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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
- TRACKAGE RIGHTS ORDER -
PAN AM SOUTHERN LLC**

ENTERED
Office of Proceedings
July 16, 2015
Part of
Public Record

**NEW ENGLAND CENTRAL RAILROAD, INC.
MOTION FOR PRELIMINARY DETERMINATION OF
APPROPRIATE METHODOLOGY AND
FOR PROTECTIVE ORDER**

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Dated: July 15, 2015

Attorneys for
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SURFACE TRANSPORTATION BOARD**

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This proceeding primarily involves a dispute over the proper compensation to be paid by Pan Am Southern LLC (“PAS”) to New England Central Railroad, Inc. (“NECR”) for certain trackage rights originally imposed by the Interstate Commerce Commission (“ICC”) in 1990. NECR filed its Opening Statement and Evidence (“NECR Opening Statement”) with the Board on June 4, 2015. In response, PAS served NECR with broad discovery requests, a copy of which is attached hereto as Exhibit A, seeking confidential and proprietary information related to a number of issues. In the course of discussions with counsel for PAS regarding NECR’s potential objections to the discovery, it became clear that PAS intended to use the “capitalized earnings” (“CE”) method to calculate one element of the trackage rights compensation, instead of the alternative “replacement cost new less depreciation” (“RCNLD”) method used by NECR in its Opening Statement, and that a significant portion of the discovery requests relate solely to PAS’s proposed use of the CE method.¹

¹ For instance, PAS seeks detailed information on revenues, “profitability” of specific traffic, as well as detailed traffic information regarding the specific commodities, weights, type of rail cars, junction points, origins and destinations, dates and time of handling, projections of future traffic by traffic group, and more.

NECR is filing this Motion to request that the Board find that the CE method is not an appropriate valuation method in this proceeding, and as a corollary to that finding, that NECR is entitled to an order under 49 C.F.R. 1114.21(c)² to protect NECR from having to respond to discovery related to the capitalized earnings approach. A finding on the appropriate valuation method at this time would be judicially economical and streamline the proceeding, and save the parties the unnecessary time and expense that would otherwise be spent on gathering the highly sensitive and proprietary documents and information requested, and on the preparation of reports and briefing with respect to an inappropriate valuation method. Because the request for a protective order is a corollary to the requested determination that the CE method PAS proposes to use is not appropriate, NECR requests that the Board not refer the request for a protective order to an administrative law judge in accordance with its new policy regarding discovery disputes.³

Background

This proceeding commenced in June, 2014, when NECR filed a Request to Set Trackage Rights Terms and Conditions in order to modify a trackage rights order (“TO”) entered by the Board’s predecessor, the ICC, in 1990. The TO governs the use of NECR’s tracks by PAS. In a decision served December 23, 2014, the Board confirmed that the TO allows the Board to modify the terms and conditions of the TO, and instituted a proceeding. The parties attempted to

² A prior protective order limited to the protection of “confidential” and “highly confidential” material was entered by the Director of the Office of Proceedings on June 3, 2015 by consent of the parties.

³ NECR understands that this motion and request for the Board to make a determination as to the proper method of valuation to be used will likely require the current procedural schedule to be suspended. As discussed in the Discussion, § 2 below, the benefits of a decision now outweigh the potential delay in the initial schedule.

mediate their dispute pursuant to the Board's mediation procedures, but were unsuccessful. The NECR Opening Statement was filed with the Board on June 4, 2015.

Following the filing of the NECR Opening Statement, PAS served NECR with an extensive set of discovery requests, a copy of which is attached hereto as Exhibit A. NECR informally objected to the scope of various requests and definitions and instructions, and the parties have been working to resolve the objections without resort to the Board. PAS granted NECR extensions to respond; NECR's formal objections and responses are now due by July 14, 2015.

