

# BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS  
2401 PENNSYLVANIA AVENUE, NW  
SUITE 300  
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820  
FACSIMILE: (202) 663-7849

238960  
ENTERED  
Office of Proceedings  
August 3, 2015  
Part of Public Record

William A. Mullins

Direct Dial: (202) 663-7823  
E-Mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com)

August 3, 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 ("PAS") Motion to Compel Responses to PAS's First Discovery Requests Directed to New England Central Railroad, Inc. in the above-captioned proceeding. 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](mailto: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  
MOTION TO COMPEL RESPONSES TO PAN AM SOUTHERN LLC'S  
FIRST SET OF DISCOVERY REQUESTS TO  
NEW ENGLAND CENTRAL RAILROAD, INC.**

---

**Robert B. Culliford  
Pan Am Southern LLC  
1700 Iron Horse Park  
North Billerica, MA 01862  
Tel: (978) 663-1126**

**William A. Mullins  
Crystal M. Zorbaugh  
BAKER & MILLER PLLC  
2401 Pennsylvania Ave., NW  
Suite 300  
Washington, DC 20037  
Tel: (202) 663-7820  
Fax: (202) 663-7849**

**Attorneys for Pan Am Southern LLC**

**Dated: August 3, 2015**

**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  
MOTION TO COMPEL RESPONSES TO PAN AM SOUTHERN LLC'S  
FIRST SET OF DISCOVERY REQUESTS TO  
NEW ENGLAND CENTRAL RAILROAD, INC.**

---

**INTRODUCTION**

On June 4, 2015, New England Central Railroad, Inc. (“NECR”) filed its Opening Statement and Evidence (“NECR’s Opening”) in the above captioned proceeding. On June 11, 2015, Pan Am Southern LLC (“PAS”) served PAS’s First Discovery Requests (“PAS’s First Requests”) upon NECR seeking workpapers and documents related to NECR’s Opening and seeking material to assist PAS in conducting its analysis for its reply. On July 16, 2015, NECR filed its “Objections and Responses to Pan Am Southern LLC’s First Set of Discovery Requests” (“NECR’s Discovery Response”) and filed its “Motion for Preliminary Determination of Appropriate Methodology And For Protective Order.” (“Methodology Motion”). As for the Methodology Motion, PAS is currently in the process of preparing its reply to that motion and intends to file its reply no later than August 5, 2015 (20 days after receipt of NECR’s motion).

While the Board issued a decision on July 29, 2015 holding the procedural schedule for the filing of PAS’s reply and NECR’s rebuttal in abeyance pending further order of the Board,

the decision was silent with respect to whether the discovery deadlines set forth in 49 CFR § 1114, Subpart B were likewise suspended. Accordingly, PAS must assume that they were not. As such, pursuant to 49 CFR § 1114.31(a), PAS hereby moves for an order compelling NECR to answer certain discovery requests that were contained in PAS's First Requests.<sup>1</sup> This Motion to Compel is necessary because NECR, through its Discovery Response, has either refused to produce responsive information and documents or provided incomplete, or in some cases, incomprehensible responses to most of the document requests propounded in PAS's First Requests. As explained herein, the information requested by PAS is relevant to this proceeding, and in some cases, is crucial for PAS to fully participate in this proceeding and prepare its analysis based upon long standing methodologies that have been utilized by the Board in trackage rights compensation cases.

### ARGUMENT

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 SSW Compensation methodology involves analysis of three elements:

- (1) variable cost of operations incurred by owning carrier as a result of tenant carrier's operations;

---

<sup>1</sup> Pursuant to 49 CFR § 1114.31(a), this motion to compel would have normally been due on July 27 – 10 days after NECR's Discovery Response; however, by agreement of the parties, and depending upon whether the Board suspended the discovery deadlines, the due date was extended to August 3. As noted, because the Board July 29 order was silent on the discovery deadlines, PAS assumes that the August 3 deadline is still applicable.

- (2) the tenant's share of track maintenance and operating expenses based on a car-mile percentage use basis; and
- (3) an interest rental component to compensate the owning carrier for tenant carrier's use of capital dedicated to the track by the owning carrier.

PAS's First Requests sought information directly relevant to these elements – a fact that even NECR admits.<sup>2</sup>

While NECR admits that most of PAS's First Requests are indeed relevant to the SSW Compensation methodologies, it has refused to produce any information regarding three of the four Board approved approaches in determining the interest rental component.<sup>3</sup> In so doing, NECR is denying PAS the opportunity to examine all relevant evidence and make a determination as to which of the four Board approved methodologies it will put forth in its reply. Instead of complying with its discovery obligations, NECR has filed its Methodology Motion seeking a Board order that only its chosen methodology is appropriate and thus it should not have to produce otherwise relevant material. Furthermore, even though there is no Board order yet in place endorsing NECR's approach, nor should there be, NECR has, in its sole discretion, and without Board approval, chosen to produce only information relevant to its chosen

---

<sup>2</sup> Throughout its Discovery Response, NECR does not object to PAS's First Requests on the basis that the information requested by PAS is not relevant to the analysis of what constitutes appropriate trackage rights compensation. Rather, NECR's objection to PAS's First Requests is grounded in its attempt to dictate which SSW Compensation methodology should be used to determine trackage rights compensation. See, e.g., NECR General Objection No. 3.

<sup>3</sup> In determining the valuation base used in calculating the interest rental component, the Board has approved the use of four methodologies – (1) capitalized earnings ("CE"); (2) replacement cost new less depreciation ("RCNLD"); (3) the comparable line segments approach; and (4) the stand alone cost method ("SAC"). Contrary to NECR's assertions, PAS has not yet determined which of these four methods it will utilize. PAS is entitled to review all relevant information in NECR's possession before making a determination as to which methodology it will employ.

approach.<sup>4</sup> 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<sup>5</sup> which might be able to affect the outcome of this proceeding – including information relevant to all approved SSW Compensation methodologies. NECR cannot withhold responsive information during discovery simply because it deems in its sole opinion that the information is irrelevant.<sup>6</sup>

Even the documents that NECR produced, which documents NECR has self-limited to its own VIP approach, are of little use. Specifically, the documents that NECR produced are either extensively redacted<sup>7</sup> (including responses designated Highly Confidential), or were produced in

---

<sup>4</sup> While NECR claims to have employed a RCNLD approach, in actuality, it modified that approach and has basically invented its own approach – which is described as a “value in place” (“VIP”) approach. Unlike RCNLD which, as the name suggests involves developing an estimate of replacement costs and reducing that amount by estimated depreciation, the VIP approach ascribes values to assets in place. There is no legal support in the SSW Compensation cases for such a VIP approach.

<sup>5</sup> PAS is entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “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). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). See also Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision, FD 35731, slip op. at 4 (STB served Aug. 22, 2013) and Seminole Electric Coop., Inc. v. CSX Transport, Inc., NOR 42110, at 2 (STB served Feb. 17, 2009).

<sup>6</sup> See Iowa Public Service Company v. Burlington Northern Railroad Company and Chicago and Northern Western Transportation Company, No. 37021; No. 37029, 1985 ICC LEXIS 542, at \*6-\*8 (March 11, 1985).

<sup>7</sup> Numerous documents have been redacted, even in highly confidential responses, without appropriate justification. For example, NECR redacted numerous documents containing revenues and maintenance expenditures, both of which are essential to determining appropriate trackage rights compensation for PAS's continued use of the NECR-owned lines under several

PDF form only (over 2,000 pages of Excel spreadsheets) rather than in native format. This tactic unfairly obliterated spreadsheet formulas and cell references and resulted in lines, columns, and cells from the spreadsheets being split over several pages so that the pages reflected a few words at most, leaving the documents produced basically incomprehensible. Producing documents that are extensively redacted or incomprehensible under the guise that NECR has replied to PAS's discovery requests prevents PAS's ability to develop meaningful evidence from the materials and is outside the boundaries of acceptable discovery practice.

In summary, PAS propounded 36 requests (one Interrogatory, and thirty-five Document Requests). Based on our review of the materials provided to date, NECR answered or produced some materials for at most 11 of PAS's 36 requests. In light of the importance of the requested information and the need to establish appropriate trackage rights compensation, PAS hereby files this motion to compel.<sup>8</sup> In the sections that follow PAS responds to NECR's General Objections (Section I). Additionally, PAS respectfully requests that the Board take the following action: (1) compel NECR to answer Document Requests Nos. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27 (Section II); (2) compel NECR to unredact the documents produced in connection with Document Requests Nos. 5, 8, 12, 20, 26, and 34 (Section III); and (3) compel NECR to supplement its

---

methodologies. NECR also refused to provide workpapers in their native format so as to allow PAS to analyze NECR's calculations, claiming that production of workpapers is subject to attorney-client and work product privilege because production of such workpapers "would reveal thought processes." See Document Request 1 below. Other documents have been improperly designated as confidential. For example, NECR produced ICC Reports, a public document, but designated them as "Confidential." Upon notification, NECR has agreed to make the ICC reports it produced public, rather than Confidential.

