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**VIA E-FILING**

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

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

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's Reply to New England Central Railroad, Inc.'s Motion for Preliminary Determination of Appropriate Methodology and for Protective Order. 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**

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

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**Attorneys for Pan Am Southern LLC**

**Dated: August 5, 2015**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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AND FOR PROTECTIVE ORDER**

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**INTRODUCTION**

As the Board is aware, 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. After a series of voluntary discussions to resolve any differences, on July 16, 2015, NECR partially responded to PAS’s discovery requests (“NECR’s 1<sup>st</sup> Response”) and filed its “Motion for Preliminary Determination of Appropriate Methodology And For Protective Order.” (“Motion”).<sup>1</sup>

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<sup>1</sup> PAS was genuinely surprised at both the contents of NECR’s 1<sup>st</sup> Response, and the fact that counsel for NECR did not communicate any intention to file its Motion, particularly given the continuous and active discussions between the parties. At no time during those discussions did NECR inform PAS that it believed that the only relevant discovery should be limited to NECR’s proffered “value in place” (“VIP”) approach.

Upon review of NECR's 1<sup>st</sup> Response and Motion, counsel for PAS again engaged in discussions with counsel for NECR over the proper scope of discovery and the procedural schedule. The parties disagreed over the next steps, but both NECR and PAS supported extending the procedural schedule for evidentiary submissions. Accordingly, on July 29, 2015, the Board issued a decision 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. PAS assumed that they were not and filed its motion to compel discovery on August 3, 2015 ("Motion To Compel"). Since the deadline for replying to the Motion was likewise not suspended, PAS hereby replies to the Motion.

NECR seeks two things in its Motion: (1) for the Board to hold that its proffered SSW Compensation<sup>2</sup> methodology, which it claims to be a Replacement Cost New Less Depreciation ("RCNLD") methodology,<sup>3</sup> should be adopted as the only methodology; and (2) once the Board so finds, the Board should protect it from having to produce any discovery related to any of the other SSW Compensation methodologies. NECR's Motion should be denied. The Motion is nothing more than a self-serving attempt to limit the evidence before the Board, which in itself is

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<sup>2</sup> 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").

<sup>3</sup> NECR claims to have employed a Replacement Cost New Less Depreciation ("RCNLD") approach as set forth in SSW Compensation and wants the Board to adopt what it claims is a RCNLD standard as the only standard. In actuality, however, NECR has modified the RCNLD and basically invented its own approach – the VIP approach, which looks at the alleged market value of the assets in place rather than calculating replacement costs and then netting out depreciation as would be required under RCNLD. There is no legal support in the SSW Compensation cases for such a VIP approach; yet alone for imposing it on PAS and adopting it as the only standard. Having set forth its VIP approach, NECR seeks to be "protected" from having to provide discovery related to any other approach.

contrary to the public interest. While NECR obviously believes its newly created and judicially untested VIP approach is the proper methodology, neither the Board nor PAS should be limited to this one approach. There is no case support for such a proposition. Under well-established case precedent, PAS is entitled to gather information and data relevant to any of the elements of the SSW Compensation methodologies, evaluate that evidence, make its case for application of that methodology, and critically address application of the VIP approach. NECR can then respond to PAS's evidence on rebuttal. Only after the submission of all of the relevant evidence is it the Board's role to determine which methodology, or combination of methodologies, are relevant to the proceeding. NECR's "my way or the highway" position eschews this fundamental administrative litigation process and does not equitably balance the interests of PAS, NECR, and the shippers served by the line.

## **ARGUMENT**

### **I. NECR's EFFORTS TO HAVE THE BOARD ADOPT ITS PROFFERED VIP APPROACH AS THE ONLY METHODOLOGY SHOULD BE REJECTED**

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;
- (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.<sup>4</sup>

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<sup>4</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 Approach"); (2) RCNLD; (3) the comparable line segments approach; and (4) the stand alone cost method ("SAC").

