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August 10, 2007

VIA E-FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423-0001

Re: STB Docket No. AB-32 Sub. No. 100
Boston And Maine Corporation And Springfield Terminal Railway
Company - Adverse Discontinuance of Operating Authority-
New England Southern Railroad Company Petition for a Waiver

Dear Secretary Williams:

On August 8, 2007, Pan Am Railways ("Pan Am") filed a Petition on behalf of its subsidiaries Boston and Maine Corporation ("B&M") and Springfield Terminal Railway ("ST") seeking waiver of certain regulation and exemption from certain statutory requirements as relevant to prospective filing of an adverse discontinuance application. On August 10, 2007 New England Southern ("NES") filed a letter requesting the Board to defer acting on the Petition pending filing of a timely response by NES. Pursuant to the provisions of 49 CFR §1104.13(a) NES hereby files its response urging the Board to deny certain of the specific requests for waiver and exemption.

NES has provided responsive rail freight service over the railroad line extending between Manchester and Penacook NH for over 22 years. During that time NES has been readily accessible in meeting the rail service needs of shippers of all categories and has continually projected an active interest in the vital concerns of the region. NES continues to meet ongoing service requirements and remains fully committed to the region. It is for these reasons that NES urges the Board to deny certain of the specific waiver and exemption requests sought by Pan Am in order that all parties with legitimate interests as to the ramifications of an adverse discontinuance filing can be apprised of Pam Am's intentions in the matter.

Specifically, Pan Am requests a waiver from the notice requirements at 49 CFR 1152.20(a)(2) without making clear whether it wants a waiver from the entire provision or only

from certain subsections of it.¹ If Pan Am's Waiver Petition seeks a categorical waiver of the provisions at section 1152.20(a)(2), then the request is unwarranted. But if Pan Am's awkward request for a waiver with respect to Section 1152.20(a)(2) seeks only a partial waiver of that provision, then it goes too far and should not be granted without appropriate adjustment.

In practice, would-be adverse abandonment or discontinuance applicants generally have observed the advance notice of intent provisions at 49 CFR 1152.20, and when seeking waivers from this provision, they customarily have sought to be excused from certain of the 12 enumerated service requirements set forth at section 1152.20(a)(2), but not all 12 at once. See, e.g., Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286) (STB served Oct. 26, 2006), slip op. at 3 (applicants sought, and were granted, waivers from Sections 1152.20(a)(2)(i) and (xii)) (“Norfolk Southern”); East St. Louis Junction Railroad Company – Adverse Abandonment – In St. Clair County, IL, STB Docket No. AB-838 (STB served June 30, 2003), slip op. at 5 (applicant, Illinois Department of Transportation, sought, and was granted, waivers from Sections 1152.20(a)(2)(ii), (iii), and (iv)) (“East St. Louis Junction”). In fact, the Board generally has not granted requests for a waiver of section 1152.20(a) in its entirety. See, e.g., Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Oct. 5, 2001), slip op. at 3 (denying Salt Lake City Corporation's request for a waiver of section 1152.20(a)) (“Salt Lake City”). Thus, if Pan Am's waiver request is viewed as a request for relief from section 1152.20(a)(2) in its entirety, the Board should deny that request.

If Pan Am has attempted to demonstrate compliance with some of the specific advance notice requirements, such as 49 CFR 1152.20(a)(2)(i),(ii), (iii), and (iv),² by serving its Waiver Petition on the Governor of New Hampshire, the New Hampshire Public Utilities Commission, and the State of New Hampshire Department of Transportation – Bureau of Rail and Transit contemporaneously with its filing with the Board, and by its statement of intent to file its Waiver Petition on shippers and connecting rail carriers,³ then Pan Am has not done enough.

Read in a context most favorable to Pan Am, the vague and contradictory Waiver Petition filed by Pan Am appears to seek relief from the advance notice requirements of 49 CFR

¹ Pan Am's Waiver Petition is very confusing in this regard. On one hand, Pan Am nominally seeks a waiver from the provisions at “Section 1152.20(a)(1),(2),(3) and (4)” (Waiver Petition at 6). On the other hand, Pan Am seems to ask the Board's acceptance of a customized and heavily abbreviated form of advance notice of intent to file an adverse application by stating that it will at some unspecified future time notify shippers and connecting rail carriers, and by indicating in the certificate of service attached to the Waiver Petition that Pan Am has served a copy of its Waiver Petition on the governor and various State of New Hampshire agencies.

