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April 18, 2016

## VIA E-FILING

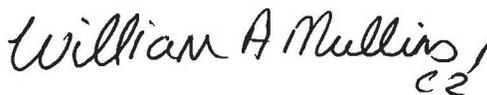
Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

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") First Supplemental 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: Steven A. Glazer, Administrative Law Judge  
Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35842**

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

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

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**Attorneys for Pan Am Southern LLC**

**Dated: April 18, 2016**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35842**

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

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**PAN AM SOUTHERN LLC’S FIRST SUPPLEMENTAL  
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NEW ENGLAND CENTRAL RAILROAD, INC.**

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**SUMMARY**

On February 12, 2016, the Board served two important decisions in this proceeding (Decision ID 44790 and 44759), in response to various evidentiary submissions and motions tendered by New England Central Railroad, Inc. (“NECR”) and Pan Am Southern LLC (“PAS”) in this proceeding. As you know, this proceeding involves the appropriate methodology to be applied to calculate trackage rights compensation for PAS’s continued operation over NECR’s lines, which operations were originally set forth in a series of ICC and STB order and in an existing trackage rights agreement (“TO”).<sup>1</sup> Consistent with February 29th decisions, the parties have worked over the past two months to resolve outstanding discovery disputes. Much progress

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<sup>1</sup> The existing TO, which provided for terms to be adjusted 20 years after the conveyance date, was established in two prior agency decisions. In National Railroad Passenger Corp.— Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C.2d 761 (1988), aff’d sub nom. National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) In National Railroad Passenger Corp.— Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak II), 6 I.C.C.2d 539 (1990).

has been made. However, as of this date, NECR has not yet produced all of the materials that it has agreed to produce and has objected flat out to producing what PAS believes to be at least two other relevant documents. With respect to the documents it has agreed to produce but has not yet done so, NECR has indicated that it would produce these materials by April 22. Because PAS has not yet had an opportunity to review these materials, which are responsive to Document Requests Nos. 5, 15 and 20, and because there are documents responsive to Document Requests No. 3 that NECR has objected to producing, PAS hereby moves for an order compelling NECR to respond fully to Document Request No. 3 (“Supplemental Motion”) and reserves its right to file an additional supplemental motion to compel documents responsive to Nos. 5, 15, and 20 after it has had a chance to review the materials that have not yet been produced.

#### ARGUMENT

PAS, NECR, and the Board all 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”). PAS and NECR disagree over the proper methodology to be applied to calculate the interest rental component of trackage rights compensation.<sup>2</sup>

Through its evidentiary submissions and motions, NECR sought to restrict calculation of the interest rental component of trackage rights compensation to NECR’s modified form of

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<sup>2</sup> Under SSW Compensation, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier’s operations over the owning carrier’s track; (b) the tenant carrier’s usage-proportionate share of the track’s maintenance and operation expenses; and (c) an interest or rental component designed to compensate the owning carrier for the tenant carrier’s use of its capital dedicated to the track. Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619, 622 (1990).

reproduction cost new less depreciation (“RCNLD”), despite the Board actually recognizing four appropriate methodologies. In fact, NECR even requested a protective order to protect NECR from having to respond to discovery related to the other recognized methodologies, including the CE approach, which is generally based on traffic, revenue, earnings and profitability information because according to NECR the methodology was inappropriate. PAS, on the other hand, argued in its pleadings that discovery should be allowed on all SSW Compensation methodologies consistent with established precedent.

The Board rejected NECR’s proposal to limit discovery to its preferred methodology and stated that discovery pertaining to **all four** SSW Compensation methodologies is permitted. In its decision issued February 12, 2016, the Board held:

PAS should have an opportunity to build a record through discovery and obtain the data it needs to make its case on the appropriate valuation method for the Board to use in determining trackage rights compensation.... Through its Methodology Motion and Supplemental Motion, NECR is now asking us to select its proposed methodology, without permitting PAS an opportunity to access information that is needed for it to fully assess the four methodologies, including the feasibility of the CE method. Forcing PAS to choose a methodology without an opportunity to make such an assessment would be unfair. As such, PAS must be allowed to obtain relevant evidence through discovery and present arguments based on that evidence. Because NECR is the only source for some of this information, PAS could only obtain it through discovery (Decision ID 44790, slip op. at 4-5).

