

CLARK HILL

Eric M. Hocky
T 215.640.8523
F 215.640.8501
Email: ehocky@clarkhill.com

Clark Hill PLC
One Commerce Square
2005 Market Street
Suite 1000
Philadelphia, PA 19103
T 215.640.8500
F 215.640.8501
clarkhill.com

242549

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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 20024

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Office of Proceedings
February 1, 2017
Part of
Public Record

Re: New England Central Railroad, Inc. -
Trackage Rights Order - Pan Am Southern LLC
STB Docket No. FD 35842
Errata to Rebuttal, Vol I

Dear Ms. Brown:

On January 23, 2017, New England Central Railroad, Inc. filed its Rebuttal. It has come to our attention that there are several errors in Volume I that should be corrected as follows:

- The highly confidential material (that has been redacted in the Public Version) is shown as shaded in the Highly Confidential Version. (The shading did not show in the original filing.)

- There are typographical errors in the headings in the Table of Contents, and inconsistencies between the headings in the Rebuttal and the Table of Contents. Corrections have been to the following headings in the Table of Contents and in the Rebuttal: Sections I, I.A., I.B, I.C. and I.D., Sections III, III.A, III.B and III.E, and Section VI.

- The subsections in Section I of the Rebuttal were inadvertently labeled as "AABC." The subsections are being relabeled as "ABCD".

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- There was an error in footnote 6 on page 17 of Volume I of the Rebuttal filed by New England Central Railroad, Inc. on January 23, 2017. The last sentence of footnote 6 should properly read (additional language marked in underline):

“As reported in an industry newsletter, in about 2011, Pan Am Railways/ST proposed a new rate of \$10.21 per car or \$3.50+ per mile. Atlantic Northeast Rails & Ports, e-bulletin dated November 26, 2014.”

- A table name on page 39 was inadvertently split from the table which appeared on page 40; the table name has been moved to page 40.

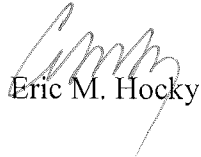
The corrections noted above apply to both the Highly Confidential and the Public Versions of Volume I of the Rebuttal.

For the convenience of the Board and the parties, we are submitting complete, corrected versions of the Highly Confidential and Public Versions of Volume I of the Rebuttal.

Thank you for your attention to this matter.

Respectfully,

CLARK HILL PLC



Eric M. Hocky

EMH/e

cc: William A. Mullins
All other parties shown on the attached Certificate of Service

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter and the appropriate versions of the corrected Rebuttal Volume I, were served on this date by the method indicated below:

By email on:

William A. Mullins
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
WMullins@bakerandmiller.com

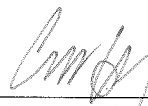
Eric R. Benson
1 Railway Lane
Burlington, VT 05401
bensonpatentlaw@comcast.net

Jeremy R. Fischer
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101
jfischer@dwmlaw.com

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By US first class mail, postage pre-paid on:

Brian R. Searles.
State Of Vermont
One National Life Drive
Montpelier, VT 05633-0001



Eric M. Hocky

Dated: February 1, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

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

**NEW ENGLAND CENTRAL RAILROAD, INC.
REBUTTAL EVIDENCE AND ARGUMENT**

VOLUME I of IV

(CORRECTED)

ERIC M. HOCKY
LISA CARNEY ELDRIDGE
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: January 23, 2017

Attorneys for
New England Central Railroad, Inc.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35842

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

NEW ENGLAND CENTRAL RAILROAD, INC.
REBUTTAL EVIDENCE AND ARGUMENT

New England Central Railroad, Inc. ("NECR") files this Rebuttal Evidence and Argument in response to the Reply filed by Pan Am Southern LLC ("PAS") on July 19, 2016, and in accordance with the schedule approved by the Office of Proceedings in a decision served October 24, 2016.