NECR's Motion focuses on only one element -- the methodology used to calculate the interest rental component used in the third part of the SSW Compensation formula and advocates only its VIP approach as the means of determining that element and asks the Board to find that the CE Approach is not an appropriate valuation method in this proceeding. NECR is wrong regarding the applicability of the CE Approach in this proceeding and the precedents it cites do not support the adoption of only a single methodology for this proceeding.

A. Board Policy Favors Allowing Discovery On All SSW Compensation Methodologies

As an initial matter, NECR frames the argument as the Board should adopt its VIP approach and reject PAS's use of the CE Approach, but NECR's initial premise is wrong. Contrary to NECR's assertions, PAS has not yet determined that it will proffer the CE Approach. In fact, it has not yet determined which of the four methods it will utilize. As such, NECR is also wrong when it says that it "does not believe that either party would suggest the Board use either the comparable line segment method or the stand alone cost method." (Motion at 6). PAS has sought discovery directed at obtaining relevant information to all of the SSW Compensation elements precisely for the purpose of determining whether the CE Approach is the preferred approach or whether another approach is appropriate.<sup>5</sup> PAS did not limit itself to seeking discovery only on the CE Approach.<sup>6</sup>

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<sup>5</sup> There is no dispute about the relevancy of the information PAS has sought in discovery. Even NECR admits that the materials PAS seeks are relevant to the SSW Compensation formula. It just doesn't want to produce the information because it believes its proffered methodology is the only methodology that should be considered.

<sup>6</sup> Indeed, under SSW Compensation, PAS is entitled to evaluate and use any of the four available methodologies to determine the interest rental component calculation. In fact, many of PAS's discovery requests were directed to the SAC and comparable line segments approaches. In addition, PAS sought discovery with respect to the NECR's actual dispatching, maintenance and operating expenses in order to determine PAS's share in the first and second parts of the SSW Compensation test.

Allowing PAS to seek evidence on all of the methodologies is fully consistent with prior Board precedent favoring allowing parties in trackage rights compensation cases to explore and provide evidence on a variety of approaches.<sup>7</sup> In fact, in a relatively recent trackage rights compensation proceeding, rather than restricting the record before the Board, as NECR wants to do here, the Board directed the parties to submit additional evidence addressing the SSW Compensation formula and even afforded the parties the opportunity to suggest other methods of measuring compensation and to explain why a different method would be superior. Pyco Industries, Inc. – Alternative Rail Service – South Plains Switching, LTD. Co.; South Plains Switching, LTD. Co. – Compensation for Use of Facilities in Alternative Rail Service – West Texas and Lubbock Railway Company (“Pyco Industries”), FD 34889, FD 34802, FD 35111 n1, 2008 STB LEXIS 4, at \*17-\*18 (STB served Jan. 11, 2008). Clearly, Board policy in trackage rights compensation cases is to allow the parties to present their best cases and not limit the evidentiary record, as NECR seeks to do here.

B. Board Policy Favors Application Of The CE Approach When Possible

Although Board policy is to allow broad based discovery and allow the parties to put forth the best case they can on their chosen methodology, the Board nonetheless prefers the CE Approach and has used that approach in several cases. See SSW II at \*16-17 (Noting that while there are several valuation methods available, the Board prefers the CE Approach because the CE Approach best values the asset as a going-concern business with income-producing potential). Here, NECR simply ignores the other approaches and focuses solely on trying to

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<sup>7</sup> PAS is entitled to review all relevant information in NECR’s possession before making a determination as to which methodology it will employ. See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company (“TP&W”), FD 26476 (Sub-No. 1), 1994 ICC Lexis 175, at \*10 (STB served Sept. 20, 1994).

foreclose discovery and evidence on the CE Approach.<sup>8</sup> In fact the Board so prefers the CE Approach that when it is not possible because of insufficient data to make precise calculations, it has applied a modified version of the CE Approach based on whatever data were available.<sup>9</sup> PAS is asking for nothing less. NECR should be required to provide whatever data is available and allow PAS to determine how best to present that data.

