments that would accurately reflect the value of the trackage rights segments; (2) there is no contemporaneous market value for NECR; and (3) the data lacks specificity in its application, and so would not accurately reflect overall earnings of NECR. However, as demonstrated in PAS's Reply, if NECR is required to produce the information requested by PAS, line specific earnings can be calculated, the market value of NECR can be estimated, and with more specificity than VIP.

Given that PAS's Reply demonstrated that the CE Approach could be calculated, it was highly surprising that the August 24th Motion offered no evidence to the contrary. NECR did not even attempt to show that PAS's approaches were deficient, or that the CE Approach couldn't be calculated in the manner suggested by PAS. NECR simply claims "[t]he Methodology Motion addressed why the CE methodology is not appropriate in this proceeding, and NECR will not address that issue again here." August 24th Motion at 9. It completely ignores PAS's arguments as to why the CE Approach is in fact calculable and relevant. Given that the CE Approach can be calculated and that the information PAS seeks is relevant, NECR has not established a basis for withholding the information.

C. Case Law Supports The Notion That PAS Should Be Provided An Opportunity To Examine And Put Forward Any Of The Methodologies

NECR points to A&M-I¹¹ as standing for the proposition that VIP should be the only accepted methodology because there are challenges in applying the available data to the other methodologies. The problem with this analysis is that the Board has never held that simply because there are challenges to obtaining and applying data that other available methodologies should be automatically rejected. It is true that the Board has previously applied RCNLD (which NECR claims is similar to VIP) but the reason RCNLD was applied in the A&M-I case was that neither of the parties actually pursued application of a CE, SAC, or comparable line segment approach. In A&M-I, the Board eventually adopted RCNLD because the parties both agreed on application of that approach and acknowledged that much of the information necessary for calculation of the CE Approach didn't even exist. In contrast, here, it is not that the information necessary is unavailable or doesn't exist, but rather, NECR just doesn't want to produce it. The information that PAS seeks is available, can be produced, and such produced information can be used to calculate the appropriate interest rental component using the CE Approach.¹²

Indeed, it is the policy of the Board not to limit a parties' ability to gather and present evidence where the information is available or is sought by a party for use in its own analysis. In TP&W, another case cited by NECR, the Board noted that parties should be provided maximum flexibility in developing their case.¹³ This preference for allowing parties maximum flexibility in

¹¹ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 6 I.C.C. 2d 619, 1990 ICC Lexis 110 (STB served Mar. 23, 1990)(“A&M-I”).

¹² Even in the A&M-I case, the Board noted that if the data were available, it would prefer the CE Approach. Here, the CE Approach is feasible if PAS were provided with the requested revenue and traffic information. Likewise, given that the comparable line segment approach and the SAC approach are also approved methodologies and NECR possesses information related to those methodologies as well, NECR should be required to produce it.

¹³ TP&W at *10.

obtaining and using data is true even if the data is not available or kept in the precise manner as discussed and employed in SSW Compensation. See St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis (“SSW III”), FD 30,000 (Sub-No. 16), 5 ICC 2d 525, 1989 ICC LEXIS 126, at *5, *11 (1989)(noting that parties should be provided the opportunity to make their case using whatever data is available). This is consistent with other cases where the Board allowed parties to make calculations depending on the circumstances and available evidence even where such data was not a perfect fit with established methodologies. See, e.g., GS Roofing (upholding the Board’s estimation of costs attributable to tenant carrier’s use of rail line based upon system-wide averages, not line specific costs or earnings.)¹⁴

The Board will provide flexibility to all of the parties to analyze and present whatever data are available and has been reluctant to hamstring the parties into applying only one methodology. NECR should be free to pursue its VIP approach,¹⁵ but likewise, PAS should be free to pursue the other approaches. It is then for the Board to weigh the evidence submitted by the parties. The Board will then have to make the same sort of judgments about the NECR submission, and the means and methods that NECR created in order to arrive at its inputs and calculations, as much as it will about the evidence to be submitted by PAS. In the end, it may be that the CE Approach, comparable line, or SAC approaches are not the appropriate methodologies, but PAS should be provided the information that NECR possesses in order to develop its submission.

¹⁴ See GS Roofing Products Co. v. STB, 262 F.3d 767, 776-77 (8th Cir. 2001)(“GS Roofing”).

¹⁵ PAS is not arguing that NECR can’t use VIP, but rather, PAS believes that VIP should not be the only methodology.

D. The VIP Approach Itself Differs From RCNLD And Is Based Upon Certain Data Limitations

While claiming that it should not be required to produce information related to the other methodologies because of alleged deficiencies in the data and its application to those other methodologies, NECR ignores that VIP itself suffers from some of the very same alleged problems. As an initial matter, it should be noted that the VIP approach has never been approved by the Board, and to PAS's knowledge, it has never been specifically applied to a trackage rights compensation dispute. Indeed, NECR itself acknowledges that VIP is merely "an approximation of RCNLD," August 24th Motion at 7.¹⁶ Actually, VIP differs in significant respects from the RCNLD approach. It is not a "mere approximation."

Some of the obvious deficiencies in application of VIP concern the valuation concepts and methodologies for depreciating assets. The valuation concepts differ for various components of the railroad right-of-way. VIP for rails, ties, ballast and other track materials is defined "as the retail market value of all rail assets as if they were available for sale assuming market prices on September 2, 2014."¹⁷ For non-rail related fixed infrastructure, which NECR limits inexplicably to bridges, tunnels, at-grade crossings and signals, the VIP is "the estimated value of in-place fixed infrastructure, again as of September 2, 2014."¹⁸ For right-of-way, NECR's VIP approach *assumes* that the entire right-of-way corridor is held in fee simple title, regardless

¹⁶ The reason NECR claims it cannot apply a true RCNLD approach is because it "does not keep its records in a way that would allow the formal calculation required under RCNLD." See August 24th Motion at 7. Yet, if NECR is allowed to modify its data and present its VIP approach, PAS should not then be prevented from obtaining relevant data applicable to other methodologies simply because NECR does not keep its data in the precise manner necessary for calculation of these other methodologies.

