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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

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's ("PAS") 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 ("Motion To Strike"). Concurrent with this Motion To Strike, PAS is also filing a corresponding motion to hold the procedural schedule in abeyance ("Abeyance Motion"). The 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 this Motion To Strike and NECR's reply to it. 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 STRIKE
PORTIONS OF NEW ENGLAND CENTRAL RAILROAD, INC.'S PETITION FOR
RECONSIDERATION OF THE BOARD'S OCTOBER 31, 2017 DECISION**

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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 –
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New England Central Railroad, Inc.’s (“NECR”) ¹ Petition for Reconsideration (“Petition”), which was filed on December 6, 2017, in effect seeks to present two new arguments and a new methodology, Replacement Cost New Less Depreciation (“RCNLD”), ² under the guise of presenting merely a legal analysis of the evidentiary record. NECR’s Petition should be seen for what it is: an attempt to present new analysis and arguments, and a methodology that NECR itself previously rejected. ³ Any and all of this evidence and analysis could and should have been presented before submitting its case to be Board for its decision, but were not. As discussed herein, the verified statement of Edward Foley (“Foley VS”) presents a new analysis that could have been previously submitted. The verified statement of Julie M. Carey (“Carey

¹ NECR and Pan Am Southern (“PAS”) are referred to collectively as the (“Parties”).

² RCNLD is a widely accepted means of determining the appropriate return on capital in an SSW Compensation case.

³ In its Opening Statement and Evidence (filed June 4, 2015) (“Opening”) and Rebuttal Evidence and Argument (filed January 23, 2017) (“Rebuttal”), NECR argued that its Value-In-Place (“VIP”) methodology was a superior methodology because use of RCNLD was not possible or appropriate. See Rebuttal at 27-28.

VS”) likewise presents new argument, analysis, and evidence that could have been introduced previously in the record. When newly raised evidence and arguments that could have been raised earlier, but were not submitted, are submitted for the first time in a petition for reconsideration, the Board consistently grants motions to strike such material.⁴ Accordingly, PAS moves to strike the Foley VS and the Carey VS in their entirety (or alternatively significant portions of the verified statements) and likewise the Board should strike any references in the legal argument to those verified statements.⁵

ARGUMENT

Board precedent is clear. In a petition for reconsideration, it is improper to include newly raised evidence and arguments that could have been raised earlier but were not presented prior to the Board’s decision. Both the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have routinely and repeatedly refused to accept evidence in a petition for reconsideration or appeal if that evidence was previously available but was withheld until after a result is obtained that is not to a party’s liking. See B. Willis C.P.A. Inc.--Petition for Declaratory Order, STB Finance Docket No. 34013, slip op. at 3-4 (STB served July 26, 2002) (“Willis”); S.R. Investors, Ltd. d/b/a Sierra Railroad Company-- Abandonment--in Tuolumne County, CA, AB-239X, 1988 ICC Lexis 17, at *7 (ICC served Jan. 20, 1988); Sunbelt Chlor

⁴ The underlying reason the Board rejects such evidence is that a party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to introduce the evidence to question the Board’s decision on the evidence the parties established in the record. To allow such evidence, analysis and argument otherwise would undermine the concept of procedural schedules and the finality of the Board’s decisions.

⁵ In the interest of making this Motion as succinct as possible, PAS refers the Board to the Background established in the Board’s October 31, 2017 decision establishing trackage rights compensation (referred to herein as “Decision 45970”) for the procedural history of the proceeding.

Alkali Partnership v. Norfolk Southern Railway Company, NOR 42130, slip op. at 19 (STB served June 30, 2016) (stating Sunbelt cannot introduce a new argument on reconsideration and claim the Board erred by not considering that argument in an earlier decision) (“Sunbelt”).⁶ Indeed, when parties previously have presented new analysis and evidence that could have been presented earlier the Board not only has refused to consider it, but also has stricken such newly offered evidence and argument from the record. See Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria and Western Railway Corporation Between La Harpe and Hollis, IL, FD 34335 (STB served Feb. 7, 2005) (“KJRY”) (granting a motion to strike new legal argument and evidence related to title to the land and a new appraisal of that real estate).⁷ As discussed herein, the Carey VS and Foley VS fit squarely within the KJRY and the other precedents. They should be stricken, along with any legal argument relying upon those verified statements.