As relevant to this Motion, NECR specifically objects to collecting and producing the valuation, revenue/earnings and traffic information requested in Document Requests Nos. 3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22. In response to NECR's original objection, PAS indicated that this information is relevant to its use of the CE method. Further, such information is only potentially relevant to the CE method of determining the interest rental component of the compensation calculation, which NECR believes is an inappropriate method of valuation for this proceeding. While there may be other discovery objections that still need to be resolved under a "standard" analysis of scope and burden, the issue of whether the use of the CE method is appropriate in this proceeding, should be addressed separately by the Board at this time. NECR believes that the resolution of this issue at this time will provide for efficiencies for all parties and the Board as the proceeding progresses.

Discussion

1. Trackage rights compensation methodology.

NECR does not believe that there is any dispute that the general formula to be applied by the Board in establishing trackage rights terms and conditions is the "SSW Compensation

methodology.” See NECR Opening Statement, pp. 6-7. The three essential elements of the SSW Compensation methodology were summarized by the Board in *North Carolina Railroad Company – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Railway Company*, et al, STB Finance Docket No. 33134 (served May 29, 1997), 1997 STB LEXIS 123, at *10, fn. 13, and include:

- (1) the variable cost that is incurred by the owning carrier but attributable to the tenant carrier’s operations;
- (2) the tenant carrier’s usage-proportionate share of track maintenance and operating expenses; and
- (3) an interest or rental component to compensate the owning carrier for tenant carrier’s use of capital dedicated to the track by the owning carrier; determined by multiplying the value of the assets by a rate of return equal to the railroad’s current pre-tax nominal cost of capital.

See also Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company, ICC Finance Docket No. 26476 (Sub-No. 1) (served September 20, 1994) (“*TPW*”), 1994 ICC LEXIS 175, at *4-5; *Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company*, 6 ICC 2d 619 (1990) (“*A&M-F*”), 1990 ICC LEXIS 110, at *7, *aff’d sub nom. Missouri Pacific Railroad company v ICC*, 23 F.3d 531 (D.C. Cir. 1994) (noting the propriety of applying the SSW Compensation methodology, modified as necessary); *Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company*, 7 ICC 2d 164 (1990) (“*A&M-IF*”), 1990 ICC LEXIS 374, at *2, fn 2.

The third element, the interest rental component, is determined by applying the owning railroad’s pre-tax cost of capital to the value of the trackage rights line. *A&M-I*, 1990 ICC

LEXIS 110, at *7 fn 8. The return that is calculated is then allocated to the tenant railroad based on its percentage usage of the line. *Id.* At issue in this Motion, is how the “value of the trackage rights line” should be calculated.

In trackage rights compensation cases, the ICC has generally discussed four of the possible methods of determining the valuation base, and has determined that the appropriate method to be used depends on the available data. Those four methods include (1) the capitalized earnings method, (2) the reproduction cost new less depreciation method, (3) the comparable line segments method, and (4) the stand alone cost method. *Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co.*, 8 ICC 2d 297 (“*ATSF*”), 1992 ICC LEXIS 43, at *15-18. *See also, TPW*, 1994 ICC LEXIS 175, at *10-13. NECR does not believe that either party would suggest that the Board use either the comparable line segment method or the stand alone cost method in this proceeding.

(a) The elements of the CE method.

The CE method that PAS proposes to use generates a valuation base by multiplying the specific earnings assigned to the trackage rights line by an earnings multiplier. The earnings multiplier is determined by dividing the market value of the owning railroad’s total railroad property by the owning railroad’s total railroad earnings. *ATSF*, 1992 ICC LEXIS 43, at *15-16.⁴ *See also TPW*, 1994 ICC LEXIS 175, at *10-11. The CE method has been used primarily in merger cases where trackage rights have been granted to address a competitive harm, and where there is a contemporaneous market valuation of the owning/landlord railroad. *See, e.g., CSX Corporation, Norfolk Southern Corporation, et. al. – Control and Operating Leases /*

⁴ The CE method was applied, and tweaked by the ICC, in the series of SSW Compensation cases. *See St. Louis Southwestern Ry. Co. -- Trackage Rights*, 1 ICC 2d 776 91984), 4 ICC 2d 668 (1987), 5 ICC 2d 525 (1989), and 8 ICC 2d 80 (1991) (“*SSW Compensation cases*”).