SUMMARY OF ARGUMENT

NECR has exercised its right under the existing Trackage Rights Order ("TO") to reopen the TO and to have the Board impose the terms and conditions of a new TO for each of the three segments of NECR's lines that are subject to the TO.¹ For the reasons set forth in its Opening Statement and in this Rebuttal, NECR requests that the Board apply the formula in *SSW Compensation*² to establish new rates for each of the segments in order to level the competitive playing field and allow a reasonable recovery of capital for NECR that will allow it to invest in

¹ As used herein, the line consists of three different segments all currently controlled by NECR. PAS has trackage rights over all three segments. The upper segment is a 13.4-mile line between White River Junction, Vermont and Windsor, Vermont ("Northern Segment"). It connects to the 48.4-mile line between Windsor, Vermont and Brattleboro, Vermont ("Connecticut River Line", also referred to as the "Middle Segment" or the "Former B&M Line"). The lower segment is a 10.6-mile line between Brattleboro, Vermont and East Northfield, Massachusetts ("Southern Segment") (collectively, all three segments are referred to as the line or rail line).

² See *St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company - Kansas City to St. Louis*, 1 I.C.C. 2d 776, 1984 LEXIS 348 (1984) ("SSW I") and *St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company - Kansas City to St. Louis*, 4 I.C.C. 2d 668, 1987 I.C.C. LEXIS 15 (1987) ("SSW II") (collectively "SSW Compensation").

the rail lines at issue for continued safe operations consistent with Rail Transportation Policy ("RTP").

PAS in its Reply argues against any changes in the compensation due under the TO, and for, at most, only minor modifications in the other terms and conditions. PAS' arguments are based almost entirely on the *Amtrak Decisions*,³ and flawed assertions that any changes would be counter to its interpretation of the ICC's decisions in those cases. PAS' support relies largely on arguments that seek to protect PAS' current unfair competitive advantage and that blatantly disregard the clear words in the TO that contemplated a re-opener in twenty years.

As set forth herein, NECR clearly explains that the changes it is requesting to compensation and otherwise are consistent with the *Amtrak Decisions* despite PAS' reframing of past events. Further, although obscured by PAS, the Board should keep in mind that the *Amtrak Decisions* only involved the Middle Segment – Amtrak was authorized to take only the Middle Segment from PAS' predecessor, Boston and Maine Corporation ("B&M") and convey it to NECR's predecessor, Central Vermont Railway, Inc. ("CV"), subject to payment of fair compensation to B&M for the taking. The ICC also only focused on the trackage rights being offered to B&M over the Middle Segment. All of the economic terms and the underlying policies that led to those decisions apply only to the Middle Segment, although the TO by mutual agreement of B&M and CV at the time was expanded to cover two other CV segments (the Northern Segment and the Southern Segment) over which B&M had trackage rights. This renders the majority of PAS' arguments with respect to the Northern and Southern Segments moot as NECR should not be governed by the *Amtrak Decisions* into perpetuity on account of a

³ See *National Railroad Passenger Corp. – Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire*, 4 I.C.C. 2d 761, 1988 ICC LEXIS 233 (1988) ("*Amtrak I*"); *National Railroad Passenger Corp. – Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire*, 6 I.C.C. 2d 539, 1990 ICC LEXIS 52 (1990) ("*Amtrak II*") (collectively, "*Amtrak Decisions*").

voluntary agreement that was mutually made over 20 years ago for administrative convenience. There is nothing in the *Amtrak Decisions* analysis that would preclude NECR changes to the compensation or terms for the trackage rights over the Northern and Southern Segments. CV (and now NECR) in no way indicated that it was waiving any of its rights to request changes in compensation or other terms with respect to those segments. The Board should not allow PAS to gloss over this important distinction.

For all of the reasons set forth herein, NECR is asking that the Board establish full compensation of \$5.08 for the Northern Segment, \$6.26 for the Middle Segment, and \$3.48 for the Southern Segment, and to impose new terms and conditions for the TO as set forth herein.