⁶ See also Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557 (slip op. at 6) (STB served May 15, 2015) (stating a party may not use a petition for reconsideration to provide, for the first time, explanation and support for claims it previously made and that the Board addressed in the prior decision) (“BNSF Tariff”); and Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 12-13 (STB served Mar. 19, 2008) (holding that “new arguments” that could have been presented earlier cannot be raised for the first time on reconsideration) (“EP 646”).

⁷ See also Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company, FD 35412 (STB served May 2, 2012) (rejecting additional evidence offered in a reply to a petition for reconsideration); and Consumers Energy Company v. CSX Transportation, Inc., NOR 42142 (STB served Dec. 9, 2016).

I. THE BOARD SHOULD STRIKE THE FOLEY VS AS NEWLY RAISED EVIDENCE BECAUSE THE SAME ANALYSIS COULD HAVE BEEN PERFORMED ON EARLIER DATA AND SUBMITTED AS EVIDENCE WHEN NECR FILED ITS REBUTTAL ON JANUARY 23, 2017

The Board should strike the Foley VS, in which NECR, for the first time, attempts to proffer as evidence concerning “the percentage of NECR traffic on the Line [] subject to competition from PAS.” Foley VS at 1. This proceeding began back on June 17, 2014, with evidence, analysis and argument that were no doubt under development by NECR for months before that date. In the subsequent months and years, both PAS and NECR introduced arguments throughout the course of the proceeding concerning competition over the involved rail lines.⁸ PAS was the only party to introduce evidence in the form of a verified statement on competition. The Michael P. Bostwick verified statement (“Bostwick VS”), Exhibit A to PAS’s Reply, showed the extent of competition between PAS, NECR, and other modes.⁹ NECR never introduced any similar evidentiary evidence until the Foley VS. It is not that NECR could not have introduced this evidence previously. The NECR case was developed and presented by an attorney with extensive experience before the Board, and was supported by evidence developed by R.L. Banks & Associates, Inc., among others.¹⁰ NECR could have offered analogous evidence on Rebuttal after it had a chance to fully review PAS’s Reply. It did not. Now, for the

⁸ See NECR’s Opening at 16 and Verified Statement of Dave Ebbrecht at 3-4; see also PAS Reply to NECR’s Opening Statement And Evidence (“PAS Reply”), submitted on July 19, 2016, which comprehensively discussed the competition for shippers on the Line. See PAS Reply at 2, 3, 12, 14, 15, 16, 36, 38, 40, 42, 52, and Exhibit A; see also NECR’s Rebuttal at 4-5, 7-10, 13-14, 16-18, and 21.

⁹ The Bostwick VS was introduced by PAS to describe waybill production requirements, speed limits, and haulage prohibitions designed to “hamstring PAS’s ability to compete effectively against NECR on the Line.” Bostwick VS at 5.

¹⁰ NECR Opening, Volume III, Verified Statement Of Charles H. Banks and John D. Ireland. Mr. Banks and Mr. Ireland’s analysis was supported by RLBA Director of Transportation Engineering, Lee Meadows, Jr. P.E. and Mr. Gary R. Anglemyer, M.A.I.

first time, NECR proffers a study by Foley examining the waybill data in 2016 in an attempt to show that PAS and NECR compete and to buttress its argument that NECR is subsidizing PAS's operations.

NECR even admits that the Foley VS is not "new evidence."¹¹ Petition at 7, FN 7. Of course, it is not new evidence.¹² It is merely newly raised evidence. To qualify as "new evidence," it must be "evidence that could not have been foreseen or planned for at the time of the original proceeding."¹³ The Board will only accept evidence that is genuinely new.¹⁴ NECR has not shown or even suggested that the evidence being offered was previously unavailable or could not have been foreseen or planned for previously, nor could it.