C. If Given Proper Discovery, Any Alleged Obstacles Cited By NECR To The Application Of The CE Approach In This Proceeding Can Be Overcome

Knowing full well that Board policy prefers application of the CE Approach when possible, NECR contends that the CE Approach is not possible in this proceeding because (1) there are no line-specific earnings available for the trackage rights segments that would accurately reflect the value of the trackage rights segments; (2) there is no contemporaneous market value for the NECR; and (3) the data lacks specificity in its application so as not accurately reflect overall earnings of the NECR. PAS disagrees with NECR that the potential issues it lists pose legitimate obstacles to a proper application of the CE methodology for the trackage rights segments and believes that the data it has reasonably requested that NECR produce in discovery will allow it to perform the necessary calculations and allocations. Indeed, although PAS has not yet determined to use the CE Approach, if given the requested information, the “obstacles” suggested by NECR can be overcome.

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<sup>8</sup> As noted, PAS sought discovery relevant to all of the SSW Compensation approaches. By focusing solely on why the CE Approach is inappropriate in this proceeding, NECR fails to address at all why the comparable line test or the SAC test – both approved methodologies – would be inappropriate. As such, even if the Board agrees with NECR with respect to the applicability of applying the CE Approach to this proceeding, which it should not do, PAS is entitled to pursue discovery directed at the other approaches.

<sup>9</sup> See St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis (“SSW III”), FD 30,000 (Sub-No. 16), 5 ICC 2d 525, 1989 ICC LEXIS 126, at \*5, \*11 (1989).

## 1. Line Specific Earnings Can Be Calculated

As the Board knows, the CE Approach calculates the interest rental component by “multiplying the specific earnings assigned to the line by an earnings multiplier. The earnings multiplier is derived through dividing the market value of the landlord’s total railroad property by the landlord’s total railroad earnings.”<sup>10</sup> NECR contends that the CE Approach to valuation is not possible in this proceeding because the line specific earnings are not readily available. PAS is unable to determine from the Motion why NECR purports that line specific earnings are not readily available because NECR’s testimony is rather circular and confusing.<sup>11</sup> But even if this statement were true, that is not grounds for refusing to provide any earnings information, as NECR requests in its Motion.

Indeed, there are several alternative methods to develop line specific information from readily accessible business records, such as revenues and operating expenses, including information developed in connection with Genesee & Wyoming Inc. (“G&WY”) acquisition of Rail America in 2008, by which PAS’s experts can evaluate and determine line specific earnings for purposes of a CE analysis. PAS can also compute (approximate) line specific earnings from available internal data and waybill records. Another approach in calculating the earnings multiplier would be to multiply the value of the landlord’s total system by the ratio of landlord’s line specific earnings to the landlord’s total railroad earnings, or using earnings from a specific line, a line’s sale price when acquired, and total railroad earnings. See SSW II. The point is that there are several ways to use available data to obtain approximate line specific earnings and

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<sup>10</sup> See Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co., 8 I.C.C. 2d 297 (“ATSF”), 1992 ICC LEXIS 43, at \*15-\*18 (STB served Feb. 20, 1992).

<sup>11</sup> Based upon information and belief, PAS strongly believes that NECR and/or its parent do keep information in the ordinary course of business relevant to NECR’s line specific earnings that could be produced.

NECR should be required to provide that data. Simply because NECR doesn't want to produce the data should not form the justification for granting NECR's Motion and denying PAS the opportunity to at least examine the data and determine whether it desires to set forth a CE Approach.

Likewise, NECR also argues that even if line-specific earnings could be calculated, they would understate the revenue potential and the value of the trackage rights line because the current trackage rights fee is too low, giving PAS an unfair competitive edge. While this may be an argument over the merits of whether a CE Approach is the most accurate approach, it should not be used as an excuse for refusing to provide relevant data. There are several means at by which to resolve this concern – if PAS had the relevant data. For example, PAS could calculate line specific earnings with and without the middle segment earnings and then average the two figures to be sure that PAS pays its fair share. NECR would be free to attack that approach, and the Board could then determine, which methodology, best captures PAS's fair share of the interest rental component when compared against current trackage rights compensation. The point is that there are several means by which to achieve the same result – but such means depend upon access to readily available information, access which NECR's Motion seeks to cut-off.