REBUTTAL EVIDENCE AND ARGUMENT

I. **NECR'S REQUESTED RELIEF IS ENTIRELY CONSISTENT WITH THE *AMTRAK DECISIONS* AS THE PRIMARY PURPOSE OF THOSE DECISIONS WAS TO CONVEY TRACKS NOT PROPERLY MAINTAINED BY PAS' PREDECESSOR AND TO DETERMINE THE COMPENSATION TO BE PAID FOR THE MIDDLE SEGMENT.**

A. **Background**

The TO at issue here is a byproduct of long, drawn out proceedings in the late 1980s and early 1990s between the National Railroad Passenger Corporation ("Amtrak") and B&M (as defined above, the "*Amtrak Decisions*"). The *Amtrak Decisions* resulted in a conveyance of a 48.8 mile segment of railroad track, the Conn River Line or "Middle Segment,"⁴ from B&M to Amtrak as ordered by the Interstate Commerce Commission ("ICC" or "Commission"), and the immediate conveyance of those tracks by Amtrak to CV, with CV to operate the Conn River

⁴ As defined above, the 48.8 mile segment of track is the "Middle Segment" as referenced in these proceedings. PAS also has trackage rights over two other NECR segments — a 13.4 mile "Northern Segment" and a 10.6 mile "Southern Segment" that were covered, by mutual agreement of CV and B&M, under the same TO as the Middle Segment.

Line subject to specified trackage rights by Amtrak and B&M. *See Amtrak Decisions.* As a result of the *Amtrak Decisions*, the ICC determined what was "just compensation" for Amtrak to pay B&M for the taking of the Middle Segment, and also imposed a TO between B&M and CV (some of which was negotiated between the parties) that established the terms and conditions for trackage rights for B&M to operate over three line segments – the Middle Segment and (by agreement) the two other segments already owned by CV, the Northern Segment and Southern Segment.

Notably, the terms and conditions of the TO between B&M and CV established in the *Amtrak Decisions* had a 20-year reopener. More than twenty years had passed when NECR (the successor to CV) sought to modify the terms and conditions of the TO with PAS (the successor to B&M). When NECR and PAS could not reach agreement on new terms and conditions, this proceeding was commenced under Section 2.2 of the TO, requesting the Board to set new trackage rights and terms. Clearly, NECR is justified in evaluating the continued appropriateness of the dated TO terms and reopening those that are no longer appropriate.

In its Reply, PAS tries to obscure NECR's clear right to reopen the TO by implying competitive tensions motivated the trackage rights reopener, and focuses on the competitive nature of the relationship between PAS and NECR with regard to customers along the rail line in question. It is true that these parties are competitors. However, short shrift is given to the larger context in which this TO was first created and the competitive advantage provided to B&M (and its successor PAS) for a 20-year period of time to help compensate for the conveyance of its tracks to Amtrak (for which B&M received in excess of \$2.3 million from Amtrak). While RTP includes goals of promoting competition between carriers and other modes, it is also a goal "to promote a safe and efficient rail transportation system by allowing carriers to earn adequate

revenues, as determined by the Board.” 49 U.S.C. §10101(3) (emphasis added). RTP is not served by allowing one party a competitive advantage, while the other is tasked with a loss of customers and revenues needed to provide a safe and efficient rail line. The primary purpose of this proceeding is to determine the proper trackage rights fee that will allow NECR to earn an adequate return on the value of its rail lines, and allow it to fairly apportion the ongoing costs of maintaining the upgraded and well-maintained rail lines that PAS now enjoys. PAS tries to reframe the concept of competitive parity, using sensationalist language to suggest there may be “captive shippers” and arguing that “B&M should be no worse off competitively.” However, there is no indication in any of the *Amtrak Decisions* that B&M (now PAS) should receive a competitive advantage into perpetuity, which advantage exists today since PAS does not pay its fair share to use the trackage rights lines. Certainly, there is no competitive parity in the current state of affairs given the cost advantage that PAS enjoys, which is likely why the ICC envisioned that the terms could be reopened after twenty years. In all fairness to NECR, B&M/PAS have collectively enjoyed over twenty years of competitive benefits under the existing TO. It is time for the competitive playing field to be leveled, and for PAS to provide some contribution toward the safe and efficient rail lines it uses.