Agreements – Conrail et. al. – Responsive Application – State of New York, by and through its Department of Transportation and New York City Economic Development Corporation, 4 STB 75 (1999), 1999 STB LEXIS 297 (“*East of Hudson Trackage Rights*”); *SSW Compensation cases*. However, the CE method is only appropriate if all of the factors used to calculate the valuation base are easily ascertainable from the facts and circumstances of the particular proceeding, and as discussed more fully below, which is not the case here.

(b) The elements of the RCNLD method.

The RCNLD method on the other hand does not require a contemporaneous valuation of the landlord railroad, or overall or line specific earnings. The RCNLD method has been accepted and acknowledged in previous proceedings as an appropriate method that reflects the value of the assets to both the owner/landlord and the tenant. *See, e.g., A&M-I*, 1990 ICC LEXIS 110. The RCNLD method is based on the assumption that the line has sufficient value to both parties such that they would replace it to its present condition if it did not exist. *ATSF*, 1992 ICC LEXIS 43, at *16-17. Formal application of RCNLD generally requires that road property investment and depreciation be categorized using the ICC’s/Board’s “Uniform System of Accounts” found at 49 C.F.R. Part 1201. *Dardanelle & Russellville Railroad Company – Trackage Rights Compensation – Arkansas Midland Railroad Company*, ICC Finance Docket No. 32625 (served June 22, 1995), 1995 ICC LEXIS 156, at *4-5. However, as a Class III carrier, NECR’s accounts are not required to conform to the Uniform System of Accounts. *Id.* NECR prepared an approximation of RCNLD using appraisals prepared by experts as the ICC has indicated is appropriate. *See ATSF*, 1992 ICC LEXIS 43, at *17 (“RCNLD can be developed through appraisals or by other means through the use of competent experts in the field.”) In the NECR Opening Statement, NECR presented its calculation of the interest rental component

based on a valuation of the road property (infrastructure) in place (with an adjustment for depreciation) and an appraisal of the underlying land, as prepared by independent experts. Since all of the factors for use of RCNLD are available, it is the most appropriate method to use in this proceeding for calculation of the interest rental component of trackage rights compensation.

2. It is in the interest of judicial economy for the Board to make a preliminary determination in this proceeding regarding the appropriate methodology for calculating the interest rental component of trackage rights compensation.

A preliminary determination of the proper valuation method to be applied will save the parties the needless time and expense that would be required to respond to irrelevant and inappropriate discovery (as well as the preparation of evidence that will not be considered). This bifurcated approach has been used by the ICC in previous proceedings to eliminate undue burdens. *See TPW*, 1994 ICC LEXIS 175, at *8 (finding, based on previous experience, that the appropriate methodology should be determined early in the proceeding); *ATSF*, 1992 ICC LEXIS 43, at *14-15 (finding it less burdensome to all concerned to resolve any disputes as to proper methodology before data is submitted to determine the valuation base and interest rental rate).

NECR understands that asking the Board to determine this issue now will likely delay the procedural schedule. However, given that this is a determination that the Board will ultimately have to make at some point in the proceeding, NECR believes that the benefits gained from a decision now in streamlining the discovery, reports and briefing in this matter, far outweigh potential delays in the initial schedule. NECR suggests that the Board follow the approach of the ICC in *TPW* and *ATSF*, and make the determination at this early stage that the CE method that PAS proposes to apply is not appropriate in this proceeding.

3. It is not appropriate in this proceeding to use the capitalized earnings approach to determine the interest rental component of trackage rights compensation.