² Pan Am maintains that its Waiver Petition should serve as its notice of intent to file an adverse abandonment application pursuant to section 1152.20.

³ Incidentally, there is no evidence that it has yet served notice upon shippers, despite its professed intent to do so. The Board's regulations at 49 CFR 1152.20 appear to contemplate that the notice of intent to file an abandonment or discontinuance application would be filed upon all designated parties at section 1152.20(a)(2) at the same time the notice is filed with the Board. Pan Am's execution of this requirement with respect to state entities is consistent with such a process.

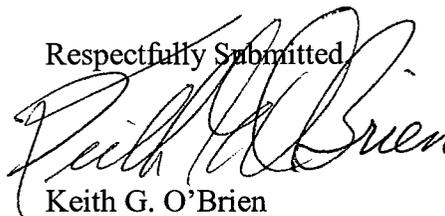
1152.20(a)(2)(vi)-(xii), and not a waiver from the provisions of section 1152.20(a)(2) in its entirety. If so, NES objects to a waiver of the advance notice requirements of 49 CFR 1152.20(a)(2)(ix) [notice to the U.S. Railroad Retirement Board (“RRB”)]. Such advance notice would not be unduly burdensome on Pan Am, which most assuredly has an ongoing relationship with RRB. Moreover, the proposed adverse discontinuance would most likely result in reduced employment for NES, which makes giving notice to RRB especially relevant. Accordingly, Pan Am should not be relieved of its obligation to serve notice on RRB.

Pan Am appears to have committed to complying in some fashion or another to the advance notice requirements of 49 CFR 1152.20(a)(2)(i)-(v), and Pan Am should be required to comply with section 1152.20(a)(2)(ix). As such, Pan Am must be held to its related obligation under 49 CFR 1152.24(b) to supply an affidavit of its compliance with the notice requirements of Section 1152.20, at least insofar as Pan Am voluntarily has served advance notice upon interested parties or has been required to do so by the Board in response to the Waiver Petition. This is especially so, because Pan Am has not sought a waiver of the Section 1152.24(b) requirement. Cf. East St. Louis Junction, slip op. at 5 (holding applicant to the requirements of Section 1152.24(b) to the extent that waivers were not sought, and were not granted, in connection with 49 CFR 1152.20).

Finally, Pan Am’s request for a waiver of the newspaper publication requirements of 49 CFR 1152.20(a)(4) appears to be unprecedented. The newspaper publication requirement serves an important public purpose, is not unduly burdensome, and should not be dispensed with here just because Pan Am would rather not take the effort. While Pan Am attempts to bolster other elements of its Waiver Petition by relying on precedent, it offers none in support of its attempt to avoid the newspaper notice requirement of section 1152.20(a)(4). This is not surprising. NES can find no instances where an applicant for an adverse discontinuance or abandonment has been granted such a waiver. In fact, waivers from Section 1152.20(a)(4) have not been denied in the past. See, Norfolk Southern, slip op. at 4; New York City Economic Development Corporation – Adverse Abandonment – New York Cross Harbor Railroad, Inc., STB Docket No. AB-596 (STB served Dec. 3, 2001) slip op. at 3 (observing that newspaper notice ensures that “potential parties with legitimate interests in the proposal can be apprised of the status of the line”); Salt Lake City, slip op. at 3 (also noting that newspaper notice ensures that “potential parties with legitimate interests in the proposal can be apprised of the status of the line”). Accordingly, Pan Am should not be relieved of its obligations under Section 1152.20(a)(4).

For all reasons set forth above NES urges the Board to deny the specifically discussed aspects of the requested waiver of regulations and exemptions from applicable statutory provisions.

Respectfully Submitted



Keith G. O'Brien

CERTIFICATE OF SERVICE

I, Keith G. O'Brien, hereby certify that on this 24th day of August 2007, copies of the foregoing response to Petition for Waiver have been served by first class mail, postage prepaid, or by more expeditious means of delivery upon all parties of record to this proceeding identified on the Surface Transportation Board's website.


Keith G. O'Brien
Attorney for New England Southern