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December 11, 2017

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: New England Central Railroad Inc. – Trackage Rights Order -- Pan
Am Southern LLC, FD 35842
EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's ("PAS") motion to hold the procedural schedule in abeyance ("Abeyance Motion"). Concurrent with this Abeyance Motion, PAS is filing a motion to strike ("Motion To Strike") portions of New England Central Railroad, Inc.'s ("NECR") December 6, 2017 Petition for Reconsideration of the Board's October 31, 2017 decision. This Abeyance Motion requests the Board to delay the filing of PAS's December 22 deadline to reply to NECR's Petition for Reconsideration until such time as the Board rules on PAS's Motion To Strike.

PAS is requesting an expedited ruling on the Abeyance Motion. PAS's response to NECR's Petition for Reconsideration is due December 22, 2017. Holding PAS's reply deadline in abeyance pending a ruling on the Motion To Strike allows the Board to fully consider the Motion To Strike and NECR's reply to it before PAS has to reply to the merits of the Petition for Reconsideration. The Board's decision on the Motion To Strike, either a grant or denial, will define the scope of PAS's reply to the Petition for Reconsideration and could save the parties and the Board significant time and expense.

Sincerely,



William A. Mullins
Attorney for Pan Am Southern LLC

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

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

**PAN AM SOUTHERN LLC'S MOTION TO HOLD THE
PROCEDURAL SCHEDULE IN ABEYANCE**

EXPEDITED CONSIDERATION REQUESTED

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Attorneys for Pan Am Southern LLC

Dated: December 11, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

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

**PAN AM SOUTHERN LLC’S MOTION TO HOLD THE
PROCEDURAL SCHEDULE IN ABEYANCE**

On December 6, 2017, New England Central Railroad, Inc.’s (“NECR”) filed a Petition for Reconsideration (“Petition”) of the Board’s October 30th decision in this proceeding. Pursuant to the Director’s decision served on November 16, 2017, Pan Am Southern LLC’s (“PAS”) reply to the Petition is due December 22, 2017. NECR’s Petition exceeded the twenty page limit imposed in 49 C.F.R. §1115.3 and included two verified statements by two new witnesses, one of which (Carey) presented a new argument and a new Replacement Cost New Less Depreciation (“RCNLD”) to support NECR’s change in position from its prior application of Value-In-Place (“VIP”); while the other verified statement (Foley) presented competition analysis.¹ Concurrent with this motion, PAS has filed a motion to strike (“Motion To Strike”) those verified statements and any legal argument relying upon those statements. For the reasons contained in this motion (“Abeyance Motion”), PAS hereby requests that the Board hold PAS’s

¹ In its Opening Statement and Evidence (filed June 4, 2015) and Rebuttal Evidence and Argument (filed January 23, 2017) (“Rebuttal”), NECR argued that its VIP methodology is the superior methodology and use of RCNLD is not possible or appropriate, and attacked PAS’s capitalized earnings (“CE”) approach. See Rebuttal at 27-28.

December 22 reply deadline in abeyance until such time as the Board rules on PAS's Motion To Strike. PAS is requesting an expedited ruling on this Abeyance Motion.

The Board's resolution of the Motion To Strike will significantly impact the scope and breadth of PAS's reply to the merits of the Petition. If the new analyses and new arguments, and any legal argument relying upon those newly performed studies, are stricken, the scope of PAS's reply and of the Board's consideration of the Petition will be significantly different than if PAS is required to provide rebuttal evidence, analysis and legal argument to the merits of what has been raised in those verified statements. If the new evidence, analysis and arguments are not stricken, then essentially the proceeding is reopened (it should not be) and equity would require that PAS be permitted to obtain an expert witness, examine the newly submitted studies and analysis, and address the merits of NECR's new RCNLD argument. As it stands, what has been presented by NECR is not a true petition for reconsideration based upon material error in the Board's application of the existing record, and to which PAS agreed to a short 16 day reply timeframe, but rather, NECR has filed a defacto petition for reopening, supported by evidence and argument that could have been presented earlier and that merits a substantive response if allowed to be put into the record.²

Whether this newly raised evidence and argument are allowed in the record is an essential question that needs to be addressed prior to PAS having to reply to the Petition.³ Holding PAS's

² PAS notes that NECR was given 37 days to file a petition for reconsideration, which under the normal 20-day rule would have been due on November 20, 2017. The reason given for the extended period, to which PAS consented, was to replace one experienced STB attorney with another experienced STB attorney. PAS did not consent to a shortened reply timeframe under the understanding that NECR would present two brand new witness statements with new analysis.