## 2. The Market Value Of NECR Can Also Be Estimated

Prior CE calculations in other cases have also relied upon pro-rata market value calculations of the landlord railroads, and NECR's claims that no such market valuations can be made here should be rejected. While it is true that NECR is a subsidiary of a larger holding company for which there is no actual market value of NECR itself, that fact does not mean a market value for NECR cannot be estimated or that G&WY has not assigned a market value to

NECR. Indeed, NECR was only relatively recently purchased as part of an arms-length transaction by which NECR's parent company, Rail America, was sold to G&WY.<sup>12</sup> PAS has sought discovery relevant to that transaction and the value that Rail America placed on NECR when marketing its properties to G&WY. NECR refuses to produce the information; however NECR and G&WY should be required to produce whatever relevant information regarding the value of Rail America and its subsidiaries it possesses. PAS can then most likely use the information to determine an approximate market value of NECR by making corresponding adjustments to reflect financial data specific to the NECR-owned lines that are subject to this proceeding.

NECR claims that 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 reliable." Well, let them make that argument in rebuttal, but that argument should not be used as an excuse to refuse to produce any relevant information in its possession. It is PAS's burden to support its methodology, including calculations used in the methodology which it submits to the Board.<sup>13</sup> NECR's role is to provide responses to PAS's discovery requests that are relevant. The Board then determines the reliability of the resulting calculations, and compares the methodologies submitted by the parties. Put simply, once NECR provides responses answers to PAS's First Requests, PAS will be able to approximate a contemporaneous market value of NECR. The Board will then determine the reliability of the market value, and its relation to any

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<sup>12</sup> Genesee & Wyoming, Inc. – Control – RailAmerica, Inc. et. al., FD 35654 (STB served December 2012).

<sup>13</sup> See North Carolina Railroad – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Railway Company ("NCR"), FD 33134, 1997 STB Lexis 123, at \*10 (STB served May 29, 1997)("The parties will be required to support their respective valuation methodologies and the final compensation that they yield.")

overall trackage rights compensation derived. NECR seeks to prevent that process from occurring and at PAS's expense.

3. Lack Of Specificity In The Data Does Not Justify Granting The Motion

NECR also claims that because it does not keep its data in accordance with the STB's Uniform System of Accounts or in the context of line specific earnings, any calculations related to the CE Approach would be approximate and not specific. Simply because any evidence produced might be based upon calculated approximations does not discount the utility of such information or provide justification for refusing to produce otherwise relevant information. The mere fact that calculations may be approximations based on whatever data is available has never formed a sufficient basis for refusal to provide information. In fact, NECR characterizes its VIP approach in its Motion as "an approximation of RCNLD." (Motion at 7). Indeed, NECR itself used approximate figures to calculate its interest rental component of trackage rights compensation because NECR's calculations under its VIP approach were themselves based upon appraisals and cost elements prepared by experts, not the Uniform System of Accounts as typically done in a true RCNLD approach.

Allowing experts to take whatever information is available and then presenting those calculations is fully consistent with how the Board calculates the components of any Board ordered-compensation. In prior cases, the Board has noted that calculations vary depending on the circumstances and available evidence. This is because it is always possible that none of the available options for calculating necessary figures, such as the interest rental component, may be a perfect fit. For example in GS Roofing, which the 8<sup>th</sup> Circuit affirmed on appeal, the Board's estimation of costs attributable to tenant carrier's use of rail line were based on system-wide

averages, not line specific costs or earnings.<sup>14</sup> Therefore, the absence of readily available line specific earnings does not warrant automatically rejecting the CE Approach. But to make these calculations, PAS must be given access to whatever readily available NECR financial information there is to perform the calculations and then the Board can determine the reliability of the calculations.

Furthermore, simply because NECR does not conform to the Uniform System of Accounts is not a sufficient basis to refuse to provide applicable discovery and reject the CE Approach outright. Indeed, it was precisely because of the lack of information from the USOA that required NECR to use appraisals and valuations prepared by its experts.<sup>15</sup> NECR wants the Board to accept its methodology based upon approximate estimates based upon its expert's opinion using non-USOA information, but doesn't want to provide the same ability to PAS in setting forth a CE, SAC, or comparable line approach. NECR simply cannot have it both ways. NECR cannot, on the one hand, request that the Board establish terms and conditions for PAS's continued usage of NECR's line based upon the "best guess" estimates of its experts but then refuse to produce necessary documents for PAS's experts to make similar calculated opinions with respect to the other potential methodologies.