As discussed above, the CE method that PAS proposes to use is one of the four methods that have been used to calculate a value for the rail line that is then used to determine the interest rental component. The use of the CE method requires, among other items, a current market valuation of the landlord railroad, overall earnings for the landlord railroad and accurate line specific earnings. It is only appropriate to use the CE method if all of the factors are easily ascertainable from the facts and circumstances of the particular proceeding. That is not the case in this proceeding.

The underlying facts and circumstances in the *SSW Compensation cases* where the CE method was used, however, are quite different from the facts presented in this proceeding. For example, in the original *SSW Compensation cases*, the ICC was dealing with trackage rights being imposed as a condition in a merger between two Class I railroads. The merger that gave rise to the need for the trackage rights established a current valuation of the landlord railroad (the acquired railroad) at the time of the merger. Further, because a Class I railroad was being acquired there was substantial data by branch line available on the Rail Form A's that were then required of Class I railroads. In addition, the trackage rights in that case were imposed to lessen the competitive impact of the merger, the line segment in question had been *exclusively* used by the landlord railroad and the tenant railroads had no existing trackage rights over the lines in question. *TPW*, 1994 ICC LEXIS 175, at *11, fn 11. *See also, East of Hudson Trackage Rights*, 1999 STB LEXIS 297, at *4, 10-14 (using market value from the underlying transaction, and information from Conrail's Class I required Form R-1's to calculate the value of Conrail's road property); *TPW*, 1994 ICC LEXIS 175, at *10-11, fn11 (describing the information available in the *SSW Compensation cases*).

The ICC regularly found that the use of the CE method was not appropriate if the key elements of the formula are unavailable or unreliable. See *TPW*, 1994 ICC LEXIS 175, at *11; *ATSF*, 1992 ICC LEXIS 43, at *16; *A&M-I*, 1990 ICC LEXIS 110, at *2-3, *10-11. In this proceeding, that is precisely the case. Many of the above-identified key elements are simply not available. For example, the following missing or unreliable elements in the instant proceeding render use of the CE method inappropriate:

(1) No contemporaneous market value of NECR. The most recent transaction involving NECR was the acquisition by Genesee & Wyoming Inc. (“GWI”) of RailAmerica. *Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al.*, STB Docket No. FD 35654 (served December 20, 2012). The RailAmerica acquisition was not a stand-alone acquisition as was present in the *SSW Compensation cases*. NECR was one of 41 U.S. subsidiary railroads owned by RailAmerica, and the acquisition also included four Canadian subsidiary railroads and several non-railroad businesses. The purchase price was based on a public auction of the publicly-traded stock of RailAmerica, based on the data and market conditions at the time of the auction. The transaction was valued and announced in July 2012, based on financials from 2011, over 3 ½ years ago.⁵ Neither NECR, nor any of the other RailAmerica subsidiary railroads, were offered for sale as separate entities, so there was no separate bidding or market price set for NECR. Any attempt to allocate fairly a portion of the purchase price paid for RailAmerica to the actual value of NECR would involve numerous assumptions and would not be nearly as reliable as the lump sum purchase price considered in the *SSW Compensation cases*. *A&M-I*, 1990 ICC LEXIS 110, at *12-13. See also, *TPW*, 1994 LEXIS 175, at *11 (CE method requires a market value for the owning railroad).

⁵ The acquisition of RailAmerica closed at the end of 2012, over 2 ½ years ago.

(2) No line-specific earnings. As a Class III carrier, NECR is not required to (and does not) keep or report line-specific earnings. Further, because the trackage rights line in question is in the middle of NECR's total line of railroad, it is not clear that NECR's earnings from freight traffic handled to, from or over the segment would be available at all, or easily determined from the overall financials and traffic data available for NECR. The determination of line specific earnings is further complicated in this proceeding by the fact that the trackage rights line itself is comprised of three individual segments (as described in the NECR Opening Statement).⁶ Without line-specific earnings for the segments of the line at issue, the CE method cannot be accurately applied. *A&M-I*, 1990 ICC LEXIS 110, at *11.