<sup>8</sup> Due to the extensiveness of the discovery disputes between the parties and the time it will take to resolve the pertinent issues in this proceeding, the Board may wish to refer the case to an administrative law judge ("ALJ"). If the Board decides to take that approach, PAS does not object. Further, as explained in Section III, having an ALJ involved in this proceeding could be beneficial in resolving issues pertaining to the extent and nature of the numerous redactions NECR has made.

response to Document Requests Nos. 14, 19, 24, 31, 32, 33, and 34 by reproducing NECR's responses in their native form, rather than as incomprehensible PDFs (Section IV).

**I. MANY OF NECR'S OBJECTIONS REMAIN WHOLLY INSUFFICIENT TO SUPPORT NECR'S REFUSAL TO RESPOND TO PAS'S DISCOVERY REQUESTS.**

NECR's Discovery Response includes sixteen General Objections to PAS's First Requests. PAS has carefully reviewed each of NECR's General Objections and is willing to amend the scope of certain discovery requests as explained herein; however, for certain other discovery requests also identified herein, PAS maintains the scope is proper, and the Board should overrule NECR's objection.

For General Objections 1 and 2, NECR objects to PAS's definition for both NECR and Genesee & Wyoming Inc. ("G&WY"). In response to NECR's General Objections, PAS will agree to narrow the definitions of each entity, as long as NECR produces any relevant G&WY documents, including documents from other G&WY subsidiaries, where such documents are related to the operation, ownership, value, and/or management of NECR.

For General Objection 3, the CE approach remains a recognized method of establishing the interest rental component of trackage rights compensation. Unless the Board diverges from precedent and rules differently on NECR's Methodology Motion, this objection is simply insufficient grounds for NECR's refusal to comply with PAS's Document Request Nos. 3, 5, 7, 10, 11, 15, 17, and 22. As stated above, PAS is entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). Absent a Board order to the contrary, any requests that seek information related to the CE approach are relevant and discoverable, and could affect the outcome of the proceeding; thus, NECR's general objection should be overruled.

General Objection 4 is directly related to General Objection 3 because under certain implementations of the CE approach, calculations will take into account earnings related to the entire railroad, not just the segmented trackage rights line. As such, this general objection should also be overruled.

For General Objection 6, NECR objects to the date range of PAS's discovery requests. PAS is willing to limit its discovery requests except for documents related to any agreements with Amtrak, various states or state subdivisions, and anything related to the price/value of infrastructure constructed or paid for by entities other than NECR. PAS is willing to accept NECR's proposal to limit its responses to the period between January 1, 2013 through May 31, 2015 for all document requests, except for Document Requests 34 and 35, which need to remain at 2008 forward, and Document Request No. 9, which must remain from 1990 forward. These earlier dates are directly tied to time periods for which PAS knows certain infrastructure improvements were made by entities other than NECR, and who, what, and how much of those infrastructure projects were paid for by others is directly relevant to the SSW compensation analysis.

For General Objections 7, 11, and 14, NECR indicates it intends to redact non-responsive information in order to protect confidential information, it intends to place documents that involve contractual confidentiality provisions with third parties on a privilege log, and it refuses to produce documents that include information relating to trade secrets, and/or confidential business records. NECR's general objections are an insufficient basis for refusing to produce the information requested. Under the existing Protective Order issued by the Board on June 3, 2015, highly confidential and confidential disclosures are permitted and are not deemed a violation of 49 U.S.C. 11323, 11904, or any other relevant provision of the ICC Termination Act of 1995.

As explained in Section III, by NECR producing highly confidential documents, and then further redacting those documents, NECR is creating a new category of documents: Highly, Highly Confidential documents. Such redaction is not provided for in the Protective Order and this practice should be disallowed. Indeed, the Board has specifically rejected efforts to refuse to produce information containing confidential, proprietary, or commercially sensitive information.<sup>9</sup> In Springfield Terminal, the Board held “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. Finally, 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.<sup>10</sup>

For General Objection No. 8, contrary to long standing practice in other cases, NECR is refusing to establish a document depository in the Washington D.C. offices of its counsel. NECR asserts that voluminous or burdensome documents will only be available in Darien, Connecticut; necessitating expensive and time consuming travel to Darien by other parties to this proceeding. Counsel for NECR has informed PAS that the documents in Darien consist of 30 rolls of dispatching papers, and three large plastic containers and a box of other documents. PAS is willing to engage in a discussion with NECR to determine what relevant information actually

---

<sup>9</sup> 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).

<sup>10</sup> 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).

is contained in the 30 rolls of dispatching papers and whether the relevant information exists in an electronic format that would facilitate the production of the information and its usefulness to PAS's experts. Clearly, it is reasonable for NECR to ship the other documents to the D.C. offices of the law firm representing the client. In fact, it is standard practice for litigation documents to be maintained in the D.C. offices of the law firm representing the client, consistent with numerous Board discovery protocols.

Alternatively, PAS believes that to the degree the documents can be copied (such as is likely true for the documents contained in the three plastic containers and the other box of other documents), it is equally reasonable for NECR to have the documents copied at PAS's expense and shipped to PAS counsel. Further to the degree that such data is available electronically, NECR should produce the documents in electronic form. Accordingly, PAS respectfully requests that the Board overrule General Objection No. 8 and compel NECR to engage in a discussion with PAS to determine what information is included in the 30 rolls of dispatching papers and whether such information is available electronically. Further, PAS asks the Board to compel NECR to produce the documents by sending the documents to the District of Columbia office of Clark Hill PLC, copying the documents at PAS's expense, or providing the documents in electronic form to whatever degree possible.

For General Objection No. 12, NECR objects to PAS's requests to the extent they seek documents not directly relevant to the proceeding, not admissible in evidence, or not reasonable calculated to lead to the discovery of admissible evidence. However, in Board proceedings, a party is entitled to all relevant and possibly admissible evidence, so long as the information sought is not privileged. To meet its relevance burden, PAS does not need to show that the information will be used or will affect the outcome, but rather, PAS needs to merely show that

the documents “might be able to affect the outcome of a proceeding.”<sup>11</sup> To the extent PAS uses such information, it is then the Board’s responsibility, not NECR’s responsibility, to determine the relevancy and admissibility of evidence sought in discovery. In summary, PAS asks the Board to overrule NECR’s General Objections with regards to Document Requests No. 3, 4, 6, 7, 8, 11, 12, and 14.

**II. PAS’S DOCUMENT REQUESTS ARE RELEVANT TO THE SSW COMPENSATION METHODOLOGY CALCULATIONS**

NECR should be compelled to respond to Document Requests No. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27 because the requested information is directly relevant to the ability of PAS to not only “test and analyzed” the assertions made by NECR with respect to its newly minted VIP approach, but are also crucial to PAS’s ability to develop its own evidence and put forth its own methodology. In particular, the document requests are relevant to the resolution of several issues: (1) the accuracy of the calculations made by NECR in NECR’s Opening; (2) establishment of NECR’s revenues; (3) evaluation of current trackage rights compensation for PAS’s usage of the NECR-owned lines; (4) determination of the profitability of the NECR lines; (5) analysis of any cost-sharing arrangements between NECR and National Railroad Passenger Corporation (“Amtrak”); and (6) determination of the adequacy of current trackage rights compensation paid by PAS for usage of NECR-owned lines.

As previously noted, answers to PAS’s document requests are necessary for the Board and PAS to perform valuation of the line consistent with the four Board recognized methodologies. NECR argues the Board should find that valuation of the line is not possible

---

<sup>11</sup> For PAS to meet its burden that the document are relevant, it need not prove that the documents “will” affect the outcome, but rather such documents “might” affect the outcome or could otherwise lead to other admissible evidence. ). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." See Amtrak, slip op. at 8.

under the CE approach, and further the Board should enter a Protective Order prohibiting PAS from seeking documents or other discovery related to the CE approach, including without limitation documents showing NECR revenue and earnings information. See NECR's Opening at 11. Clearly, NECR seeks to avoid its discovery obligations for Document Requests No. 3, 5, 7, 10, 11, 15, 17, and 22 because NECR purports that the requests are solely related to CE approach, a methodology NECR urges the Board to reject. See Motion at 4. Yet, unless and until there is a Board order limiting the methodologies that should be employed, NECR is under an obligation to produce all relevant information, and NECR admits that this information is relevant to the CE approach. Furthermore, not only are the documents relevant to the CE approach, but many of the very same Document Requests could be used to calculate the interest rental component under a SAC methodology. While NECR asserts that certain necessary information is unavailable, it has made no attempt to obtain such information, and would rather the Board rely solely on NECR's preferred VIP approach to value the line. As explained below, the Board should reject NECR's meritless attempts to avoid having to produce relevant documents.<sup>12</sup>

NECR is under an obligation to produce as much relevant information it can in accordance with the Document Request. It is then up to PAS and its experts to examine that evidence, determine which methodology is appropriate, and then put forth its case. NECR can comment on the sufficiency of the information and methodology in its rebuttal. If NECR believes that the information is somehow misused in PAS's analysis, it can make those arguments in rebuttal, but it should not be allowed to make that determination on its own and refuse to produce whatever information it does have in its possession. Accordingly, the Board should compel NECR to

---

<sup>12</sup> Furthermore, while such information may be unavailable in the exact format that PAS has requested, it is likely that some, or even most, of the information could be available in whole or in part in another format. Appointment of an ALJ would facilitate discussion and resolution of just what types of information, and what formats, are available.

respond to Document Requests No. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27 because the requested information is directly relevant and might be able to affect the outcome of the proceeding.