D. The Precedents Cited By NECR Do Not Support Adopting VIP As The Only Relevant Methodology

PAS does not dispute that NECR is free to use a RCNLD approach because "[t]he 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

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<sup>14</sup> See GS Roofing Products Co. v. STB, 262 F.3d 767, 776-77 (8th Cir. 2001)("GS Roofing").

<sup>15</sup> Because NECR has refused to provide workpapers supporting its expert's opinions, calculations, and assumptions, it is impossible for PAS or the Board to give NECR's calculations any credibility, much less independently verify such calculations.

Motion at 7 citing to A&M-I.<sup>16</sup> NECR then cites other cases where the RCNLD approach was used and claims that A&M-I and those cases support its request to reject use of the CE Approach (and presumably, the other approaches as well) and adopt only RCNLD.<sup>17</sup> However, the cases cited by NECR actually support PAS's view that to the extent possible, parties should be able to pursue discovery on all available methodologies and adapt the evidence and record accordingly.

The controversy in A&M-I centered over valuing a 2,150 foot (non-railroad) bridge, which was constructed by the Army Corps of Engineers in order to improve river navigation.<sup>18</sup> The Board in calculating the interest or rental component valued the bridge using RCNLD, but not the remaining track because of inadequacies and missing information in the record. Id. But the case does not stand for the notion that RCNLD is the only available method simply because there may be challenges in applying other methods. Indeed, even the A&M-I decision indicates that the Board prefers the CE Approach where possible. Yet, in large part, RCNLD was applied in the A&M-I case because neither of the parties actually pursued application of a CE, SAC, or comparable line segment approach and such information was not even put into the record. Here, if NECR is required to provide the information requested by PAS, such as data related to its

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<sup>16</sup> Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 6 I.C.C. 2d 619, 1990 ICC Lexis 110 (STB served Mar. 23, 1990)(“A&M-I”). PAS agrees that RCNLD (as opposed to VIP) is one of four available methodologies; and, it was applied in A&M-I, as indicated by NECR; however, under that standard, the three other approaches PAS is considering using are likewise “accepted and acknowledged” as proper methodologies for which PAS should be able to pursue.

<sup>17</sup> PAS does dispute that the VIP approach is equivalent to the RCNLD approach previously applied and adopted by the Board. As previously noted, NECR's VIP approach differs in significant respects from the RCNLD approach, and in fact, to PAS's knowledge, it has never been specifically applied to a trackage rights compensation dispute, which is another reason why the Board should not grant NECR's Motion.

<sup>18</sup> A&M-I at \*9-\*10.

financial and operating expenses, PAS strongly believes that it can develop the necessary components for various SSW Compensation methodologies and put those into the record.

Applying the CE Approach in A&M-I was also problematic because of problems with calculating the value of the Arkansas and Missouri Railroad Company (“A&M”) system. Unlike in this proceeding, “the property at issue [in the A&M proceeding] was never sold in an arm’s length market transaction.” Id. at \*18.<sup>19</sup> This proceeding, on the other hand, did involve a recent arms-length transaction. If PAS is provided the relevant information from that arms-length transaction, PAS should be able to calculate an approximate market value of the entire NECR system.

