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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB 32 (SUB-NO. 100)

**BOSTON AND MAINE CORPORATION, INC. AND
SPRINGFIELD TERMINAL RAILWAY COMPANY
- ADVERSE DISCONTINUANCE -
NEW ENGLAND SOUTHERN RAILROAD CO., INC.**

COMMENTS OF NEW ENGLAND SOUTHERN RAILROAD CO.

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Dated: August 28, 2009

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In a decision served in this proceeding on July 16, 2009 ("July 16 Decision"), the Board gave notice of its acceptance of the formal application (the "Application") of Boston and Maine Corporation, Inc. ("B&M") and Springfield Terminal Railway Company ("ST") (collectively, "Pan Am") requesting the Board to authorize the third-party, or "adverse," discontinuance of the operating authority of New England Southern Railroad Co. ("NES") over approximately 27 miles of B&M's New Hampshire Main Line (the "Line"), extending from milepost B80.68 at Penacook to milepost B56 at Manchester, NH, and including (1) the portion of the former Claremont and Concord Railroad line from the switch to the New Hampshire Main Line valuation station 41+98; and (2) one track for interchange purposes in the B&M yard at Manchester. In that

decision, the Board directed that comments responsive to Pan Am's Application, including the protestant's entire opposition case, should be filed by August 30, 2009.¹

NES hereby submits its comments on the Application. At the outset, NES wishes to express its regret that Pan Am has elected to take action, without cause, to remove NES from the Line. NES has a long-standing record of providing superior service to shippers on the Line, and has forged strong and constructive ties to these shippers over a period of over 24 years. It is with regret that it appears that the day will soon arrive when ST will replace NES as the Line's operator, a turn of events that NES understands the shippers on the Line would prefer not to occur. Despite its deep disappointment, NES recognizes that it is not constructive to be an obstacle to the legal exercise of Pan Am's right to terminate its contractual relationship with NES and to take the subject action before the Board.

For these reasons, NES does not oppose the proposed termination of NES's common carrier status on the Line, but, as discussed below, NES – (1) strenuously objects to Pan Am's self-serving, inaccurate, and misleading depiction of the circumstances surrounding this adverse discontinuance proceeding; (2) questions whether ST will meet the needs of shippers on the Line following NES's departure; and (3) is concerned about whether ST will arrange for the timely and efficient interchange of traffic with NES at a point near to where the Line and NES's non-Pan Am-owned lines intersect at Concord.

¹ Although the Board directed interested parties to file comments responsive to the Application by August 30, 2009, that date happens to fall on Sunday. NES presumes that responsive comments would be considered timely if filed on Monday, August 31, but, out of an abundance of caution, NES has decided to file its comments on the last business weekday before the 30th – Friday, August 28.

NES will set the record straight and defend its reputation as an upstanding and honest short line railroad. In so doing, NES will briefly respond to the more egregious misstatements and mischaracterizations in Pan Am's Application. In that regard, as NES will explain, Pan Am's invocation here of the costly and time-consuming adverse discontinuance procedures was avoidable and unnecessary. Moreover, NES will explain why it believes that the future adequacy of ST's service to shippers on the Line and those that NES will continue to serve remains a looming question mark.

Background

NES is a Class III railroad that has continually provided responsive rail service over the Line extending between Manchester and Penacook, NH, for approximately 24 years pursuant to a lease arrangement (the "Agreement") with B&M.² Under the terms of the lease arrangement, NES was not permitted to charge shippers on the Line for NES's services, because such charges were assessed and collected by Pan Am. In turn, under the terms of the Agreement, Pan Am was obligated to pay NES per car interline charges and improperly withheld car hire charges. In addition, although the Agreement contains "no fault" contract termination provisions, which Pan Am has elected to exercise, the Agreement has no provision obligating NES either to seek STB authority to terminate its common carrier status on the Line in the event of contract termination or to fund any such effort to terminate its common carrier status. In the absence of such a provision, it is NES's view that, because Pan Am has elected a no fault termination of the Agreement and because of other extenuating circumstances discussed below, Pan Am has the

² See New England Southern Railroad Co., Inc. – Lease and Operation Exemption – Boston and Maine Corporation, Finance Docket No. 30618 (ICC served Apr. 26, 1985).

responsibility, absent additional arrangements between the parties, to seek termination of NES's common carrier obligations at Pan Am's expense.

As of at least 2003, Pan Am's payments to NES for accrued per car allowances mandated under the Agreement became sporadic. NES repeatedly contacted Pan Am to inquire about Pan Am's non-payment. Ultimately, on April 5, 2007, after the accumulation of a substantial amount of such allowances, NES sent Pan Am a demand letter requesting prompt payment of amounts owed to NES. In response, Pan Am paid NES only small portion of what Pan Am's own monthly statements reflected was due to NES.