### DOCUMENT REQUESTS

In Document Request No. 1, NECR objects to producing workpapers and supporting documents for NECR's Opening, including all materials reviewed, relied upon and/or prepared by Dave Ebbrecht, President of NECR; R.L. Banks and Associates; and Gary R. Anglemeyer and Associates in support of their submissions in this proceeding. NECR also objects to the request as improper to the extent it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine or any other legally cognizable privilege.<sup>13</sup> Instead of providing the workpapers substantiating its calculations, "NECR refers PAS to the Highly Confidential version of its Opening Statement." See NECR's Discovery Response. Of course the Opening Statement contains the witnesses' testimony and their conclusions, it does not contain the raw data, i.e. the workpapers that were relied upon by that witnesses.<sup>14</sup>

NECR's refusal to provide the witness workpapers is astonishing because in almost every Board proceeding, the Board and the parties are universally provided fully functioning, linked and documented spreadsheets (including assumptions), upon which the evidence was based.

---

<sup>13</sup> As a preliminary matter, NECR provides no legal support for its objection with respect to workpapers as privileged material. PAS has done an extensive search and was unable to find any cases suggesting that the Board has ever found workpapers to be subject to NECR's purported claims of privilege.

<sup>14</sup> For example, while the RL Banks statement listed items like unit costs, there was no visibility as to the source of a particular cost. All the RL Banks reports says is that the source of the myriad of unit costs is "American Metal Markets, Unitrac and RLBA estimates." NECR should be required to produce all of the documents relied upon by RL Banks (and its corresponding real estate valuation) in developing the estimates. In addition to all of the underlying spreadsheets, these include, but are not limited to field notes and measurements, memoranda or conversation with suppliers, copies of quotes or estimates received from contractors and vendors, track charts and other inventory documents provided by NECR, breakdowns of any unit prices that might reflect transportation costs, removal, salvage or other component, photographs, etc.

Given that NECR is asking the Board to determine trackage rights compensation, NECR should at a minimum be required to supply the information necessary to calculate trackage rights compensation. Refusal to do so violates PAS's due process rights and is contrary to Board precedent. Indeed, in a recent decision, the Board discussed the importance of such detailed supporting information being provided in its native form. The Board indicated that spreadsheets should include a clear description of what the spreadsheet represents and a clear description of the rows and columns therein. Additionally, the "source of any evidence (e.g., the sources for unit costs, annual frequency, etc.) used in calculations should be noted in the spreadsheet in which the calculation is made." Consumers Energy Company v. CSX Transportation, Inc., NOR 42142, slip op. at 3 (STB served July 15, 2015). Clearly, when a party submits evidence that party must also make available any documents relied upon by its experts in developing their analysis (underlying spreadsheets, supplier data, quotes and estimates) in order for both the Board and other parties to evaluate the accuracy of the evidence submitted. Otherwise, the evidence can only be deemed unsupported.<sup>15</sup>

NECR has provided nothing but conclusory evidence. It has failed to provide support for its calculations. By requiring that documents be submitted in their native form (for example providing spreadsheets as an excel document not a PDF), it allows opposing parties and the Board to validate the submitting party's calculations, and assures that any changes to assumptions flow through to all of other calculations made in the evidence. It also allows parties to verify the assumptions made in the documents. For example, if calculations are made in a proceeding involving unit cost, the submitting party should be required to provide documents

---

<sup>15</sup> "The source of all values in a spreadsheet must be readily apparent. If a source is not identified parties run the risk that we [the Board] will assume that the value is unsupported." Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, EP 347 (Sub-No. 3) slip op. at 5 (STB served Mar. 12, 2001) ("EP 347").

supporting those asserted unit costs.<sup>16</sup> Therefore, PAS asks the Board to compel NECR to provide the workpapers and supporting documentation identified in Document Request No. 1, to allow PAS to evaluate the accuracy of the evidence presented.

In Document Request No. 3, NECR objects to providing valuation analyses performed by or at the request of G&WY in connection with its acquisition of Rail America. NECR states Document Request No. 3 is overly broad, unduly burdensome, not relevant, and related to the CE approach, which as explained in NECR's Motion the Board is asked to reject. However, such evidence is directly relevant to several of the SSW Compensation methodologies, including the CE approach.

As stated above, the sale of Rail America to G&WY was an arm's length transaction, pursuant to which G&WY obtained Rail America, which owned NECR; thus, PAS can use the information it is seeking through Document Request No. 3 to determine or calculate the value that the buyer placed on NECR and make corresponding adjustments to reflect financial data specific to the NECR-owned lines that are subject to this proceeding. Given that the value of NECR when G&WY acquired it is relevant to PAS's calculations under several methodologies, any documents that show that value in part or in whole should be produced. Further, if no specific value was assigned to NECR, then, in some calculations, PAS is entitled to calculate

---

<sup>16</sup> In the event NECR is concerned over the confidential or highly confidential information contained in the workpapers, NECR should produce such workpapers in accordance with the Protective Order issued by the Board on June 3, 2015. See Western Coal Traffic League – Petition for Declaratory Order; Motion for Protective Order, FD 35506, at \*2-\*3, 2011 STB LEXIS 452 (Sept. 27, 2011)(Ordering parties to produce workpapers to validate calculations (including write-up, depreciation calculations, etc.), even if the workpapers contain confidential, proprietary, or commercially sensitive material, so long as the requesting party agrees to be bound by a protective order and noting that the existence of a protective order ensures that the material produced in response to a discovery request or otherwise will only be used in connection with the proceeding before the Board and not for any other business or commercial purpose.)

NECR's value based upon the value of Rail America as a whole. Thus, NECR's general and specific objections are simply not adequate grounds for withholding the requested information. Therefore, PAS urges the Board to compel NECR to provide the documents requested in Document Request No. 3, which relate to valuation analyses performed by or at the request of G&WY in connection with its acquisition of Rail America.

In Document Request No. 7, PAS requested that NECR provide a breakdown of NECR revenues (by source) for the years 2008 to present. NECR objects to Document Request No. 7 on the basis that the request was overly broad, unduly burdensome, and related to the CE approach, which it urges the Board to reject. PAS of course agrees that such information is related to the CE approach, as well as other approaches, because such information can be used to establish NECR's revenues, which is critical for the Board and PAS to properly value the line.

NECR also objects to PAS's chosen date range for document Request No. 7, and proposes that the response period be limited. PAS's request was originally based on 2008 because PAS wanted to be sure that the trackage rights compensation adequately captured all regular infrastructure investments over the line, given that railroad infrastructure investment varies greatly from year to year. However, PAS has considered NECR's objection and is willing to limit the discovery response period to January 1, 2013 through May 31, 2015, consistent with NECR's General Objection No. 6.

Unless and until such time that the Board rules that the NECR's proffered VIP approach is the only applicable approach, which the Board should not do, the information sought in Document Request No. 7 remains relevant. As such, PAS respectfully asks the Board to compel NECR to provide the documents requested in Document Request No. 7.

In Document Request Nos. 10 and 11, PAS requested information, including studies and analysis performed by or for NECR, relating to the profitability of NECR's traffic by traffic group, and by line, including, the former B&M Connecticut River Line from Windsor, Vermont to Brattleboro, Vermont (Amtrak I) and the CV Lines from White River Junction, Vermont to Windsor, Vermont and from Brattleboro, Vermont to East Northfield, Massachusetts, over which PAS has trackage rights (Amtrak II). NECR objects to Document Request Nos. 10 and 11 again because NECR believes the requests are not related to its proffered approach. Such requests, are related, however, to other SSW Compensation approaches. Clearly, determination of the profitability of the NECR lines is relevant to whether the trackage rights fee currently paid covers the additional costs incurred from PAS's operation over the NECR-owned lines. More importantly, profitability is the essential focus for determining trackage rights compensation under several methodologies. Again, unless and until such time that the Board rules in favor of NECR on its Methodology Motion, the information sought remains relevant and possibly admissible evidence, which might well affect the outcome of the proceeding. Thus, PAS has satisfied its burden concerning relevancy and production of the information that it has requested.<sup>17</sup>

For Document Request No. 15, PAS requests that NECR produce the databases, data warehouses and computer programs (with all documentation related to these databases and computer programs), in a computer-readable format, that includes 37 categories of information for each movement handled by NECR as an originating, terminating, overhead or single-line carrier for each year or partial year from 2008 to present. NECR objects on the grounds that

---

<sup>17</sup> PAS has considered NECR's General Objection No. 6 and is willing to limit NECR's discovery response period to January 1, 2013 through May 31, 2015. Given the importance of the information sought in determining appropriate trackage rights compensation, PAS respectfully asks the Board compel NECR to provide the requested documents.

request is overbroad, burdensome, and not relevant to its VIP approach. As explained herein, it is the responsibility of the Board, not NECR to determine relevancy. Further, this data forms an important part of the SSW Compensation approach, and if NECR's objection is correct that it does not have revenue data for only the trackage rights segments but only on a systemwide basis, it should still produce it because such data will allow PAS to allocate revenues to the trackage rights segments using Board-sanctioned procedures. Finally, unless and until such time that the Board rules on NECR's Methodology Motion, such information remains relevant and possibly admissible evidence, which could well affect the outcome of the proceeding.