B. The Real Fundamental Goal of the *Amtrak Decisions* Was To Allow the Condemnation of The Middle Segment As A Result of B&M's Own Poor Maintenance History of Those Tracks.

Between 1972 and 1987, Amtrak operated the “Montrealer” passenger service between Washington, D.C. and Montreal. See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 412 (March 25, 1992) (reversing Court of Appeals’ reversal of ICC decision authorizing the taking of the Middle Segment). After many years of significant track neglect by B&M along the Middle Segment, which were necessary for the Montrealer’s service, including

rails so poor that Amtrak had to slow to 5 mph at times, Amtrak was forced to discontinue the Montrealer service in April 1987. *Id.*

Soon thereafter, Congress appropriated money to upgrade the Montrealer route but Amtrak decided not to spend the money to upgrade the Middle Segment since B&M could not be relied upon to maintain the upgraded track. *Id.* Consequently, Amtrak used its statutory condemnation power to acquire the tracks comprising the Middle Segment, then re-convey those tracks to CV, who had agreed to take over ownership of the tracks, and upgrade and maintain them. *Id.* CV agreed to provide the balance of funds to upgrade the track, and to maintain the track for 20 years in a condition meeting Amtrak's standards, to grant Amtrak trackage rights for 20 years, and to grant B&M trackage rights to serve existing customers. *Id.*

Following several appeals and remands, the ICC's order conveying B&M tracks to Amtrak (and then to CV) was upheld, and Amtrak was ordered to pay B&M in excess of \$2.3 million as just compensation to B&M for the Conn River Line. *See Amtrak I, 4 I.C.C. 2d 761; Amtrak II, 6 I.C.C. 2d at 540.* As part of *Amtrak I*, the ICC also ordered that CV would be allowed to operate the Conn River Line subject to certain requirements, including that specified trackage rights were provided to B&M. *Amtrak II, 6 ICC 2d at 539.* The Board established certain principles regarding the trackage rights at issue, including (1) that B&M be permitted exclusively to serve its existing shippers and new shippers at existing facilities but that this right was dependent on B&M providing three days per week service; and (2) that the \$75,000 payment cap for trackage rights would not apply to B&M's traffic exceeding 125% of its 1985 traffic – a total of approximately 32,500 cars. *Id. at 540.*

On September 9, 1988, the parties consummated the transactions by Amtrak paying the \$2.3 million to B&M and immediately conveying those tracks to CV. *Id. at 540-41.* At the same

time, B&M and CV entered into a temporary trackage rights agreement (the "Interim Agreement"), which CV claimed were the trackage rights conditions suggested by B&M that it agreed to abide by temporarily to take possession and begin track rehabilitation work before winter. *Amtrak II*, 6 I.C.C. 2d at 540-541. When the parties failed to reach a final trackage rights agreement satisfactory to both parties, CV filed a petition with the STB asking it to impose terms and conditions for trackage rights on the Middle Segment in an adjunct proceeding to the original *Amtrak Decisions*. See *Amtrak II*. The parties and the ICC all used the Interim Agreement as a starting point to establish the final terms and conditions for the trackage rights, but certain modifications were argued on both sides and clarifications by the Board were made. *Id.* at 541-542. In reviewing the Board's initial decision regarding the TO at issue here, it is clear that the Board was balancing the need to provide B&M some protection as a result of the forced conveyance, but also provide some fairness to CV. Although the various restrictions benefitting B&M related to the taking of the Middle Segment only, by mutual agreement of the parties, the final TO covered the Southern and Northern segments as well. See *Amtrak II*, 6 I.C.C. 2d at 542. It is important to highlight that many of PAS' arguments in its Reply are made broadly with a "sleight of hand" hoping that the Board will fail to recognize the key distinctions between the segments, which would have dire consequences for the entire NECR if not recognized.