¹⁷ Verified Statement of RLBA at 6.

¹⁸ *Id.*

of whether or not that assumption holds true.¹⁹ NECR's VIP approach ignores roadbed and other critical cost items typically considered in RCNLD valuations. There is no fixed method for depreciating the assets, as is done when RCNLD is applied; thus, application of VIP spawns ambiguity as to what degree of depreciation NECR opts to apply and to which assets. Finally, NECR's own testimony indicates that the VIP methodology only "attempts to provide the current value" (Id. at 8) for the line. VIP appears to depend largely on estimates as to the potential sales price or market value of such assets, an approach that is different than RCNLD, which relies on adjustments to replacement costs, and thus eliminates the VIP need to establish arbitrary sales or market values.

Regardless of these differences between VIP and RCNLD, PAS is not suggesting that NECR should be prevented from putting it forth. But PAS should be free to put forth its preferred methodology. As PAS has established, the CE Approach can be calculated using the information currently in NECR's possession; a point which NECR didn't even rebut, and NECR likewise possesses data that would allow PAS to calculate the other approaches as well. Given that parties should be provided with maximum flexibility in presenting their evidence, it should not be grounds for withholding relevant evidence simply because NECR does not keep its data in the precise manner discussed in the SSW Compensation cases. PAS should be free to take that data and present its case. The Board can then weigh the various approaches and make its own decision. Adopting only one methodology is not consistent with this approach. Accordingly, the Motions should be denied.

¹⁹ Verified Statement of RLBA at 9.

II. RESTRICTING DISCOVERY IS CONTRARY TO THE PUBLIC INTEREST AND ESTABLISHED PRECEDENT

Because the Motions should be denied, PAS's Motion to Compel should be granted and PAS should be able to pursue its discovery; however, as noted previously, NECR continues to resist discovery, even discovery related to its own VIP approach. Yet, PAS is entitled to seek discovery on all of the Board approved methodologies as long as the information sought is relevant.²⁰ At the onset, it is important to note that NECR's refusal to produce what it admits is otherwise relevant information should be rejected because NECR is under an obligation to produce any relevant and admissible evidence which might be able to affect the outcome of this proceeding. Clearly, the evidence that PAS seeks might affect the outcome of this proceeding. As such, PAS is entitled to gather information and data relevant to any of the elements of the SSW Compensation methodologies, evaluate that evidence, and make its case for application of its chosen methodology.

NECR argues that discovery is meant to be narrowly tailored and that the Board should first determine a methodology, and to do so without allowing one of the parties (PAS) to review any data relevant to other methodologies. According to NECR, only by limiting discovery to its one methodology can discovery be tailored and the issues focused. But NECR has it backwards. The scope of discovery is meant to be broad, not narrow. See Fed. R. Civ. P. 26(b)(1). Indeed,

²⁰ "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Appl. of the Nat'l R. R. Passenger Corp. Under 49 US C. § 24308(a)-Can. Nat'l Ry. ("Amtrak"), FD 35743, slip op. at 8 (STB served Sept. 23, 2014) quoting Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me. ("Waterloo"), AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). Clearly the information PAS seeks "might affect the outcome."

courts have recognized that one of the main purposes of discovery is to gather broad information to help define and clarify the issues.²¹

Even the Supreme Court has recognized that "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." See Hickman v. Taylor, 329 U.S. 495, 500-501 (1947) ("Hickman"). Hickman also noted that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Id at 507. This is exactly why PAS has sought all relevant information before settling on a methodology. NECR had all available information to it before it decided on VIP. PAS should likewise be given access to that same information before determining what methodology is appropriate. Only then can both parties have the "mutual knowledge" necessary to make informed decision on whether the Board should use the CE Approach or another approach. As such, PAS's Motion to Compel should be granted.

CONCLUSION

NECR's Motions collectively seek a holding that NECR's newly created VIP methodology is the only appropriate methodology, and as such, NECR should be protected from providing any other information applicable to any of the other SSW Compensation methodologies. This request should be denied. Other valid and acceptable methodologies exist, but can only be applied using information solely within the files of NECR. PAS should be provided that information. PAS can then evaluate the evidence, present its case based on its chosen methodology, and provide its views on the VIP approach. NECR can then respond to PAS's evidence on rebuttal. It is then the Board's role to weigh the evidence, and to determine which methodology it will adopt and apply. That is the proper course and that is the only course

²¹ See Chan v. City of Chicago, 1992 U.S. Dist. LEXIS 10434 (N.D. Ill. July 15, 1992); and SEC v. Colin McCabe, 2015 U.S. Dist. LEXIS 67253 (May 22, 2015).

that ensures mutual knowledge of all the relevant information, which is an essential component to proper litigation. As such, PAS respectfully requests that the Board deny the Motions and grant the Motion To Compel.

Respectfully submitted,



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Attorneys for Pan Am Southern LLC

September 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Pan Am Southern LLC's Reply to New England Central Railroad, Inc.'s Motion for Supplemental Protective Order in Partial Response to Motion to Compel ("Reply") by mailing copies of the Reply via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. this 14th day of September, 2015.



William A. Mullins
Attorney for Pan Am Southern LLC