Indeed, the information requested in Document Request No. 15 goes to the very crux of what the Board is determining in this proceeding, which is appropriate trackage rights compensation for PAS's usage of the NECR-owned lines. In order for PAS (and the Board) to evaluate and determine appropriate trackage rights compensation, NECR must provide significant revenue and traffic data (the necessary data is included as subparts to Document Request No. 15). Without this data, PAS is foreclosed from meaningful participation in establishing trackage rights compensation under several SSW Compensation methodologies.

Additionally, not only is the data in Request No. 15 relevant to other methodologies, but it is also relevant to for the Board and PAS to evaluate any calculations that NECR made using its VIP approach. Given the nature and type of the data requested, it is critically important that any data produced be provided in native form, rather than as a PDF. In order for PAS to be able to calculate the interest rental portion of appropriate trackage rights compensation under several of the available methodologies, PAS respectfully urges that the Board compel NECR to respond to Document Request No. 15.

For Document Request No. 16, PAS requests NECR provide copies of train dispatcher sheets (or the data recorded in such sheets in a computer readable format, to the extent available), or other documents (e.g., conductor wheel reports) that record train movement data in a computer readable format to the extent available, for all car and train movements on the NECR. NECR has agreed to produce responsive documents, but only in Darien, CT and apparently only in paper form. As discussed earlier, if such data is available in electronic form, PAS requests that it be so produced. However, even if not available in electronic format, NECR should make such data available at the D.C. offices of the law firm representing the client. Accordingly, PAS respectfully requests that the Board compel NECR to produce the documents subject to Document Request No. 16 by sending the documents to the District of Columbia office of Clark Hill PLC, copying the documents at PAS's expense, or providing the documents in electronic form to whatever degree possible.

For Document Request 19, PAS requests that NECR provide documents sufficient to show NECR's existing maintenance-of way plan, costs and staffing on the NECR, including the maintenance-of-way districts and/or crews employed by NECR to maintain the (a) track, (b) signals and communications facilities, (c) bridges, and (d) all other facilities and structures on the NECR, the number of NECR employees by job classification presently assigned to each maintenance-of-way district or crew on both a permanent and a seasonal basis, and any changes in the maintenance districts, crews, and number and classification of employees that have occurred since January 1, 2008.

PAS has considered NECR's objection and is willing to limit the discovery response period to January 1, 2013 through May 31, 2015, consistent with NECR's General Objection No. 6. However, NECR has refused to provide any documents in connection with Document

Request No. 19, and instead refers PAS to the Highly Confidential Version of NECR's Opening Statement. Analogous to Document Request No. 1, the information requested in Request No. 19 is necessary for PAS to evaluate the accuracy of the evidence presented by NECR's in its Opening Evidence. Furthermore, historical data is needed because the SSW approach allocates NECR's actual maintenance and operation expenses to the tenant. Such an approach does not rely upon a consultant's estimate of these costs, but rather on the actual costs. As such, this data is necessary for PAS to perform its calculations under several of the SSW Compensation methodologies, including the CE approach and SAC, either of which PAS could potentially elect to apply.<sup>18</sup>

Refusal to produce the information is contrary to Board precedent. As stated by the Board, when a party submits evidence, that party must also provide a sufficient level of detail, including documents relied upon by experts in developing their analysis (underlying spreadsheets, supplier data, quotes and estimates) upon which to evaluate the accuracy of the evidence submitted. See EP 347. Due process requires that PAS be provided such information in native format so it can accurately evaluate NECR's methodology. As such, the Board should compel NECR to produce the documents subject to Document Request No. 19.

For Document Request 22, PAS requests that NECR produce any and all valuation analyses or studies conducted since 2008 for the NECR. NECR objects to the request as overly broad, burdensome, not relevant because it is solely related to the CE approach, which it urges the Board to reject. Yet, it is relevant to the CE approach, as well as to possible other approaches. As such, contrary to NECR's assertions, establishment of any valuations performed is critical for the Board and PAS to properly value the line under the SSW Compensation approach. As such,

---

<sup>18</sup> To be clear, PAS is seeking all workpapers related to NECR's filings, including workpapers related to any the calculations made by NECR.

unless the Board finds that NECR's proposed approach is the only applicable methodology, PAS's requested information remains relevant and admissible evidence, which might be able to affect the outcome of the proceeding. In fact, the information requested in Document Request No. 22 is highly likely to impact overall calculations on appropriate trackage rights compensation for PAS's used of the NECR-owned lines. Thus, PAS seeks all available information necessary for it to present evidence to the Board concerning the appropriate methodology to be applied in this proceeding and to ensure that any terminal trackage compensation established, equitably balances the interests of PAS, NECR, and the public interest.

For Document Request No. 27, PAS requests that NECR produce documents identifying all donated rights of way and/or land grants (including easements) obtained by NECR or NECR's predecessors in connection with the construction of any rail line located on the NECR. PAS requests nine categories of information in connection with this request. NECR objects to this request on the grounds that the requested information is publicly available and/or contained in conveyance documents; further, NECR argues that the request is overbroad, burdensome, and not relevant. Also, NECR asserts that the request is in part duplicative of Request 26. NECR objections should be overruled.

First, the request is not duplicative, since it asks NECR to clearly identify donated or easement land, rather than requiring PAS to send individuals to each county courthouse to do a deed search and then analyze each of the deeds and conveyance documents—a process that could take months or more. Second, Document Request No. 27, goes directly to the heart of performing of a proper valuation of the line, which as recognized by NECR is the driving

determinant of the ... interest [ ] rental component.”<sup>19</sup> Such documents are relevant to all four of the SSW Compensation methodologies for determining the value of the right-of-way. Document Request No. 27 is also critical for PAS to “test” or validate NECR’s VIP evidence. Finally, given the short time that PAS has to retrieve publicly available data, it is likely far less burdensome for NECR to provide whatever documents it has in its possession than for PAS to search and retrieve them. Note that all PAS is requesting is for NECR to produce any deeds or information in NECR’s custody or control.<sup>20</sup> For all these reasons, PAS asks the Board to compel NECR to provide the requested documents in connection with both Discovery Request No. 27 and Discovery Request No. 26 as explained above.

In summary, as explained above, the Board should compel NECR to respond to Document Requests No. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27 because the requested information is directly relevant and might be able to affect the outcome of the proceeding. Despite NECR’s Motion, until such time that the Board orders that the only valid approach is NECR’s proffered VIP approach, which order would be highly prejudicial to PAS and contrary to all previous cases applying the SSW Compensation approach, the information sought in PAS’s First Requests remains relevant and possibly admissible evidence, which might well affect the outcome of the proceeding. Thus, PAS has satisfied its burden concerning relevancy and production of the information that it has requested. As such, the Board should compel NECR to respond to Document Requests No. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27.

### **III. NECR SHOULD BE ORDERED TO UNREDACT CERTAIN RESPONSES AND PROVIDE SUCH RESPONSES IN NATIVE FORM TO THE DEGREE POSSIBLE**

---

<sup>19</sup> See NECR’s Opening at 11.

<sup>20</sup> Note NECR did not object on the basis that such information was not available, not in its possession, or would require a special study. As such, PAS must assume that NECR does possess such information, which it should be compelled to produce.

As noted, NECR did produce some documents, but what it did produce was heavily redacted and limited to its proffered VIP approach. PAS agrees that to the extent those redactions were due to attorney/client privilege, they should stand. However, a review of the privilege log shows that most of the redactions were based on relevancy (i.e. not relevant because they were not responsive to NECR's VIP approach) or because such redacted information was "confidential" business data. Neither of these claims form a legitimate rationale for redacting the information. As such, the Board should order NECR to unredact the documents produced in connection with Document Requests Nos. 5, 8, 12, 20, 26, and 34.

The information that PAS has sought in connection with PAS's First Requests is directly related to several methodologies that PAS could potentially use to calculate the interest rental component of any proposed trackage rights compensation. As such, unless the Board issues an order establishing NECR's proffered VIP approach as the only appropriate methodology, NECR is under an obligation to unredact any information that is relevant to any of the SSW Compensation methodologies, and to the extent it contains sensitive commercial information, the Board's existing Protective Order provides sufficient protection for such information.

The information sought in PAS's First Requests is critical for PAS to perform several calculations necessary to determine trackage rights compensation. A party cannot withhold information during discovery simply because the party deems in their sole opinion that the information is irrelevant, so long as the information is responsive. It is simply unacceptable that NECR has arbitrarily redacted financial information necessary to calculate trackage rights compensation, even in its highly confidential discovery responses. Specific examples are as follows:

In Document Request No. 5, PAS requested that NECR provide financial statements and all supporting documentation and workpapers for NECR, including income statements, statements of cash flows, and balance sheets, for the years 2008 to the present. NECR produced documents labeled NECR\_000367-NECR\_000414. However, NECR's production is problematic for two reasons. First, nearly 15 pages of the data are redacted even in NECR's highly confidential responses, leaving mostly large black boxes on the page. Second, the data, which included spreadsheets, was not produced in its native form making it difficult to double check calculations and any assumptions related to the calculations.