¹¹ Even if it were truly new evidence, such new evidence is still not admissible in the context of a petition for reconsideration based upon material error, as is the current Petition. Middletown & N.J.R.R. – Lease & Operation Exemption – Norfolk S. Ry., FD 35412, slip op. at 3 (STB served May 2, 2012). Such evidence would only be relevant to support a claim of changed circumstances. Even then, such a changed circumstance must materially impact the previous decision to be admissible. See Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, FD 35087, (Sub-No. 8), slip op. at 5 (STB served Oct. 30, 2017) ("CN/EJ&E") (noting that the Board previously rejected a 2011 petition for reconsideration because the newly offered and created evidence would not have changed the outcome of the Board's prior decision).

¹² Just because the waybill data being examined was from 2016, and not from 2014 or 2015, creates no excuse. To decide that this distinction has any relevance would be to rule that no STB decision has any sense of finality.

¹³ See Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago Central and Pacific Railroad Company, and Cedar River Railroad Company, FD 33556, slip op. at 6 (STB served Aug. 27, 2002) ("CN/IC"). Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988) (stating nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process) ("Connecticut Trust"). See also Western Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

¹⁴ See, e.g., Duke Energy Corporation v. Norfolk Southern Railway Company, NOR 42069, et al. (STB served Oct. 20, 2004) (accepting a new government coal production forecast as the basis for recalculating volumes on which stand-alone costs were determined).

NECR's own expert admits that "2016 was a typical year." Foley VS at 1. PAS and NECR limited the discovery window to the period from January 1, 2013 through May 31, 2015. NECR had full access to both the Board's waybill data and PAS's data for that period. As such, NECR could have performed the same analysis in the Foley VS for any given year during this time period and offered it as evidence in the proceeding. Only after receiving the Board's final decision in the proceeding did NECR present its 2016 competition evidence. But the Foley VS is not "new evidence." A similar study using previous data could have been foreseen and conducted. As such, the Foley VS is merely newly raised evidence to bolster its new analysis and arguments presented for the first time on a petition for reconsideration.

Being merely newly raised evidence and argument, the Board should strike the entire Foley VS on the basis that such evidence is not new evidence and should likewise strike any legal narrative based upon it, and any reliance upon such evidence by NECR witness Carey. The Board has said that "[a] party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened [or reconsidered] so that it may introduce the evidence."¹⁵ In a rate case in 2012, the Board made it clear that "[i]t is axiomatic that ...new evidence must in fact be new; it is not new if the 'same substance' could have been brought before us previously." See Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company, NOR 42014, 2012 STB Lexis 425, at *6 (STB served Nov. 26, 2012). Clearly, the data and study contained in the Foley VS is the "same substance" that could have been previously presented. It, along with NECR witness Carey's

¹⁵ See Willis at 3.

reliance on the Foley evidence, and any related argument in the narrative, should therefore be stricken and should not be considered by the Board in evaluating the Petition on the merits.¹⁶

II. THE BOARD SHOULD LIKEWISE STRIKE THE CAREY VS BECAUSE IT TOO RAISES NEW ARGUMENT NOT PREVIOUSLY RAISED AND SUBMITS A NEW ANALYSIS THAT COULD HAVE BEEN PREVIOUSLY SUBMITTED

As stated previously, new evidence can be submitted to support a petition for reconsideration, but only if the new evidence was not available during the course of a proceeding, would materially change the previous decision, and the new argument or evidence could not have been foreseen or planned for previously. The Carey VS does not present new evidence, but rather new argument and newly raised evidence offered to (1) relitigate and support NECR's previous argument that the capitalized earnings ("CE") approach is unworkable; (2) to present yet another revised methodology – a RCNLD calculation based upon previously produced and submitted economic evidence; and (3) to claim that the Board committed material error in failing to create its own RCNLD valuation and apply it over VIP or CE.