TP&W and ATSF likewise cited by NECR do not support the view that NECR’s VIP approach should be the only approach. Indeed, those cases also fully support PAS’s view that PAS should be entitled to examine information relevant to all of the SSW Compensation methodologies and choose its preferred approach. In both cases, the Board discussed briefly all four methodologies and stated that the parties were free to submit evidence supporting, whichever methodology they feel would be appropriate. Most notably, in TP&W, Peoria and Pekin Union Railway Company (“PPU”), the line’s owner, (like NECR here) argued in its opening statement that it considered both the CE Approach and the RCNLD, and concluded that only RCNLD was appropriate.<sup>20</sup> Whereas TP&W (like PAS here) argued that before it could select a methodology, it would have to obtain information through discovery, and only then could TP&W advocate for a methodology. The Board agreed with TP&W that it should be

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<sup>19</sup> See also CF Industries, Inc. v. Koch Pipeline Company, L.P., FD 41685, 4 S.T.B. 637, 2000 STB LEXIS 260, at FN 64 (STB served May 9, 2000)(distinguishing A&M-I on the basis that the agency could not value the A&M system by reference to an arm's length purchase price.

<sup>20</sup> TP&W at \*6-\*10.

permitted to explore all four methodologies.<sup>21</sup> As the Board did in accepting TP&W's two-step approach before deciding on an appropriate methodology, the Board should allow the parties to produce all relevant information and then allow the parties to determine which approach is most appropriate

In the end, regardless of the interest rental component methodology that PAS ultimately employs, it is unacceptable and contrary to precedent for NECR to refuse to produce relevant information that could be used in a CE Approach or any of the other SSW Compensation methodologies. Essentially, NECR wants the Board to determine trackage rights compensation, all the while refusing to provide information necessary for PAS to perform the requisite calculations for its preferred methodologies. It is the responsibility of the Board to ensure that PAS has all relevant information available for it to present its cases, and then for the Board, not NECR, to select the methodology that should be applied in establishing trackage rights compensation. Accordingly, the Board should deny NECR's Motion to limit the SSW Compensation approach to only the RCNLD approach.

**II. BECAUSE THE BOARD SHOULD NOT LIMIT APPLICATION OF THE SSW COMPENSATION FORMULA TO ONLY THE RCNLD APPROACH, NECR'S REQUEST FOR A PROTECTIVE ORDER UNDER 49 C.F.R. § 1114.21(C) SHOULD BE DENIED**

Here, in the Motion, NECR seeks a protective order under 49 C.F.R. § 1114.21(c) seeking to be protected from having to produce what it admits is otherwise relevant discovery in a SSW Compensation case. Of course the basis for granting such extraordinary relief is solely

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<sup>21</sup> While the Board in TP&W gave tentative views on each methodology, it said "[t]he parties should not feel constrained by [its] preliminary comments; [the parties] are free to respond and develop any methodology they consider appropriate." Id at \*10. While the Board has stated that the CE method may not be appropriate if key elements of the formula are unavailable or unreliable, there must first be a fair determination of whether the information is truly unavailable or unreliable. NECR's Motion seeks to deny PAS the fair opportunity to examine the evidence and make an appropriate determination.

dependent upon the Board granting its Motion to limit the record to only filing evidence on NECR's proffered VIP approach. As discussed above, there is no legal basis for granting NECR's Motion and denying PAS the opportunity to examine all of the relevant data and then make a determination as to which SSW Compensation methodology its will put forth. Similarly, NECR has not met its burden<sup>22</sup> to justify the grant of a protective order. For a motion under Section 1114.21(c) to be granted, NECR must prove that a protective order is needed in order to protect it "from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding."

NECR does not argue that the discovery sought by PAS would result in annoyance, embarrassment, or oppression. NECR also does not argue that the discovery is untimely. Instead, NECR makes a half-hearted attempt to argue that the discovery would be burdensome or expensive, and, although not precisely couched in these terms, its main argument seems to be that the discovery sought by PAS would be inappropriate in this proceeding. Neither of these two arguments is valid.

A. PAS's Discovery Requests Are Not Unduly Burdensome Or Expensive

NECR presents no tangible evidence to establish that complying with PAS's First Requests would be unduly burdensome or expensive. It appears that PAS's First Requests are burdensome simply because NECR believes that its VIP methodology, which it advocates as an RCNLD approach, should be the only methodology that the Board considers in this proceeding. Accordingly, in NECR's view, having to produce any information not related to VIP would be

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<sup>22</sup> See 5 U.S.C. §556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). See also Dardanelle & Russellville Railroad Company—Trackage Rights Compensation—Arkansas Midland Railroad Company, FD 32625, 1996 STB Lexis 232, at \*3 (STB served Sept. 5, 1996) ("As the party seeking an order setting compensation in this trackage rights proceeding, DRRC/CALM has the burden of proof." [footnote omitted], citing 5 U.S.C. §556(d)).

burdensome and expensive. Yet this is not the standard. To be protected from discovery, the requests must be unduly burdensome and expensive. In making that determination, the Board will weigh whether the information sought and the time to gather it is “unduly burdensome in relation to the likely value of the information sought.” 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).