With respect to the confidential nature of the requested information, the existing Protective Order provides sufficient protection. By NECR producing highly confidential documents, and then further redacting those documents, NECR has created a new category of documents: Highly, Highly Confidential documents. As explained above, such redaction is not provided for in the Protective Order and this practice should be disallowed. Further, it is not grounds to withhold relevant information simply because the document may be governed by contract confidentiality provisions with third parties. Intermountain Power Agency v. Union Pacific Railroad Company, NOR. 42136, 2012 STB LEXIS 260, at \*10-\*11, (STB served July 12, 2012)(documents containing non-disclosure provisions ordered to be produced when such documents were relevant and the third party was afforded notice and given a reasonable opportunity to object to production of such information and obtain a ruling from the Board on that objection).<sup>21</sup> Furthermore, NECR cannot refuse to produce any underlying workpapers – a

---

<sup>21</sup> See also Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, NOR 42056, slip op. at 2-3 (STB served Feb. 9, 2001)(The Board ordered that the parties exchange shipper contract information in discovery, despite shipper objections. The four shippers affected by the proceeding questioned the information's relevancy to the proceeding, and argued that potential disclosure could result in competitive damage because of concerns over

standard practice in STB proceedings. Accordingly, the Board should order NECR to unredact the documents produced in connection with Document Requests Nos. 5.

Document Requests 8, 12, and 20 are related but seek similar information for different line segments. In Document Request No. 8, PAS requests a breakdown of all NECR operating expenses by major railroad operating expense category (i.e., train crew wages, locomotive ownership, lease, locomotive operations and maintenance (including fuel), maintenance of way, freight car ownership and maintenance, depreciation, ad valorem taxes, loss and damage, general and administration, etc.) for the entire NECR system for the years 2008 to the present. In Document Request No. 12, PAS requests that NECR provide a breakdown of all operating expenses by major railroad operating expense category (i.e., train crew wages, locomotive ownership, locomotive operations and maintenance (including fuel), maintenance of way, freight car ownership and maintenance, depreciation, ad valorem taxes, loss and damage, general and administration, etc.) for the years 2008 to the present but only for certain line segments. In Document Request No. 20, PAS requests that NECR provide detailed costs for each year for capital maintenance (regular, periodic replacement of track and bridge components) and operating expense maintenance (inspections, spot maintenance, lubricating, etc.) from January 1, 2008 to May 31, 2015.

NECR responds to Document Request No. 8, 12, and 20, by referring PAS to documents produced in Document Request No. 8 as NECR\_000415-NECR\_000421. This is problematic because those documents (NECR\_000415-NECR\_000421) are almost entirely redacted. NECR claims that portions redacted relate to revenue information and are subject to NECR's Motion.

---

the sufficiency of the protective order in this proceeding. The Board held “[w]hile we understand the concerns raised by those shippers here, we are satisfied that the parties’ agreements regarding scope and the application of the “highly confidential” provisions of the protective order are sufficient to protect the interests of third-party shippers.”)

However, disclosure of revenue information is permitted under the existing Protective Order issued by the Board on June 3, 2015. Further, NECR's objections presume that NECR is entitled to relief under 49 C.F.R. §1114.21(c). As will be detailed in PAS's Reply, NECR has simply failed to meet its burden for protection, under 49 C.F.R. §1114.21(c) to obtain the extraordinary relief it seeks. As stated herein, unless and until such time that the Board agrees with NECR that the only applicable methodology is NECR's proffered VIP approach, any information related to the other methodologies remains relevant and admissible evidence, which might be able to affect the outcome of the proceeding, and for which NECR is under an obligation to produce.

Again, on the confidentiality issue, the Board has rejected arguments that the information should not be produced because it contains confidential, proprietary, or commercially sensitive information. See Springfield Terminal. Therefore, the Board should order NECR to unredact the documents produced in connection with Document Requests Nos. 8, 12, and 20.

In Document Request No. 26, PAS requests that NECR produce without regard to any date limitation, copies of any land valuation maps for NECR rail lines located on the NECR, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps. In response to Document Request No. 26, NECR produced nearly 700 pages of maps with numerous redactions. The privileged log produced by NECR on July 23, 2015 states that the redacted information includes (1) external summaries, which are non-responsive and (2) several hundreds of pages of maps with internal notations that are not part of the map, which are non-responsive. It is unclear why the notations are "unresponsive." Does the redacted information counter the valuations of the right-of-way and infrastructure put into the record by RL Banks & Associates? Was it redacted because it relates to the other methodologies, which NECR asserts are not relevant? PAS has no way of knowing.

As such, PAS requests that such information be unredacted. If NECR continues to object, then PAS requests an in-camera review of the maps by either a Board employee or an ALJ assigned by the Board to be sure that the information redacted by NECR does not pertain to relevant deed information or other real estate information concerning grants and conveyances of land, which could potentially impact the outcome of this proceeding or relate to any of the SSW Compensation methodologies.<sup>22</sup>

In Document Request No. 34, PAS requests that NECR produce documents sufficient to show the cost that NECR has incurred for the following track materials from 2008 to the present, including, average cost per linear foot and/or ton by weight of rail for both new and relay rail, turnouts, and other track materials (Ties, Tie Plates, Rail Anchors, Spikes, etc.). NECR produced documents labeled NECR\_004541-NECR\_0004587. NECR's production is problematic for two reasons. First, the data provided is redacted almost entirely, even in NECR's highly confidential responses, which makes NECR's response essentially useless. Second, the data, which included spreadsheets, was not produced in its native form, which limits the utility of the data produced. Accordingly, PAS requests that the Board order NECR to unredact the documents produced in connection with Document Requests No. 34, and additionally, PAS requests that the Board compel NECR to produce the requested data in its native form.

In summary, as explained above, the Board should compel NECR to unredact the documents produced in connection with Document Requests Nos. 5, 8, 12, 20, 26, and 34. As

---

<sup>22</sup> The Board has recognized that parties can request an ALJ to perform such a review in STB proceedings. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, FD 32760, Decision No. 57 n2, 1996 STB Lexis 422, at \*34 (STB served Nov. 20, 1996); see also Petition of Canadian National Railway Company for Institution of Practitioners Proceeding, EP 453, 1984 ICC LEXIS 447, at \* (STB served June 7, 1984).

explained herein, the information that PAS has sought is in connection PAS's First Requests is directly related to several methodologies that PAS could potentially use to calculate the interest rental component of any proposed trackage rights compensation. Furthermore, it is not grounds to refuse to produce information simply because it may contain confidential, proprietary, or commercially sensitive information.

**IV. THE DOCUMENTS NECR PRODUCED ARE INCOMPLETE BECAUSE THE RESPONSES WERE NOT PROVIDED IN NATIVE FORM<sup>23</sup>**

The Board should order NECR to supplement its responses to Document Requests Nos. 14, 19, 24, 31, 32, 33, and 34 in native form because NECR's Discovery Response included over 2,000 pages of Excel spreadsheets and tables that were produced as PDFs rather than its native format, which obliterated formulas and cells references and forced lines, columns, and cells from the spreadsheets to be split over several pages so that the pages reflected a few words at most. As a result, the documents produced were basically incomprehensible. Producing documents that are incomprehensible due to format in which the documents were produced under the guise that NECR has replied to PAS's discovery requests is simply unacceptable.

The documents that PAS seeks to have produced in native form are in connection with Document Requests Nos. 14, 19, 24, 31, 32, 33, and 34. These Documents Requests seek documents containing operating statistics and density data for all traffic by railroad (NECR, Amtrak, and Pan Am) and by commodity (Document Request No. 14); documents concerning NECR's existing MOW plan, costs, staffs, signals, bridges, and facilities (Document Request No. 19); property tax assessments and records (Document Request No. 24); documents

---

<sup>23</sup> On July 31, 2015, counsel for NECR indicated that it will produce some information in electronic format but not until after the due date for the filing of this Motion to Compel. After review of any produced information, PAS may withdraw some of its requests. At this time, it is unclear what information is going to be produced.

identifying construction and rehabilitation costs than exceed \$250,000 (Document Request No. 31); documents concerning construction plans, engineer estimates, and construction costs (Document Request No. 32); documents concerning AFEs, construction plans, engineering estimates, and construction specifications (Document Request No. 33); and documents concerning trail materials costs (Document Request No. 34). PAS finds it peculiar that rather than NECR producing the requested documents as maintained in NECR's system, NECR has chosen to spend the time, effort, and money to convert the requested documents into PDFs, a burdensome and much less useful form for PAS.

It is important to note that by NECR not producing the documents in their native form, it makes it nearly impossible to interpret or gauge the relevance of the data, and understand any related calculations and assumptions critical to determining the accuracy of the information supplied. As explained herein, the Board has recognized the importance of parties producing information in its native form. Specifically, the Board has stated any spreadsheets should include a clear description of what the spreadsheet represents and a clear description of the rows and columns therein. Additionally, the "source of any evidence (e.g., the sources for unit costs, annual frequency, etc.) used in calculations should be noted in the spreadsheet in which the calculation is made." Consumers Energy Company v. CSX Transportation, Inc., NOR 42142, slip op. at 3 (STB served July 15, 2015). When a party submits evidence, that party must also provide a sufficient level of detail, including documents relied upon by experts in developing their analysis (underlying spreadsheets, supplier data, quotes and estimates) upon which to evaluate the accuracy of the evidence submitted. NECR's production has failed this test.