(3) Line-specific earnings would not accurately reflect value. Even if line-specific earnings could be calculated, they would understate the revenue potential and the value of trackage rights line. In this instance, PAS has not only overhead trackage rights, but it also has the exclusive right to use the middle segment of the trackage rights line to serve customers and locations that were being served by PAS's predecessor B&M in 1989,⁷ and to compete for new business to and from the middle segment. Thus, NECR does not have full access to all of the traffic data on, or the revenue associated with, the trackage rights line. Moreover, because the current trackage rights fee is too low (as NECR contends in this proceeding), PAS has had an

⁶ The three segments include the 48.8 mile middle segment formerly owned by Boston & Maine Corporation ("B&M") (PAS's predecessor), and a 13.4 mile northern segment, and a 10.6 mile southern segment formerly owned by Central Vermont Railway, Inc. ("CV") (NECR's predecessor). The trackage rights over the northern and southern segment were in place in 1998 when the ICC ordered B&M to sell the middle segment to Amtrak, and granted B&M trackage rights as a condition of the sale. While the three segments were voluntarily covered by the same trackage rights order, NECR contends in its Opening Statement that it may be more appropriate to have separate agreements for each segment.

⁷ The middle segment was first transferred in 1989 from B&M to Amtrak (and subsequently to NECR's predecessor CV). Prior to the transfer, B&M was the owner of, and the serving carrier on, the middle segment.

unfair competitive edge over NECR in obtaining traffic on and from the middle segment, and the earnings are artificially depressed. *See TPW*, 1994 ICC LEXIS 175, at *11 (exclusion of the tenant carrier's earnings from the line would exclude a portion of the line's earnings, but inclusion would be circular to the calculation of compensation). Additionally, because the trackage rights fees themselves are at issue in this case, any calculation of a new level of compensation that uses the old level of compensation as part of the proposed CE method earnings formula would also be circular and unreliable. *TPW*, 1994 ICC LEXIS 175, at *11; *A&M-I*, 1990 ICC LEXIS 110, at *11-12; *A&M-II*, 1990 ICC LEXIS 374, at *8, fn 8.

NECR's earnings (overall and from the trackage rights line) have been artificially reduced by the existing low trackage rights fees. Using existing trackage rights fees as an element in determining the new trackage rights fee is circular. Because of these issues NECR's earnings have been reduced by the existing low trackage rights fees, and an accurate earnings multiplier to calculate value under the CE method cannot be developed. *ATSF*, 1992 ICC LEXIS 43, at *16. Moreover, the value of the trackage rights line, especially to PAS, would be understated by any calculation using solely NECR's revenues attributable to the segments of the trackage rights line.⁸

(4) Overall earnings of NECR would not adequately reflect NECR earnings potential.

For the reasons noted above, the current level of trackage rights compensation being paid by PAS has had a negative effect on NECR's earnings – both in terms of reduced trackage rights compensation, and in terms of NECR's ability to compete for traffic. Moreover, although not a startup, as a Class III railroad, NECR's earnings can be expected to fluctuate more than a Class I

⁸ As compared to the CE method, using the current value of the assets “has the advantage of reflecting the value of an asset to both the owner and the tenant.” *See ATSF*, 1992 ICC LEXIS 43, at *16; *A&M-I*, 1990 ICC LEXIS 110, at *11-16.

railroad as a good portion of its traffic is subject to diversion to other modes. Using artificially low earnings to derive a value based on the CE method, would be illogical and unfair to NECR. *A&M-I*, 1990 ICC LEXIS 110, at *13.

Because so many elements of the CE approach are missing or would be unreliable in this proceeding, the Board should find that it is inappropriate for PAS to use the CE method in presenting its reply evidence.