To facilitate this discovery, the Board assigned Administrative Law Judge Steven A. Glazer of FERC responsibility for handling and ruling upon discovery matters and resolving all disputes concerning discovery in this proceeding.<sup>3</sup> Judge Glazer held the first discovery conference for the proceeding on March 4, 2016. Both before and after Judge Glazer’s initial

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<sup>3</sup> The Board referred the proceeding to Judge Glazer for the limited purpose of deciding relevancy and whether certain information should be produced consistent with the Board’s order. Decision 44759 is very specific – Judge Glazer is not tasked with resolving any underlying disputes regarding the appropriate methodology to be used for determining the value of the trackage rights line.

discovery conference, NECR has been generally responsive to PAS's discovery requests. Over the past month, NECR has produced additional documents that are responsive to most, but not all, of PAS's requests. However, there are three remaining areas of potential dispute.

First, NECR has yet to complete its production of documents responsive to Document Requests Nos. 15 and 20, although it indicates it will do so by April 22. Until such time as those documents are produced and PAS has had a chance to review them, PAS cannot make a determination as to whether NECR has fully complied with Requests Nos. 15 and 20. Based upon conversations with counsel, PAS believes the documents that NECR has agreed to produce will be fully responsive. Yet, until they can be reviewed, PAS needs to reserve its right to file a supplemental motion to compel. PAS therefore reserves its right to file a supplemental motion to compel with respect to documents that are yet to be produced but are purportedly responsive to Requests Nos. 15 and 20.

Second, NECR has refused to produce document(s) relevant to Request No. 3. Request No. 3 sought "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."<sup>4</sup> Documents related to the market value of NECR are directly relevant to the SSW Compensation methodology.

Under applicable STB precedent, PAS is entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding."<sup>49</sup> C.F.R.

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<sup>4</sup> G&WY acquired NECR through its acquisition of RailAmerica, a holding company that owned 41 shortline railroad companies. The combination of G&WY and RailAmerica created the largest shortline and regional railroad holding company in the world.

§ 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).

PAS is not entirely sure of NECR’s reasons for refusing to produce these responsive documents. NECR has stated that documents relevant to the G&WY acquisition of RailAmerica exist, but they valued the RailAmerica company as a whole and did not assign a value to each separate railroad owned by RailAmerica. Accordingly, it argues that such a document is not responsive because it is not directly relevant to the value of NECR. NECR also admits that it did conduct a post-acquisition valuation of NECR for GAAP accounting purposes, but claims that such a document is also not responsive.

NECR is wrong on both accounts. The test for relevance is whether or not the information “might be able to affect the outcome of a proceeding.” Amtrak, slip op. at 8. The overall value of NECR is a crucial element in the SSW Compensation methodologies. Clearly these documents, which NECR admits it has and could be produced, “might” affect the outcome. They would provide valuable information and data that would allow PAS’s experts to develop a

market value for NECR as an alternative to NECR's "value in place" methodology.<sup>5</sup> PAS is entitled to review the information.

Finally, NECR has not yet fully complied with Document Request No. 5. In this request, 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." Although it has not yet produced the documents, NECR claims that it will produce such financial statements by the end of the week. Until such time as NECR produces the financial statements that it has agreed to produce and PAS has had an opportunity to review them, PAS reserves its right to file another supplemental motion to compel with respect to those documents and to move to compel production of any pre-2013 documents that NECR may possess.

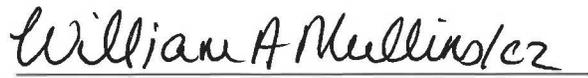
### **CONCLUSION**

For the reasons explained herein, with respect to documents responsive to Requests Nos. 15 and 20 that NECR has agreed to produce but has not yet done so, PAS reserves its right to file an additional supplemental motion to compel documents responsive to Nos. 15 and 20 after it has had a chance to review the materials that have not yet been produced. With respect to Request No. 3, PAS moves to compel NECR to produce the documents that it admits it possesses but claims are not responsive. Such documents are relevant and would lead to admissible evidence and affect the outcome of this proceeding. Finally, with respect to Request No. 5, it reserves its right to move to compel after review of the produced documents.

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<sup>5</sup> While not entirely clear, it appears that NECR may not want to produce the documents because it continues to believe that its "value in place" methodology should be the only applicable methodology. Thus, it does not want to produce any documents that might allow PAS's experts to develop an alternative valuation based upon market prices or extrapolated from GAAP accounting valuations.

Respectfully submitted,



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Attorneys for Pan Am Southern LLC

April 18, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing First Supplemental Motion to Compel Responses to PAS's First Discovery Requests Directed to New England Central Railroad, Inc. 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 18<sup>th</sup> day of April, 2016.

William A Mullins  
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William A. Mullins  
Attorney for Pan Am Southern LLC