C. The Alleged PAS Fundamental Goals Are Contrived As Appropriate Compensation for the Condemnation of The Middle Segment Was The Key Fundamental Goal of the *Amtrak Decisions* Not the Trackage Rights Agreement Between B&M and CV, Which Was Merely Adjunct to the Main Proceeding and Expressly Subject to Reopening after Twenty Years.

(a) Competitive Parity Is Not A Stated Goal of the *Amtrak Decisions*.

The primary goal of the *Amtrak Decisions* was allowing Amtrak to invoke its statutory power and force a conveyance of the Middle Segment due to B&M's long-term failure to properly maintain that line to the detriment of Amtrak's Montrealer service as well as the stoppage of other services by other carriers such as the Claremont and Concord Railway ("CCR"), which made comments in the *Amtrak II* Proceeding in support of the conveyance to CV. See *Amtrak II*, 6 I.C.C. 2d at 543-544. *Amtrak I* is a detailed explanation as to how Amtrak sustained its burden of proof and how just compensation for the taking was established. As part of the analysis of Going Concern Value ("GCV") in *Amtrak I*, the ICC analyzed the annual changes in net revenue as a result of Amtrak's taking of the Middle Segment. See 1988 ICC LEXIS 233 at *63. The ICC imposed certain caps on maintenance costs for years 1-3 (approximately \$142,000) and years 4-20 (\$75,000) as "a reasonable, amortized surrogate representing the lost traffic to B&M." *Id.* at *65; Table 2 at *68. This calculation was needed to finalize the ICC's GCV calculation because the "proper focus of the compensation decision is upon the value of the property at the time it is taken." *Amtrak I*, 1988 ICC LEXIS 233 at *65. These numbers were surrogates, at the time, and were not contemplated to be established as facts into perpetuity. Beyond using the maintenance cap terms to help determine the GCV, the ICC was very clear that the trackage rights terms between B&M and CV were excluded from the compensation analysis. *Id.* at *67 ("Beyond this, the terms of trackage rights that Amtrak/CV propose to give back to B&M [after CV acquires the property from Amtrak] are excluded from the compensation analysis. This is a separate transaction, and there is no basis on which to conclude that B&M would actually consummate the trackage rights or that the terms proposed are reasonable."). Accordingly, it is very clear that "competitive parity" was not the focus of

Amtrak I but making sure that B&M received proper compensation for the conveyance of its rail line, which it did.

Contrary to PAS' assertions, the *Amtrak Decisions* were not focused on the "ICC's intent for CV and B&M to operate as equal competitors on the Line." See PAS Reply at p. 8. To the contrary, the language relied on by PAS is taken from the section of *Amtrak I* addressing B&M's opposition to CV's Petition for Exemption, which expressly required an analysis of whether the exemption will promote the goals of effective competition. *Amtrak I*, 1988 LEXIS 233 at *82. The ICC rejected B&M's claim that allowing CV to assume ownership of the line would have a negative effect on B&M. *Id.* at *84 (competitive situation need not worsen as a result of the taking and conveyance to CV; if B&M accepts trackage rights it will continue to serve its existing shippers and may obtain access to new shippers; rehabilitation of the line will enhance B&M's as well as CV's ability to provide competitive service). The ICC even hypothesized that if B&M chose not to exercise its trackage rights option then B&M's exclusive shippers could use CV exclusively and that would not reduce the quality of competition. *Id.* It is a stretch to argue that "competitive parity" more than twenty years later between PAS and NECR was the primary goal of the *Amtrak Decisions*. Moreover, extended to its logical conclusion, PAS' emphasis on "competitive parity" would actually support NECR's position here where it is seeking to even the playing field for competition with PAS after subsidizing PAS for over twenty years under the terms of the TO at issue here.

(b) The Current TO Can be Modified after 20 Years and B&M Expressly Sought the Right to Modify the TO After That Time With No Limitation on the Type of Modifications Sought.