4. The Board should issue a protective order to protect NECR from discovery related to PAS's proposed inappropriate application of the capitalized earnings approach.

Under 49 C.F.R. 1114.21(c) a party from whom discovery is sought, "for good cause shown," can seek an order to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding." Relief may include one or more of the following:

(1) That the discovery not be had;

* * *

(5) That certain matters not be inquired into or that the scope of discovery be limited to certain matters; ...

49 C.F.R. 1114.21(c).

As demonstrated by NECR above, use of the CE method is not appropriate in this proceeding. Given that showing, and given the highly confidential and proprietary nature of the detailed valuation, revenue and traffic information sought, there is "good cause" for the Board to enter a protective order generally prohibiting PAS from seeking discovery related to the CE method, and particularly finding that NECR does not need to respond to Document Request Nos.

3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22 as they relate solely to the application of the CE method.⁹

Conclusion

For the foregoing reasons, NECR requests that the Board find that the use of the CE method to calculate the interest rental component of trackage rights compensation in this proceeding, is not appropriate. As a corollary to that determination, NECR requests that the Board enter a protective order prohibiting PAS from seeking documents or other discovery related to the CE method, including without limitation documents showing NECR revenue and earnings information as requested in Document Request Nos. 3, 5 (as it relates to revenues), 7, 10, 11, 15, 17 and 22, and holding that NECR shall not be required to respond thereto.

Respectfully submitted,


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Dated: July 15, 2015

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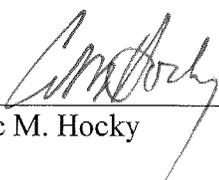
⁹ It should be noted that PAS's document requests go well beyond merely seeking information regarding NECR's total earnings (total revenues less total costs), and line-specific earnings (line-specific earnings less line-specific costs). Instead, PAS seeks information on "profitability" of specific traffic, as well as detailed traffic information regarding the specific commodities, weights, type of rail cars, junction points, origins and destinations, dates and time of handling, projections of future traffic by traffic group, and more – none of which are essential to the relevant calculations of total and line-specific earnings. As such, even if the Board were to allow discovery related to the CE approach, NECR will be objecting that the requests are overbroad and burdensome, irrelevant and not likely to lead to the production of relevant evidence.

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:

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Eric M. Hocky

Dated: July 15, 2015

EXHIBIT A
PAS DISCOVERY REQUESTS

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June 11, 2015

VIA EMAIL

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

Dear Eric:

On behalf of Pan Am Southern LLC (“PAS”), I am enclosing herein Pan Am Southern LLC’s First Discovery Requests directed to New England Central Railroad, Inc. in the above-captioned proceeding. This discovery is served pursuant to the Surface Transportation Board’s regulations at 49 C.F.R. §1114.21, and related regulations.

Complete responses to these requests are due by June 26, 2015. Please feel free to contact me promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously. I can be reached by phone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Robert B. Culliford

**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
FIRST SET OF DISCOVERY REQUESTS TO
NEW ENGLAND CENTRAL RAILROAD, INC.**

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Dated: June 11, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**NEW ENGLAND CENTRAL RAILROAD, INC.
- TRACKAGE RIGHTS TERMS AND CONDITIONS -
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**PAN AM SOUTHERN LLC'S
FIRST SET OF DISCOVERY REQUESTS TO
NEW ENGLAND CENTRAL RAILROAD, INC.**

Pursuant to 49 C.F.R. §1114.21 through 1114.31, Pan Am Southern LLC ("PAS") hereby directs the following discovery requests to New England Central Railroad, Inc. ("NECR"). Responses should be served as soon as possible, and in no event later than June 26, 2015 (fifteen days after service). NECR is requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view towards resolving any disputes or issues of interpretation informally and expeditiously, to avoid unnecessary delay to the proceeding.