On April 27, 2009, roughly three weeks after NES's demand letter, Pan Am notified NES that it had elected to terminate the Agreement effective August 1, 2007.³ Although Pan Am made two additional payments towards the balance it owed NES, the second of those payments, in June 2007, which fell far short of satisfying Pan Am's debt to NES, was the last such payment that NES received. Despite the fact that Pan Am continued (and continues) to send NES monthly statements showing an amount due to NES, Pan Am continued (and continues), without any basis whatsoever, to withhold all amounts owed to NES under the Agreement. By December 2007, six months after Pan Am's last payment, NES ultimately saw no choice but to institute legal action against Pan Am for the mounting arrearages, which as indicated above, constituted virtually all of NES's prospective income from operating the Line.⁴

³ In fact, NES believes that Pan Am elected to terminate the Agreement as a response to NES's demand for payment of the substantial – indeed mounting – arrearages owed to NES.

⁴ At this point, NES has a claim against Pan Am for such unpaid charges in excess of \$600,000 pending in state court. Since June 2007, NES has operated the Line without

Pan Am Has Unfairly and Inaccurately Depicted the Circumstances Surrounding Its Application

Having provided responsive service to appreciative shippers on the line for over 24 years, NES regrets that Pan Am has chosen to sever NES's ties to the Line and its shippers. Nevertheless, under the circumstances, NES does not object to the ultimate purpose of the subject adverse discontinuance Application (termination of NES's common carrier obligation over the Line),⁵ and it does not dispute that Pan Am has legally invoked its rights under the Agreement to terminate NES's leasehold interest. But in its Application, Pan Am adds insult to injury by mischaracterizing the facts underlying this proceeding in a purposeful effort to cast NES in an unfavorable light.

For example, Pan Am characterizes NES as uncooperative and spiteful, suggesting that NES has initiated litigation with Pan Am over unpaid charges as retaliation for Pan Am's termination of the Agreement. Such characterizations are entirely baseless and untrue. As reflected above, NES issued its written demand for back-owed amounts before Pan Am gave notice of termination of the Agreement, and NES initiated a court claim for unpaid charges only after it became apparent that Pan Am did not intend to remedy its non-compliance with the payment terms in the lease

compensation of any sort from Pan Am, due to the latter's refusal to remit payments to NES. By October 2008, sixteen months after Pan Am's last payment, NES opted, out of necessity, to charge shippers directly for its services, recognizing that Pan Am viewed the Agreement between Pan Am and NES as terminated. NES so acted because, while it has a continuing legal obligation to shippers unless or until it is officially relieved of that obligation, NES must also have revenue to fund its ongoing operations.

⁵ NES recognizes, as does Pan Am, that NES cannot legally discontinue operations over the Line absent specific Board authority permitting such discontinuance to take place. For that reason, and due to questions surrounding whether ST must secure its own authority to assume operation of the Line, NES has adhered to its obligation to continue service to shippers until the Board either orders or permits it to cease such service.

Agreement. Simply put, NES filed suit because it was not paid for its services, not because Pan Am's decided to terminate the lease.

Pan Am has also attempted to mislead the Board into believing that NES has stonewalled Pan Am on the subject of NES's discontinuance, such that Pan Am has had no alternative but to file the subject Application. In fact, Pan Am did have, indeed has, alternatives to a formal adverse discontinuance available to it, and NES would have agreed to participate in such alternative approaches had Pan Am not failed to pursue such options thoroughly. Nevertheless, Pan Am has incorrectly and unfairly suggested that NES is obligated to terminate its common carrier status (absent any provision in the Agreement to that effect), and that, despite such an alleged "obligation," NES has obstinately refused to do so.

NES has no such obligation, and it has good reason not to expend funds it does not have to obtain discontinuance authority. Because Pan Am has for years now evaded its payment obligations to NES (and has thereby deprived NES of income essential to NES's continued viability), and because the Agreement contains no provision obligating NES on its own to seek authority to discontinue service, NES objects to the suggestion that it should be responsible for obtaining discontinuance authority at its sole expense.

Recognizing that Pan Am inevitably would re-take possession of the Line and assign operations to ST, NES has been willing, as indicated, to discuss alternatives to a formal discontinuance process before the STB that would accommodate the proposed change of rail operators from NES to ST. For example, during past settlement discussions, NES has suggested that, as part of such a settlement, NES would endorse a change of operators notice of exemption that would permit Pan Am to resume operation

of the Line via ST. Such an exemption process would be less costly and time consuming to all concerned than would be any formal discontinuance proceeding (whether an adverse discontinuance application by Pan Am or a petition for exemption filed by NES). Granted, such a voluntary arrangement was originally presented within the scope of settlement discussions, but, even though such discussions (now no longer ongoing) did not succeed, NES nevertheless sees the efficiency and, indeed, the wisdom of such an approach here, and it would have agreed to endorse such a notice of exemption process had Pan Am presented the approach outside of the scope of settlement discussions. In short, Pan Am has elected to incur the costs of this adverse discontinuance Application because it has chosen to act unilaterally to terminate NES's common carrier obligation, and not because NES refused to cooperate with any other approach to this objective.