³ Absent a grant of this abeyance, PAS will have to request expedited consideration on its Motion To Strike in order to have a ruling by December 22. Expedited consideration would be

reply deadline in abeyance pending a ruling on the Motion To Strike thus serves several purposes. It sets the ground rules and clarifies the scope and substance of a PAS reply by determining whether the newly raised evidence must be addressed. This could save the parties and the Board significant time and expense having to deal with superfluous issues if the material is stricken. It provides NECR with at least a full twenty days to respond to the merits of Motion To Strike and without the need to expedite its reply before the December 22 deadline and/or respond to a request for expedited treatment of the Motion To Strike. It allows time for the Board to fully consider the Motion To Strike and NECR's reply to it without the need to act expeditiously or in a hurried fashion so as to provide guidance by December 22. Finally, granting the abeyance would also allow time for NECR to produce the workpapers of its witnesses and to provide redacted and/or confidential versions of its pleadings,⁴ and if the material is not stricken, provide time for PAS to obtain experts, allow those experts to review the new verified statements, and provide analysis on those arguments. Of course for these benefits to be achieved in a timely manner, the Board should expeditiously consider this Abeyance Motion.

Granting an abeyance not only serves several purposes as noted above, but it is also fully consistent with prior precedent. The Board, as recently as 2016, has held a proceeding in abeyance in order to allow time for the record to be clarified, the issues to be narrowed, and for

justified to prevent PAS from expending unnecessary resources in preparing a reply to NECR's wide-ranging and improper evidentiary submission and the arguments. But there is no need for the Board to expedite consideration of the Motion To Strike if it grants this Abeyance Motion.

⁴ NECR has produced some workpapers in support of its newly-submitted evidence, but has not produced all of the workpapers. NECR has not produced a confidential version of its pleading. PAS has asked NECR to identify if any of the highly confidential ("HC") material could be classified as confidential so as to be able to disclose that information to in-house counsel. PAS has also asked NECR to indicate, in its HC version, which material was redacted in its public version. NECR has not yet completed those tasks.

the Board to rule before subsequent future filings are made.⁵ See also, Meridian Southern Railway, LLC—Acquisition And Operation—Line Of Kansas City Southern Railway Company, FD 33854, 2000 STB LEXIS 270 (STB served May 15, 2000) (holding proceeding in abeyance so that the Board could rule on pending motions before proceeding on the merits of the overall transaction); and Diana Del Grasso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba – Petition For Declaratory Order, FD 35652 (STB served March 7, 2013) (suspending procedural schedule in order to allow the Board time to rule on an administrative appeal on the basis that “suspending the procedural schedule at this time will avoid unnecessary filings and will allow the Board to fully consider” the reconsideration request and the reply.)

If the Board is not inclined to grant this Abeyance Motion and instead desires to rule on the merits of the Motion To Strike and any reply to that motion in the context of a future Board ruling on the merits of the Petition itself, then PAS requests an extension of time to file its reply to the Petition. Failure to hold the schedule in abeyance now would require PAS to respond to the merits of the Petition before obtaining a ruling on the Motion To Strike; requiring PAS to address issues that may not be relevant and eventually stricken. It would also require PAS to obtain expert opinion to address arguments that may likewise be eventually stricken. For the reasons stated herein, PAS believes a grant of the Abeyance Motion is in the Board’s and the parties’ best interest. If the Board disagrees, however, then PAS respectfully requests an

⁵ See Finch Paper LLC—Petition For Declaratory Order, FD 35981, 2016 STB LEXIS 285, (STB served Oct. 6, 2016) (granting a request to hold the proceeding in abeyance until the Board could rule on an appeal because the Board’s decision on the appeal would impact the substance of subsequent rebuttal filings).

extension of time to file its reply to the merits of the Petition, equal to at least 20 days following the decision of the Board on this Abeyance Motion, giving due regard to the holidays.

In conclusion, the Board should grant PAS's Abeyance Motion in its entirety and do so on an expedited basis. PAS's response to NECR's Petition is due December 22, 2017. Holding PAS's reply deadline in abeyance pending a ruling on the Motion To Strike allows the Board to fully consider the Motion To Strike and NECR's reply to it before PAS has to reply to the merits of the Petition. The Board's decision on the Motion To Strike, either a grant or denial, will define the scope of PAS's reply to the Petition and could save the parties and the Board significant time and expense. Absent a full grant, the Board should, at a minimum, grant an extension of time for PAS to reply to a date at least 20 days beyond the date of the Board's decision, giving due regard to the intervening holidays.

Respectfully submitted,

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Attorneys for Pan Am Southern LLC

December 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of December, 2017, I served a copy of Pan Am Southern LLC's Motion To Hold The Procedural Schedule In Abeyance by mailing copies of the Motion To Strike via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.



William A. Mullins
Attorney for Pan Am Southern LLC