It is unquestionable that most of the newly raised evidence and analysis in the Carey VS could have been performed and offered into the record earlier. NECR's own witness states she was tasked with analyzing the decision against the "economic evidence in the record." Carey VS at 2. To be clear, NECR does not claim in the Petition that the evidence necessary to perform RCNLD was unavailable during the course of the proceeding or that it could not have done its own RCNLD. In fact, NECR claims that "[t]he Board had data on the record (or could have acquired additional production of data) ... to permit a direct determination of the cost of the Line

¹⁶ See Sunbelt; KJRY; BNSF Tariff; and EP 646. See also CN/EJ&E, (refusing to accept evidence which is merely newly-produced or created).

assets using the RCNLD approach.”¹⁷ Carey admits that “there is an independent and objective analysis of the NECR RCNLD from Duff and Phelps in the record that can be used to develop an appropriate trackage rights fee.” Carey VS at 3. The fact that the Duff and Phelps document referenced above was produced in discovery, almost a year before NECR’s Rebuttal was due, strongly supports PAS’s argument that NECR could have developed and introduced an RCNLD methodology, relying on the Duff and Phelps report as witness Carey does, into the record during its Rebuttal. It should not have waited until a petition for reconsideration, nor can it legally do so. As such, the Carey analysis is not new evidence, but a new analysis using existing data and presented after the fact.

The Carey VS also offers a new argument recommending “that the Board reconsider its failure to use economic costs measure for determining the trackage rights fee,” and, that “the Board recognize that a cost-based measurement is the only reliable approach to develop an economically appropriate trackage rights fee to ensure that NECR earns adequate revenues on the assets used by PAS.” Id. This is clearly a new argument. It is completely contrary to its previous argument. From Opening to Rebuttal, NECR continually claimed that VIP was the superior methodology and that use of RCNLD was not possible or appropriate.¹⁸ Now, only after losing its argument, does NECR have a change of heart and argue, for the first time, that the Board should have performed its own RCNLD analysis because RCNLD is a superior methodology to CE and VIP.¹⁹

¹⁷ Petition at 3.

¹⁸ Rebuttal at 27-28.

¹⁹ In making this argument, the Carey VS also relies, in part, on the newly developed evidence presented in the Foley VS. See Carey VS at 8-9. Because the Foley evidence and analysis should be stricken, any reliance upon that analysis in the Carey VS should also be stricken as the

In its final decision, the Board rejected the VIP approach to valuation because it was not a “conceptually valid” methodology.²⁰ Having lost, NECR wants another “bite at the apple” to attack both the underlying rationale of the Board’s decision and PAS’s previously-submitted evidence. In other words, NECR wants to make new arguments regarding the Board’s decision, rather than filing and arguing truly “new” evidence or focusing on why it was material error for the Board to rely upon the evidence of record (rather than the newly produced evidence) to reach the conclusion it did. Indeed, a portion of NECR’s new argument is based on evidence that it admits was previously available and on new studies in the Foley VS and Carey VS that NECR also admits could have been previously performed.

Only now does NECR claim that RCNLD, rather than VIP, should have been the proper methodology. This is improper new argument. Let’s be clear, though. It was NECR’s own decision not to submit a typical RCNLD analysis.²¹ During the proceeding, had NECR believed that CE was fatally flawed and that RCNLD was superior, as it now argues, it could have so argued and used the evidence of record to make that finding. It could have hired, at that time, Ms. Carey and Mr. Foley to run the very same comparisons it performs on reconsideration to support CE’s purported flaws. It could have used the same evidence it now relies upon to introduce RCNLD into the record. It did none of that. Instead, NECR continued to argue for

fruit of otherwise inadmissible evidence. As explained in Sunbelt, parties may not introduce a new argument on reconsideration and claim the Board erred by not considering that argument in an earlier decision.