As was discussed above and in PAS’s previously filed Motion To Compel, the information sought by PAS is highly valuable and is in fact crucial to PAS’s ability to determine which SSW Compensation methodology it will use. As such, the mere fact that NECR will have to spend time and money reviewing, gathering, and classifying documents and information does not make PAS’s request “unduly” burdensome and expensive.<sup>23</sup> Accordingly, having failed to provide specific estimates of how much time and expense would be required to respond to PAS’s discovery requests,<sup>24</sup> as the party with the burden of proof, NECR has failed to meet the requirements of this part of the Section 1114.21(c) test.<sup>25</sup>

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<sup>23</sup> Tongue River Railroad Company, Inc. – Rail Construction And Operation – In Custer, Power River And Rosebud Counties, Mont, FD 30186, slip op. at 8 (STB served Sept. 10, 2014)(Denying protective order by noting that locating and identifying documents may require additional cost and effort but that does not demonstrate that such efforts will be overly burdensome.)

<sup>24</sup> See Farmland Industries, Inc. v. Gulf Central Pipeline Company, et. al., No. 40411, 1994 ICC LEXIS 52, at \*8 (STB served April 8, 1994)(Board denied a protective order under 49 CFR 1114.21(c) because the complainant failed to provide any evidence that the requests were burdensome.)

<sup>25</sup> Indeed, as shown in the attachments to PAS’s July 23, 2015 letter, PAS finds it interesting that NECR purports that producing relevant information would be burdensome, but then has gone to considerable lengths to actually produce some of it, but then heavily redact it.

B. PAS's Discovery Requests Are Appropriate To An SSW Compensation Proceeding

As explained above, discovery related to the SSW Compensation formula, including information related to any of the four Board-recognized approaches for calculating the interest rental component of trackage rights compensation, as PAS has sought, is not only relevant and appropriate, but is crucial for PAS to determine which approach it believes the Board should apply in this proceeding. It is not grounds to withhold such potentially relevant information on the basis that such information is not in the precise format as requested by PAS or in the specific manner as prescribed in the SSW Compensation cases. If the information is remotely relevant, it should be provided.<sup>26</sup> Then, once provided, it is PAS's obligation to review that information and determine whether it will pursue the CE Approach, the comparable line segment method, SAC, RCNLD, or some other modified approach as NECR has done with VIP. PAS is prepared to, and has the burden to, support application of whatever methodology, including calculations in that methodology, that it submits to the Board. Restricting the scope of discovery to only the topics favored by one party to a proceeding would turn due process on its head and prevent PAS from making its best case.

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<sup>26</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)

## CONCLUSION

NECR's Motion seeking a holding that only its proffered VIP methodology should be adopted and then seeking protection from having to produce any discovery related to any of the other SSW Compensation methodologies should be denied. The Motion is a self-serving attempt to limit the evidence before the Board, contrary to the public interest and prior precedent. Under well-established case precedent, PAS is entitled to gather information and data relevant to any of the elements of the SSW Compensation methodologies, evaluate that evidence, make its case for application of that methodology, and critically address application of the VIP approach. NECR can then respond to PAS's evidence on rebuttal. It is then the Board's role to determine which methodology it will adopt and apply. NECR's approach does not equitably balance the interests of PAS, NECR, and the shippers served by the line. As such, PAS respectfully requests that the Board grant its previously filed Motion To Compel and deny the Motion.

Respectfully submitted,



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Attorneys for Pan Am Southern LLC

August 5, 2015

**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C. this 5<sup>th</sup> day of August, 2015.



William A. Mullins  
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