THE RAILROAD ENTITIES

1. "G&WY" means Genesee & Wyoming Inc., a publicly-traded non-carrier holding company, that currently controls, through direct or indirect equity ownership, two Class II carriers and 105 Class III carriers operating in the United States, including NECR, and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

2. "NECR" means New England Central Railroad, Inc., and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.
3. "PAS" means Pan Am Southern LLC, and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

DEFINITIONS

1. Amtrak means National Railroad Passenger Corporation
2. "Amtrak I" means the 1988 ICC decision that authorized the conveyance to Central Vermont Railway, Inc. ("CV") of a 48.8-mile portion of the subject line from Windsor, Vt., to Brattleboro, Vt., which also authorized CV's conveyance of trackage rights over that portion of the line to the Boston and Maine Corporation ("B&M"). See National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C. 2d 761 (1988).
3. "Amtrak II" means the 1990 ICC decision that imposed terms and conditions for the trackage rights of the subject line – the 48.8-mile portion at issue in Amtrak I and two adjoining CV-owned segments over which B&M previously had trackage rights. See 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).

4. "Board" or "STB" means the Surface Transportation Board and its predecessor agency, the Interstate Commerce Commission, if applicable.
5. "Describe" when used in relation to a discussion, meeting or other communication means to identify the participants, the date or time period when the communication took place, the location of the participants at the time of the communication and a detailed summary of the content of the communications.
6. "Document" means any writing or other compilation of information, whether oral, printed, typed, handwritten, recorded, or produced or reproduced by any other process. It also means any communication in any form, including electronic mail; correspondence; telegrams; memoranda; contracts; instruments; studies; projections; forecasts; summaries; notes, or records of conversations or interviews; minutes, summaries, notes, or records of conferences or meetings; records or reports of negotiations; diaries; calendars; photographs; maps; tape recordings; computer tapes; computer disks; other computer storage devices; computer programs; computer printouts; models; statistical statements; graphs; charts; diagrams; plans; drawings; brochures; pamphlets; news articles; reports; advertisements; circulars; trade letters; press releases; invoices; receipts; financial statements; accounting records; and workpapers and worksheets. Further the term "document" includes:
 - a. both basic records and summaries of such records (including computer runs); and
 - b. both original versions and copies that differ in any respect from the original version.
7. "Including" means including without limitation.
8. "Person" means an individual, company, partnership, or other entity of any kind.
9. "Produce" means to make available to the undersigned attorneys for copying and viewing.

10. "Provide" (except where the word is used with respect to providing service or equipment) or "describe" means to supply a complete narrative response.
11. "Relate to" or "relates to" a subject means making a statement about, referring to, or discussing the subject, including actions taken or not taken, any decision to take, not take, or defer decision, and including, as to any condition or state of affairs (*e.g.*, competition between carriers), its absence or potential existence.
12. "Request" means an interrogatory, request for admission or request for production of Documents or things.
13. "Request to Establish New Terms and Conditions" means NECR's June 17, 2014 request for the Board to set new terms and conditions for trackage rights over the 72.8 mile line from White River Junction, VT to East Northfield, Mass.
14. "Studies, analyses and reports" include studies, analyses, and reports in whatever form, including letters, memoranda, tabulations, and computer printouts of data selected from a database.
15. "This Proceeding" means STB Finance Docket No. 35842, New England Central Railroad Inc. – Trackage Rights Terms and Conditions – Pan Am Southern LLC and any related proceedings or sub-dockets.
16. "You" and "Your" means NECR.

INSTRUCTIONS

1. These discovery requests ("Requests") call for all non-privileged information which is in the possession, custody, or control of NECR and its affiliates, parent, subsidiaries and counsel.