²⁰ Decision 45970 at 14.

²¹ The Board’s decision addressing the Methodology Motion (“Decision 44790”), which was served on February 12, 2016, provided notice to both parties that the Board would compare the methodologies put forth by each party and set the terms and conditions of the trackage rights order ("TO") based on the full evidentiary record.

application of VIP. That was NECR's choice. NECR now wants the Board to undo its choice. This is not permissible in the context of a petition for reconsideration.²²

Likewise, NECR's new argument, which NECR raises for the first time, that it was the Board that should have used the evidence in the record to, on its own, transform a conceptually-invalid methodology (VIP) into a typical RCNLD, even though no party requested such an analysis, should be rejected. In NECR's view, the Board had an obligation to create a RCNLD methodology to determine the trackage rights compensation, despite NECR's claims on Rebuttal that such a methodology was not appropriate, and then apply it. This argument, and the evidence used to support it, should be stricken. NECR is simply attempting to assign the blame for NECR not making this argument to the Board. But as the Board recognized in Sunbelt, the Board is not responsible for making "a case for a complainant, especially when the complainant has expressly opposed that modification, and the defendant has provided useable evidence." Sunbelt at 6. The same principle holds true in this proceeding.

The Carey VS also includes a newly raised argument that the Board should have weighed its application of CE against the revenue adequacy of NECR. The Carey VS states "the STB's CE analysis and its resulting trackage rights fee does not and cannot ensure that NECR will be compensated in a manner consistent with revenue adequacy requirements." Carey VS at 2. As expounded upon in Section III, NECR never claimed in the proceeding that it was revenue inadequate, nor did NECR produce any information for the Board or PAS to determine whether NECR was or was not revenue adequate. Because it would be impossible for the Board to have

²² As noted previously, but worth repeating, "[a] party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened [or reconsidered] so that it may introduce the evidence." See Willis at 3; accord, Connecticut Trust.

evaluated evidence and argument that NECR never raised or produced into the record, such newly raised evidence and argument do not qualify as truly new evidence. It is merely new argument. As such, it should be stricken entirely in both the Carey VS and the legal argument.

For all of the reasons explained herein, the Board should follow its long-standing precedent and strike the Carey VS in its entirety. It contains new evidence, argument, and analysis that could have and should have been raised earlier. In the event that the Board does not strike the Carey VS in its entirety and deems that certain portions of the Carey VS are permissible argument on reconsideration, then, at a minimum, PAS requests that the following sections of the Carey VS that contain improper new argument and evidence should be stricken.

- Section I – Criticisms of CE evidence, implication that the Board should have used the record and evidence to create and apply RCNLD on its own, and argument concerning the claim that an interest rental component based on a legitimate RCNLD measure of the value of the tracks would be substantially higher than the value the STB prescribed.
- Section III.B – Entire 3rd paragraph (related to Foley VS), 4th paragraph, and 5th paragraph (related to Foley VS and competition).
- Section VI – New compensation and economic analysis based on the existing record, and workpapers, including the Genesee & Wyoming Inc. Determination of the Fair Value and Remaining Useful referenced in footnotes 24 and 25 (related to Duff and Phelps report produced by NECR).
- Section VII.B – The entirety of the first paragraph concerning the term of the TO, which relates to the term of the agreement and clearly could have been submitted previously as an argument.
- Exhibit 2 – Revenue Adequacy Argument and Evidence, which could have been introduced based on the evidence in the record.

Those portions of the Carey VS simply are not evidence that “could not have been foreseen or planned for at the time of the original proceeding,” CN/IC, slip op. at 6, but are issues, arguments, and analysis that NECR could have raised earlier. Having not done so, it is improper to now raise these issues and arguments in the context of a petition for reconsideration.