NES is Concerned about the Adequacy of Future ST Service

Pan Am's scurrilous tactics and inefficient approach to STB matters aside, NES is deeply concerned about whether ST will provide adequate service to shippers on the Line once ST assumes operation. NES has operated the Line since 1985, and since even before then (1982), NES has also operated pursuant to a modified certificate a connecting New Hampshire-owned rail line extending north from Concord (the so-called "White Mountain Line").⁶ Because of its long-standing service to shippers on both lines, NES is very familiar with these shippers' service needs, and understands and appreciates the level of service that these shippers need to grow and thrive. Over the years, however,

⁶ Since 1982, NESR has provided service on the connecting White Mountain Line owned by the New Hampshire Department of Transportation pursuant to an agreement with the State. This line extends from Concord to Lincoln, NH, and currently has no other connection with the interstate rail system other than the B&M-owned Manchester-Penacook Line with which it intersects.

NES and its shippers have witnessed a distressing decline in the frequency and reliability of ST's service to and from the current NES-ST interchange at Manchester. Recently, ST's service to/from the Manchester interchange – which was five times a week– has dwindled to twice weekly or less.

Pan Am has represented that ST will base a switching crew at Concord, and that is encouraging as far as it goes coming from Pan Am, which appears to have been experiencing problems with motive power and crew shortages as it is. But the proof will be in ST's actual delivery on its promise of five days per week service.⁷ NES has attempted for some time to make do with ST's unreliable and infrequent interchange at Manchester. But it is clear that the status quo is unacceptable, and that shippers on both the Line and on the NES-served White Mountain Line will require at least three times per week service not only to maintain their continued use of rail service, but also so that both carriers – ST and NES alike – may attract additional business to their lines. Clearly, NES's shippers on the White Mountain Line will still depend upon ST interchange service with NES (albeit at what would be a new interchange location) even after ST assumes operation of the Line. So, while shippers on the Line will be keenly interested in what ST will do in assuming operations, NES, its existing and prospective shippers on the White Mountain Line, and the state of New Hampshire all will have a strong vested interest in the adequacy of ST's services going forward, also.

NES is Concerned about Future NES-ST Interchange

In addition to its concerns for the future of service on the Line and the frequency of future interchange between ST and NES in support of NES's remaining operations

⁷ See Application, Verified Statement of Richard Miller at unnumbered page two, paragraph 6.

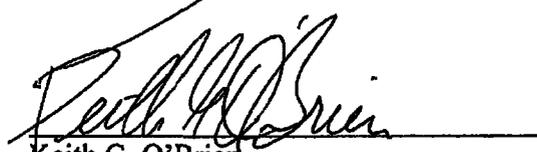
north of Concord, NES is also concerned about whether Pan Am will agree to appropriate arrangements to effect a new interchange near the connection of the Line and the White Mountain Line. In that regard, NES believes that adequate facilities exist in Concord Yard that are suitable for future NES-ST interchange, but, to this point, ST and NES have not discussed, much less reached an accord on, this critical service issue. NES is hopeful that the parties will reach an accord on interchange so that the issue does not re-emerge at the Board. NES wishes nevertheless to identify the issue as one that is not yet resolved, but can and should be resolved before any change in operators on the Line takes place.

Conclusion

Although NES strenuously objects to the manner in which Pan Am has presented its Application (and, indeed, the fact that Pan Am is using the formal adverse discontinuance application procedures in this case), and despite NES's concerns over the future adequacy of service that Pan Am will provide to shippers on the line and in interchange with NES at or near Concord, NES does not object to the ultimate objective of this Application – the termination of NES's common carrier obligations on the Line. NES requests only that the Board consider the true circumstances underlying this proceeding, and keep careful watch over Pan Am's execution of its plans in removing NES and installing ST in its place. Having had the privilege of serving shippers on the Line for nearly 25 years, NES is concerned that the actions proposed by Pan Am may ultimately result in harm to these industries. The Board should share those concerns. In fact, in acting on the Application, the Board's overarching consideration must be the adequacy of service that shippers on the Line (and, for that matter, on the White

Mountain Line) receive going forward, and, in that regard, the Board should be mindful of the representations Pan Am has made in this proceeding regarding the service it will provide.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Keith G. O'Brien", is written over a horizontal line.

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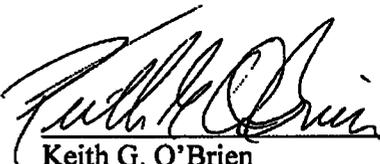
Attorneys for New England Southern
Railroad Co.

DATED: August 28, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Comments upon all parties of record by depositing a copy in the U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: August 28, 2009



Keith G. O'Brien
Attorney for New England Southern
Railway Co.