2. Where a Request has a number of separate subdivisions, or related parts or portions, a complete response is required to each part or portion. Any objection to a Request should clearly indicate the subdivision, part, or portion of the Request to which it is directed.
3. Each Request shall operate and be construed independently, and, unless otherwise indicated, no Request limits the scope of any other Request.
4. Words used in the singular shall include the plural and words used in the plural shall include the singular, whenever the context permits. Terms such as “and,” “or,” or “including” shall be construed in the broadest and most inclusive manner, in the disjunctive or conjunctive as necessary, in order to call for all responsive information without limitation.
5. References to railroads, shippers, and other companies include: parent companies; subsidiaries; controlled, affiliated, and predecessor firms; divisions; subdivisions; components; units; instrumentalities; partnerships; and joint ventures.
6. References to the present tense shall be construed to include the past tense, and references to the past tense shall be construed to include the present tense, as necessary to bring within the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.
7. If You believe that any request or definition or instruction applicable there-to is ambiguous, set forth the language that You believe is ambiguous and the interpretation that You are using in responding to the Request.
8. If any document covered by a Request is withheld for whatever reason, including any privilege asserted, NECR shall furnish a written document identifying all withheld documents in the following manner:
 - a. the specific Request to which the document is responsive;

- b. the date of the document;
 - c. the name of each author or preparer;
 - d. the name of each Person who received the document and the name of such Person's employer at the time the Person received the document;
 - e. a brief description of the subject matter of the document and any withheld attachments or appendices;
 - f. the specific factual and legal basis for withholding; and
 - g. the number of pages withheld.
9. Each document produced shall be an authentic original document or a true duplicate of an authentic original document.
10. All requests are continuing and, pursuant to 49 C.F.R. § 1114.29, You are under a duty seasonably to supplement Your responses with respect to any question.
11. Unless otherwise indicated in specific discovery Requests, these Requests cover the period beginning January 1, 2008 and ending with the date of the response.
12. If You object to any Request or any part thereof, please state the reasons for such objection, and all information forming the basis for such objection.
13. If You know or later learn that a response to any Request is incorrect, You are under a duty seasonably to correct that response.
14. Any delay in production of requested documents or answers to interrogatories is certain to prejudice the ability of PAS to present evidence to the Board in this proceeding.
15. Responsive documents should be produced to the undersigned counsel at Baker & Miller PLLC, 2401 Pennsylvania Ave., NW, Suite 300, Washington, DC 20037, not later than (15) days after the date of service, meaning no later than June 26, 2015. Serial production of

relevant documents and narrative responses during that period is encouraged and requested.

Objections, if any, should be made as soon as possible, and not later than 10 days after the date of service of the requests.

16. You should contact William A. Mullins at (202) 663-7823 immediately to discuss any objections or questions with a view to resolving any dispute or issues of interpretation informally and expeditiously.
17. If NECR has information that would permit a partial answer to any interrogatory or document request, but it would have to conduct a special study to obtain information necessary to provide a more complete response to that request, and if the burden of conducting such special study would be greater for NECR than for PAS:
 - a. state that fact;
 - b. provide the partial answer that may be made with information available to NECR;
 - c. identify such business records, or any compilation, abstract, or summary based thereon, as will permit the undersigned parties to derive or ascertain a more complete answer; and
 - d. as provided in 49 C.F.R. § 1114.26(b), produce such business records, or any compilation, abstract, or summary based thereon, as will permit the undersigned parties to derive or ascertain a more complete answer.

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.

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. Anglemeyer and Associates in support of their submissions in this filing.

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.

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.

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.

Document Request No. 5. Please 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.

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

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.

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.

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.

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.

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).

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).

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.

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.

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;

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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:

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

- h. Any documents relating to funding provided by government or quasi government entities for such projects.

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.

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

1. Any cost sharing between NECR and another entity.

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.).

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.

Respectfully submitted,



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June 11, 2015

Attorneys for Pan Am Southern LLC

CERTIFICATE OF SERVICE

I, William A. Mullins, hereby certify that on this 11th day of June, 2015, copies of the foregoing Discovery Requests were served via email upon counsel for New England Central Railroad, Inc.



William A. Mullins
Attorney for Pan Am Southern LLC