Unless and until any information is produced in its native form (for example providing spreadsheets as an excel document not a PDF), PAS cannot evaluate and determine the

credibility of NECR's proffered VIP approach; yet alone conduct a true RCNLD approach or calculations under any of the other approaches. As it currently stands, NECR is effectively attempting to block PAS from evaluating its evidence. Additionally, NECR's actions are preventing PAS from developing its own evidence based on reliable financial and traffic data routinely kept by NECR. Therefore, the Board should order NECR to supplement its responses to Document Requests Nos. 14, 19, 24, 27, 31, 32, 33, and 34 by providing the data produced in its native form.

### **CONCLUSION**

For the reasons explained herein, PAS respectfully requests that the Board reject NECR's objections as set forth in Section I of this Motion to Compel, order NECR to provide responses to Document Requests No. 1, 3, 7, 10, 11, 15, 16, 19, 22, and 27 (Section II), unredact the documents produced in connection with Document Requests Nos. 5, 8, 12, 20, 26, and 34 (Section III), and supplement its responses to Document Requests Nos. 14, 19, 24, 31, 32, 33, and 34 (Section IV).

Respectfully submitted,

Robert B. Culliford  
Pan Am Southern LLC  
1700 Iron Horse Park  
North Billerica, MA 01862  
Tel: (978) 663-1126



William A. Mullins  
Crystal M. Zorbaugh  
BAKER & MILLER PLLC  
2401 Pennsylvania Ave., NW  
Suite 300  
Washington, DC 20037  
Tel: (202) 663-7820  
Fax: (202) 663-7849

August 3, 2015

Attorneys for Pan Am Southern LLC

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion to Compel Responses to PAS's First Discovery Requests Directed to New England Central Railroad, Inc. ("Motion") by mailing copies of the Motion 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 3<sup>rd</sup> day of August, 2015.



William A. Mullins  
Attorney for Pan Am Southern LLC

**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  
MOTION TO COMPEL RESPONSES TO PAN AM SOUTHERN LLC'S  
FIRST SET OF DISCOVERY REQUESTS TO  
NEW ENGLAND CENTRAL RAILROAD, INC.**

---

**EXHIBIT A**

---

**NECR's WRITTEN RESPONSE TO PAS'S  
FIRST DISCOVERY REQUEST**

---

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

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

---

**NEW ENGLAND CENTRAL RAILROAD, INC.'S  
OBJECTIONS AND RESPONSES TO  
PAN AM SOUTHERN LLC'S  
FIRST SET OF DISCOVERY REQUESTS**

ERIC M. HOCKY  
LISA CARNEY ELDRIDGE  
CLARK HILL PLC  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
(215) 640-8500  
[ehocky@clarkhill.com](mailto:ehocky@clarkhill.com)

Dated: July 15, 2015

Attorneys for  
New England Central Railroad, Inc.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

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

---

**NEW ENGLAND CENTRAL RAILROAD, INC.'S  
OBJECTIONS AND RESPONSES TO  
PAN AM SOUTHERN LLC'S  
FIRST SET OF DISCOVERY REQUESTS**

---

New England Central Railroad, Inc. ("NECR") hereby responds to the discovery requests served on it by Pan Am Southern LLC ("PAS") pursuant to 49 C.F.R. §1114.21 through 1114.31, as follows:

**GENERAL OBJECTIONS**

1. NECR objects to the Definition of "NECR" to the extent that it is defined to encompass "predecessors, successors, parents, subsidiaries, affiliates...; and all Persons acting or purporting to act on their behalf" as it is circular, overly broad, burdensome and irrelevant to the instant proceeding. Further, NECR does not have possession or control over the documents of its parent or affiliated companies.

2. NECR objects to the Definition of "G&WY" to includes all "predecessors, successors, parents, subsidiaries, affiliates...; and all Persons acting or purporting to act on their behalf" as it is circular, overly broad, burdensome and irrelevant to the instant proceeding.

3. NECR objects to these discovery requests to the extent they seek information related to the capitalized earnings ("CE") method to determine the interest rental component of trackage rights compensation. As set forth in NECR's Motion for Preliminary Determination of

---

Appropriate Methodology and for Protective Order (“NECR’s Methodology Motion”) being filed simultaneously before the Surface Transportation Board, information requested by PAS relating to valuation, revenue and traffic is irrelevant as the CE method is not the appropriate valuation method in this proceeding. Until such time as the STB rules on NECR’s Methodology Motion, NECR will not produce its highly confidential valuation, revenue, earning and traffic information. *See* NECR’s Methodology Motion for a more thorough discussion of why the CE method is not appropriate in the current proceeding.

4. NECR objects to these requests to the extent they request documents that relate to more than the trackage rights line at issue, or to the three segments comprising the trackage rights line. Where segmented information is not available, NECR will produce non-privileged, responsive information related to the entire railroad.

5. NECR objects to these requests to the extent they ask for information in “major railroad” categories. NECR is a Class III carrier, not a major railroad. It is therefore not required to - nor does it - maintain records in the same manner as major railroads. NECR will respond with documents and information in the form maintained in its usual course of business. Similarly, in other requests in which information has been requested by specific categories or type of document, NECR is responding with documents and information in the form maintained in its usual course of its business.

6. NECR objects to the date range in these requests as PAS generally requests documents going back to 2008, and in several instances even earlier. There is no basis for seeking documents going back to 2008 as such requests would not produce relevant evidence for this proceeding, particularly since NECR is not seeking to calculate trackage rights based on those periods, nor is it seeking compensation retroactively for those periods. NECR only used

---

information from 2014 in its Opening Statement and Evidence (“Opening Statement”). Going back that far to produce irrelevant documents is unduly burdensome, overbroad, and would require extraordinary time and expense. NECR does not object to producing documents for the period of January 1, 2013 through May 31, 2015 (the two-year period following GWI’s obtaining control of NECR at the end of December, 2012). Notwithstanding the foregoing, NECR does not object to producing available documents from the transactions that were the subject of “Amtrak I.”

7. To the extent that documents being produced contain both responsive and non-responsive information, NECR intends to redact the non-responsive information in order to protect confidential information.

8. Certain documents responsive to these requests are too voluminous or burdensome to copy and shall be produced, where indicated, at in Darien, Connecticut, at a mutually convenient time.

9. NECR objects to these discovery requests to the extent they seek information or documents that are publicly available and/or already in the possession, custody and control of PAS.

10. NECR objects to these requests to the extent they seek documents protected by the attorney-client privilege and/or the work product doctrine. To the extent relevant, responsive documents fall in this category that are dated before the start date of litigation they will be listed on a privilege log to be produced as soon as possible after this production. NECR will not list documents protected by the attorney-client privilege and/or the work product doctrine that were created after the start date of litigation on said privilege log.

---

11. NECR objects to these discovery requests to the extent they seek documents subject to contractual confidentiality provisions with third-parties, which require the permission of those third-parties to disclose. To the extent relevant, responsive documents fall in this category they will be listed on a privilege log, and NECR will request permission for the disclosure of such documents from the relevant third-parties.

12. NECR objects to these requests to the extent they seek documents not directly relevant to this proceeding, not admissible in evidence or not reasonably calculated to lead to the discovery of admissible evidence.

13. NECR objects to these requests to the extent that responding would impose an unreasonable burden on NECR.

14. NECR objects to these discovery requests to the extent that they seek proprietary information and/or information relating to trade secrets, confidential business records or other practiced material of NECR.

15. NECR objects to these requests to the extent they seek to impose greater obligations on NECR than required under the Board's regulations, including those respecting discovery at 49 CFR 1114.21 *et seq.*

16. NECR incorporates each of these General Objections in its response to each of the below discovery requests as if fully set forth therein and its response to any such discovery request is not a waiver of these General Objections. NECR reserves its right to make further, specific objections to the discovery requests below. NECR also reserves its right to supplement these responses with the discovery of new information as NECR's investigation continues.

---

### **RESPONSE TO INTERROGATORIES**

Interrogatory No. 1. Has NECR budgeted any funds for the current and/or future fiscal year(s) to undertake any track expansion or capacity improvements on or along the subject line, and if so, provide a detailed breakdown of how those funds will be spent? Identify what percentage of those funds is attributable to revenue received from PAS, NECR, or any other source.

**RESPONSE:** Objection. This Interrogatory is overbroad, unduly burdensome and not likely to lead to the discovery of admissible evidence. Without waiving these specific objections or the General Objections, NECR responds as follows: NECR has not currently budgeted any track expansions or capacity improvements on or along the trackage rights line. NECR only budgets on an annual basis.