III. NECR'S NEW ARGUMENT IN THE PETITION THAT THE BOARD'S PARAMOUNT DUTY IS TO ENSURE THAT THE TRACKAGE RIGHTS COMPENSATION ALLOWS NECR TO OBTAIN REVENUE ADEQUACY IS LIKEWISE NEW ARGUMENT THAT SHOULD BE STRICKEN

The Board's directive to ensure that carriers attain revenue adequacy under the Rail Transportation Policy ("RTP") and its application to NECR's compensation as set forth in the legal narrative is also a new argument that should be stricken consistent with the Board's decisions in Sunbelt, BNSF Tariff, and EP 646. Counsel for PAS has examined NECR's numerous pleadings and has determined that NECR never claimed in the proceeding that it was revenue inadequate, nor did NECR produce any information for the Board or PAS to determine whether NECR was or was not revenue adequate.²³ On Rebuttal, NECR did reference 49 U.S.C. §10101(2), requiring the Board to promote a "safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board," (Rebuttal at 16) as one of the core principles of the RTP, but it did so in support of its argument that it should be allowed to earn an adequate return on the value of the Line. This was not an argument that application of anything other than VIP (or what it now argues should be RCNLD) would make NECR revenue inadequate or that adoption of CE would make it revenue inadequate, which is what NECR's new counsel now argues. NECR did not raise any argument related to application of CE as not meeting the revenue adequacy test until its Petition. NECR cannot now argue that there was evidence on the record at the time (which there was not) that would allow the Board or PAS to make (in the case of the Board) or attempt to rebut (in the case of PAS) an argument that NECR could have made on its own but chose not to.

²³ In fact, NECR objected to producing profitability and other related information necessary to make such a determination.

Nor can the Board rely upon this newly developed argument now. As just mentioned, there is no evidence of record anywhere (or even in the Petition) regarding whether NECR was or was not revenue inadequate. Counsel's revenue adequacy claim in the context of its Petition is simply a new argument that could have been raised earlier, and was not. Indeed, it would be impossible to calculate NECR's revenue adequacy because NECR refused to produce or enter into the record the information necessary for the Board to make such a determination.

Had NECR wished to argue that the Board should weigh revenue adequacy as an argument against CE, the appropriate time for NECR to have raised such an argument would have been on Rebuttal when NECR was tasked with supporting its preferred methodology and demonstrating why the methodology proposed by PAS was flawed. Because NECR chose not to introduce its newly raised revenue adequacy argument until after Decision 45970 had been issued, the argument should be stricken as a new argument impermissibly raised in a petition for reconsideration. Even if this new argument were properly raised, there is no evidence supporting it, and it should be rejected outright.

CONCLUSION

NECR could have developed and submitted all of the arguments and evidence contained in the Foley and Carey verified statements during the proceeding. None of it is truly new evidence that was unavailable at the time of the proceeding. It is merely newly raised evidence and argument that is not permissible in a petition for reconsideration based upon material error. Similarly, Carey's argument regarding the inadequacy of CE because of its alleged failure to allow a carrier to achieve revenue adequacy is a new argument never previously raised. As such, both witness statements are based upon newly raised evidence, new analysis of the existing

evidence, or new argument raised for the first time in a petition for reconsideration. This is improper in the context of a petition for reconsideration.

Only now, after the Board has presented a final decision based on the evidence and arguments in the record, which was developed in a proceeding that has lasted nearly three and a half years, has NECR decided to present these arguments. In doing so, NECR simply wants another bite at the apple to present a raft of new argument and newly raised evidence that it should have previously raised. As it has consistently done in the past, and as it is legally required to do, the Board should strike NECR's "new evidence" and "new argument" supporting its Petition. It is not "new" evidence, just newly-submitted evidence that the Board has routinely rejected in the past. Accordingly, PAS requests the Board to strike the Foley VS and the Carey VS in their entirety and any references in the legal argument to those verified statements in the body of the petition for reconsideration itself.

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 served a copy of Pan Am Southern LLC's Motion to Strike Portions of New England Central Railroad, Inc.'s Petition for Reconsideration of the Board's October 31, 2017 Decision ("Motion To Strike") 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