### **RESPONSE TO DOCUMENT REQUESTS**

Document Request No. 1. To the extent not otherwise already filed, please produce all workpapers and supporting documentation, in electronic format where available, that support NECR's Opening Statement and Evidence in this matter, including all materials reviewed, relied upon and/or prepared by Dave Ebbrecht, President of NECR; R.L. Banks and Associates; and Gary R. Anglemyer and Associates in support of their submissions in this filing.

**RESPONSE:** Objection. This request is improper to the extent it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine or any other legally cognizable privilege. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to the Highly Confidential version of its Opening Statement.

---

Document Request No. 2. Please produce current operating timetables, and track charts, which are applicable to NECR's line between East Northfield, MA, and New River Junction, VT. If current versions of any of the requested documents are not available, please produce the most recent versions that are available.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_000001 – NECR\_000069.

Document Request No. 3. Please provide all documents related to any valuation analyses performed by or at the request of G&WY in connection with the acquisition of RailAmerica, including any analyses that assigns separate values to each short line entity then owned by RailAmerica and which was acquired by G&WY pursuant to the transaction approved by the STB in Finance Docket No. 35654.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 4. Without regard to any date limitations, please provide all documents related to the sale of the Connecticut River Line by Amtrak to CV, including any documents related to leasehold or fee simple interests in the Connecticut River Line that were conveyed.

---

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR objects to this request insofar as it seeks information in the possession or control of PAS and/or its affiliates, officers, directors, employees, agents, representatives, attorneys, and all other persons acting or purporting to act on its behalf. NECR further objects on the basis that the information requested is publicly available to PAS. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_000070 – NECR\_000366.

Document Request No. 5. Please provide financial statements and all supporting documentation and work papers for NECR, including income statements, statements of cash flows, and balance sheets, for the years 2008 to the present.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. With respect to the revenue information requested, NECR further objects to this request on the bases outlined in NECR's Methodology Motion. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_000367 – NECR\_000414.

Document Request No. 6. Please provide income tax returns and supporting documentation and workpapers for NECR for the years 2008 to the present.

---

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, NECR has no documents responsive to this request. NECR does not file independent tax returns.

Document Request No. 7. Please provide a breakdown of all NECR revenues by major source (freight, demurrage, switching, Amtrak, etc.) for the NECR system, for the years 2008 to the present.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined NECR's Methodology Motion.

Document Request No. 8. Please provide a breakdown of all NECR operating expenses by major railroad operating expense category (i.e., train crew wages, locomotive ownership, lease, locomotive operations and maintenance (including fuel), maintenance of way, freight car ownership and maintenance, depreciation, ad valorem taxes, loss and damage, general and administration, etc.) for the NECR system for the years 2008 to the present.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible

---

evidence. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_000415 – NECR\_000421.

Document Request No. 9. From 1990 to the present, please provide any agreements or documents evidencing, relating to, or reflecting, any funding, whether in the form of a grant, loan, contribution, or subsidy, provided to NECR (or will be provided to NECR) by any governmental or quasi-governmental agency, including, without limitation, Amtrak, the U.S. Department of Transportation, the Federal Railroad Administration, the Federal Transit Administration, or the States of Vermont or Massachusetts.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_000422 – NECR\_001194. Further responsive documentation will be made available for review in Darien, CT at a mutually convenient time.

Document Request No. 10. Please produce all studies and analyses conducted by or for NECR from 2008 to the present which relate to the profitability of NECR's traffic by traffic group.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim

---

or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 11. Please produce all studies and analyses conducted by or for NECR from 2008 to the present which relate to the profitability of:

- a. the former B&M Connecticut River Line from Windsor, Vermont to Brattleboro, Vermont (Amtrak I), and
- b. the CV Lines from White River Junction, Vermont to Windsor, Vermont and from Brattleboro, Vermont to East Northfield, Massachusetts, over which PAS has trackage rights (Amtrak II).

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 12. Please provide a breakdown of all NECR operating expenses by major railroad operating expense category (i.e., train crew wages, locomotive ownership, locomotive operations and maintenance (including fuel), maintenance of way, freight car ownership and maintenance, depreciation, ad valorem taxes, loss and damage, general and administration, etc.) for the years 2008 to the present for:

- 
- a. the former B&M Connecticut River Line from Windsor, Vermont to Brattleboro, Vermont (Amtrak I), and
  - b. the CV Lines from White River Junction, Vermont to Windsor, Vermont and from Brattleboro, Vermont to East Northfield, Massachusetts over which PAS has trackage rights (Amtrak II).

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to those documents produced in response to Document Request No. 8.

Document Request No. 13. Please produce copies of all documents, including agreements and/or understandings and all amendments and supplements thereto between NECR and other railroads, including but not limited to:

- a. Agreements or understandings pertaining to NECR's payments to any of the identified railroads of a revenue factor, division, flat rate or other type of compensation for the railroad's portion of a movement;
- b. Trackage rights and other usage agreements;
- c. Locomotive run-through power or power sharing agreements or arrangements;
- d. Train crew run-through or train crew sharing agreements or arrangements;
- e. Any other agreements or arrangements pertaining to rates, surcharges, revenue sharing or operations;

- 
- f. Agreements or arrangements with Amtrak for the use of the Connecticut River Line by Amtrak to provide intercity passenger service or otherwise.
  - g. Agreements or arrangements with any governmental or quasi-governmental entity to provide operating subsidies for the Connecticut River Line or public investment for the rehabilitation of the Connecticut River Line, including without limitation any construction agreements, service outcome agreements and/or grant agreements.
  - h. Copies of all bills or invoices from 2008 to the present (including all supporting documents and data) rendered between NECR and any of the identified railroads pursuant to each of the agreements and/or understandings.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, and based on the withdrawal of Document Requests Nos. 13(a) through (e) by PAS, NECR refers PAS to documents produced herewith in response to 13(f) and (g) labeled NECR\_001195 – NECR\_001775. With respect to Document Request No. 13(g), NECR also refers PAS to documents produced in response to Document Request No. 9.

Document Request No. 14. For each NECR line segment, please produce documents, in a computer-readable format to the extent available, which contain operating statistics and density data (including but not limited to train miles, train hours, locomotive unit miles, loaded car-miles, empty car-miles, net ton-miles, gross ton-miles (both including and excluding

---

locomotives), number of trains, etc.) for all traffic by railroad (NECR, Amtrak, and Pan Am) and by commodity for each year or partial year 2008 to the present.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_001776 – NECR\_002073.

Document Request No. 15. Please produce the databases, data warehouses and computer programs (with all documentation related to these databases and computer programs), in a computer-readable format, that include the information listed below for each movement handled by NECR as originating, terminating, overhead or single-line carrier for each year or partial year 2008 to the present:

- a. Commodity (seven-digit Standard Transportation Commodity Code ("STCC"));
- b. Origin station and state;
- c. Destination station and state;
- d. For shipments that originated on NECR's system, the date and time the shipment was originated;
- e. For shipments NECR received in interchange, the on-junction station, state and SPLC;
- f. For shipments NECR received in interchange, the road received from;

- 
- g. For shipments NECR received in interchange, the date and time the shipment was interchanged;
  - h. For shipments given in interchange, off-junction station, state and SPLC;
  - i. For shipments given in interchange, the road to which they were given;
  - j. For shipments given in interchange, the date and time the shipment was interchanged;
  - k. For shipments terminated on NECR'S system, the date and time the shipment was terminated;
  - l. Origin Freight Station Accounting Code ("FSAC");
  - m. Destination FSAC;
  - n. Origin SPLC;
  - o. Destination SPLC;
  - p. Number of railcars;
  - q. Number of intermodal containers/trailers
  - r. Tons (Net);
  - s. Railcar tare weight;
  - t. Intermodal container/trailer tare weight;
  - u. Total freight revenues from origin to destination, including any adjustments thereto, along with a description of the adjustment (i.e., add to or subtract from gross revenue);
  - v. NECR's share or division of the total freight revenues, including any adjustments thereto;

- 
- w. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NECR's division thereof provided in response to Subparts (v) and (w) above;
  - x. The contract, agreement, tariff, pricing authority, etc. that the shipment is billed under, including the amendment and item numbers;
  - y. Waybill number and date;
  - z. TOFC/COFC plan;
  - aa. Car/trailer/container initial for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer initials);
  - bb. Car/trailer/container number for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer number);
  - cc. Total loaded movement miles;
  - dd. Total empty movement miles;
  - ee. Miles used to derive applicable fuel surcharges;
  - ff. Applicable fuel surcharge rate;
  - gg. Total loaded miles on NECR's system;
  - hh. Total empty miles on NECR's system;
  - ii. AAR car-type code;
  - jj. Provider of car and trailer/container (NECR-owned, NECR-leased, shipper, or foreign road);
  - kk. Provide the intermodal service plan code and the intermodal line of business code for each intermodal shipment.

---

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 16. Please provide copies of the NECR train dispatcher sheets (and the data recorded in such sheets in a computer readable format, to the extent available), or other documents (*e.g.*, conductor wheel reports) that record train movement data in a computer readable format to the extent available, for all car and train movements on the NECR for each year or partial year 2008 to the present.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, responsive documentation will be made available for review in Darien, CT at a mutually convenient time.

Document Request No. 17. Please produce all forecasts and all documents related to forecasts or projections prepared by or for NECR from 2008 through the present, or in NECR's possession, of future traffic volumes and/or revenues for freight traffic by traffic group (including any breakdowns of any such forecasts or projections whether by commodity classification, geographic region, line segment, or any other category) moving over any portion

---

of the NECR system. Documents responsive to this request include, but are not limited to, traffic projections prepared in connection with engineering studies, authorization for expenditures, marketing studies, operating expense budgets, capital budgets, investment of public money, grant agreements, construction agreements or mergers with or acquisitions of other carriers.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 18. Please produce all inflation and/or rail cost adjustment estimates, calculations, projections, or studies in NECR's possession for each year or partial year 2008 to the present.

**RESPONSE:** Subject to and without waiving the General Objections, NECR has no documents responsive to this request.

Document Request No. 19. Please provide documents sufficient to show NECR's existing maintenance-of way plan, costs and staffing on the NECR including the maintenance-of-way districts and/or crews employed by NECR to maintain the (a) track, (b) signals and communications facilities, (c) bridges, and (d) all other facilities and structures on the NECR, the number of NECR employees by job classification presently assigned to each maintenance-of-way district or crew on both a permanent and a seasonal basis, and any changes in the

---

maintenance districts, crews, and number and classification of employees that have occurred since January 1, 2008.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to the Highly Confidential version of its Opening Statement.

Document Request No. 20. Please provide detailed costs for each year for capital maintenance (regular, periodic replacement of track and bridge components) and operating expense maintenance (inspections, spot maintenance, lubricating, etc.) from January 1, 2008 to May 31, 2015.

**RESPONSE:** Objection. This request is overly broad, unduly burdensome and redundant. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, NECR responds as follows: NECR refers PAS to those documents produced in response to Document Request No. 8.

Document Request No. 21. Please produce any and all agreements between NECR and G&WY related to any fees for management or administrative services that G&WY charges NECR for services.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002074 – NECR\_002086.

---

Document Request No. 22. Please produce any and all valuation analyses or studies conducted since 2008 for the NECR.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects to this request on the bases outlined in NECR's Methodology Motion.

Document Request No. 23. Please produce NECR's current contract with American Rail Dispatching Center ("ARDC") for dispatching services. In addition, please produce copies of all monthly bills from ARDC for dispatching services to the present.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002087 – NECR\_002091.

Document Request No. 24. Please produce NECR's state property tax assessment documents for Massachusetts, Vermont and New Hampshire. Please include documents to support NECR's claim that property taxes in Vermont will increase after 2014.

**RESPONSE:** Objection. This request is overly broad. Subject to and without waiving the foregoing objection and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002092 – NECR\_002155.

---

Document Request No. 25. Please produce all documents prepared from January 1, 2005, to date related to, or reflecting, any planned capacity enhancements or capital improvements on the NECR, including, but not limited, to documents containing estimated or actual construction costs and documents related to changes in rail rates or rail pricing strategy in connection with any such plans.

**RESPONSE:** Subject to and without waiving the General Objections, NECR has no documents responsive to this request.

Document Request No. 26. Without regard to any date limitation, please produce copies of any land valuation maps for NECR rail lines located on the NECR, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects on the basis that the information requested is publicly available to PAS. Subject to and without waiving the foregoing objections and General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002156 – NECR\_002840.

Document Request No. 27. Please produce documents identifying all donated rights of way and/or land grants (including easements) obtained by NECR or NECR's predecessors in connection with the construction of any rail lines or facilities located on the NECR. The documents provided should include the following for each donated or easement land parcel:

- 
- a. The NECR parcel number;
  - b. The exact location of the parcel, including county and state;
  - c. Valuation section and map number;
  - d. Original railroad acquiring the parcel;
  - e. Type of instrument and/or title, e.g. easement, right-of-way deed, quit claim deed, condemnation, grant, etc.
  - f. The size of the parcel in square feet or acres;
  - g. The date of the transaction;
  - h. The names of the parties to the transaction; and
  - i. Any dollar amount associated with the transaction.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. NECR further objects on the basis that the information requested is publicly available to PAS. Subject to and without waiving the foregoing objections and General Objections, NECR responds as follows: NECR refers PAS to those documents produced in response to Document Request No. 26.

Document Request No. 28. Please produce all documents related to any sale, appraisal, abandonment or acquisition of land (improved and unimproved) that NECR completed on the NECR, including but not limited to documents showing the location of the parcel, size of the parcel, the valuation of the parcel by NECR, the sale or acquisition price, a description of any improvements to the parcel, the value of any improvements, the date of sale, and any

---

characteristics of the parcel such as land use, utilities, access and topography, for the years 2005 to the present.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to the Highly Confidential version of its Opening Statement.

Document Request No. 29. Please provide documents identifying the amount that NECR pays annually by location (including relevant milepost boundaries) for right of way easements.

**RESPONSE:** Subject to and without waiving the General Objections, NECR has no documents responsive to this request.

Document Request No. 30. Please produce documents sufficient to show the average cost per cubic yard paid by NECR for ballast used on the NECR system during each of the years 2005 to the present:

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002841 – NECR\_002843.

Document Request No. 31. Please produce documents sufficient to show the following for each construction and rehabilitation project which exceeded \$250,000 in cost and was completed by NECR, or an outside contractor acting on NECR's behalf, since January 1, 2005:

- a. The date the project was started;
- b. The date the project was completed;
- c. Whether the project was new construction or rehabilitation;

- 
- d. Whether or not the project was performed “under traffic”, i.e., traffic continued to move through the construction area;
  - e. A complete copy of the Authorization for Expenditure ("AFE") and description of all columns and data contained with the AFEs;
  - f. A complete copy of the Roadway Completion Report or any successor document;
  - g. All invoices underlying each AFE and/or Roadway Completion Report;  
and
  - i. Any documents relating to funding provided by government or quasi government entities for such projects.

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_002844 – NECR\_004518. Further responsive documentation will be made available for review in Darien, CT at a mutually convenient time.

Document Request No. 32. Please produce documents, including but not limited to AFEs, construction plans, engineering estimates, bid tabs, contractor invoices, and construction specifications for any projects that a carrier other than NECR has undertaken on the NECR since January 1, 2005, for which NECR paid for some or all of the project.

**RESPONSE:** Subject to and without waiving the foregoing objections and General Objections, NECR responds as follows: NECR refers PAS to those documents produced in response to Document Request No. 31.

---

Document Request No. 33. Please produce documents sufficient to show the following information related to the construction or replacement, in part or in whole, of each bridge on the NECR system from 2005 to the present:

- a. The location of the bridge, by line segment and milepost;
- b. The design for each bridge;
- c. An itemized listing of the bridge components being constructed or replaced (including quantities);
- d. The estimated cost, by component, for each of the components (identified in response to Subpart c. above) being constructed or replaced;
- e. The actual cost, by component, for each of the components (identified in response to Subpart c. above) being constructed or replaced;
- f. The total cost of the bridge;
- g. The total length of the bridge;
- h. Whether the project was new construction or rehabilitation;
- i. Whether or not the project was performed "under traffic", i.e., traffic continued to move through the construction area;
- j. All costs incurred as a function of performing the project under traffic, e.g., flagging costs, temporary signal costs, realignments, delays and all other costs that would not be incurred if the bridge was new construction;
- k. The construction documents and contracts for the construction and/or rehabilitation; and
- l. Any cost sharing between NECR and another entity.

**RESPONSE:** Objection. This request is overly broad and unduly burdensome. This request is further improper to the extent it seeks information that is neither relevant to any claim or defense in this matter nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections,

---

NECR refers PAS to documents produced herewith and labeled NECR\_004519 – NECR\_004540.

Document Request No. 34. Please produce documents sufficient to show the cost that NECR has incurred for the following track materials from 2008 to the present:

- a. Average cost per linear foot and/or ton by weight of rail for both new and relay rail;
- b. Turnouts;
- c. Other track materials (Ties, Tie Plates, Rail Anchors, Spikes, etc.).

**RESPONSE:** Subject to and without waiving the General Objections, NECR refers PAS to documents produced herewith and labeled NECR\_004541 – NECR\_004587. NECR further refers PAS to those documents produced in response to Document Request No. 31.

Document Request No. 35. Please produce documents sufficient to show the cost that NECR has incurred for installing or replacing the following types of crossings from 2008 to the present:

- a. Private;
- b. Active Public;
- c. Passive Public.

**RESPONSE**: Subject to and without waiving the General Objections, NECR refers PAS to those documents produced in response to Document Request Nos. 31 and 34.

Respectfully submitted,



---

ERIC M. HOCKY  
LISA CARNEY ELDRIDGE  
CLARK HILL PLC  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
(215) 640-8500  
[ehocky@clarkhill.com](mailto:ehocky@clarkhill.com)

Dated: July 15, 2015

Attorneys for  
New England Central Railroad, Inc.

---

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing document was served by email  
on counsel for Pan Am Southern, LLC:

William A. Mullins  
Baker and Miller PLLC  
Suite 300  
2401 Pennsylvania Ave, N.W.  
Washington, D.C. 20037  
WMullins@bakerandmiller.com

  
\_\_\_\_\_  
Eric M. Hocky

Dated: July 15, 2015