There is no dispute that the terms of the existing TO could be reopened after twenty years, and could be modified thereafter. In fact, in *Amtrak II*, CV first proposed an initial 20-

year term with automatic renewal thereafter from year to year unless terminated by either party on 90-days' notice. *See Amtrak II*, 6 I.C.C. 2d at 545. B&M proposed, however, that the trackage rights would be perpetual "but that after 20 years either party may seek modification from the other." *Id.* There is nothing in *Amtrak II* to suggest, as PAS does now, that any modifications "sought" by either party after twenty years must be "minor." The "minor" assertion is pulled from thin air. In fact, the Commission contemplated that the parties would have the right to seek imposition of a "new agreement" after twenty years, which would obviously not just include "minor" modifications. The Commission stated that, "on reply, however, CV accepts B&M' proposal for a perpetual agreement *with the right to renegotiate or seek imposition of a new agreement by the Commission, after 20 years.*" *Amtrak II*, 6 I.C.C. 2d at 545 (emphasis added) (and agreeing to impose that term). Thus, although B&M/PAS' right to use the track was perpetual, the conditions under which that right operated was subject to change and even subject to a new agreement after twenty years. PAS obviously understands clear language and has no defenses, which is why it relies on conjecture and libelous statements related to NECR's motivations in reopening the TO in an attempt to insert emotion and sympathy into a proceeding where NECR is merely trying to earn a fair return.

(c) The Cap on Maintenance and Capital Expenses Were Limited to the 20-year TO Until Reopening.

In *Amtrak II*, the ICC stood firm on providing B&M with a cap on its maintenance costs, making clear that such cap during the 20-year initial period of the TO applied to routine maintenance as well as capital projects and interest rental payments. As stated by the ICC in *Amtrak II*,

CV may not allocate additional costs of routine maintenance to B&M. The annual caps that we established in *Amtrak* include the cost of upgrading and maintaining this line at FRA Class II

standards. Not only did we use Amtrak's figures for upgrading the line to FRA Class II standards as the basis for developing the higher \$142,000 caps for years 1 through 3, we also used Amtrak's normalized maintenance costs for maintaining the line at FRA Class II standards as the basis for developing the \$75,000 annual cap for years 4 through 20.

Amtrak II, 6 I.C.C.2d at 551 (emphasis added). Although the maintenance caps were in place for the duration of the 20-year TO until reopening, the Commission did allow for B&M to share in costs "associated with unforeseen circumstances such as changes in regulation or natural disasters." The Commission found that those costs could not be predetermined and were not included in the development of the GCV of the line. *Id.* at 552. In addition, the Commission provided for reasonable inflation adjustments to the maintenance caps as it had developed the compensation calculation in *Amtrak I* based on static revenues and expenses. The ICC was not concerned with increasing cap rates over time as B&M (and its successor PAS) "will have the opportunity to increase its rates to shippers as its costs rise...it may not be adversely affected by paying higher per-mile charges". *Amtrak II*, 6 I.C.C. 2d at 550.

PAS argues that because the Commission used certain assumptions regarding future cash flows, future maintenance payments, and B&M's future obligation to pay for capital upgrades, those assumptions were extended into perpetuity. *See* PAS Reply at p. 10. R.L. Banks & Associates ("RLBA"), who participated in the *Amtrak I* proceedings, agrees that the calculation of GCV done in *Amtrak I* in 1988 included the cash flow adjustments noted by Mr. Baranowski and that, in keeping with GCV valuation methodology, the savings were assumed to be perpetual to represent the ongoing cash flows beyond the initial 10-year forecast. *See* RLBA Rebuttal VS at 5-6. RLBA also notes that a GCV is determined as of a point in time based on estimates made at the time; it is not a guarantee that the estimates will be realized. The amount of savings could

be more or less than estimated. It is not appropriate to recalculate GCV at a later time based on actual future results.

And there have been changes, but not just changes that would be detrimental to PAS. As noted above, the annual cap was calculated based on the upgrade of the line to FRA Class 2, and the normalized maintenance to keep it in that condition. The current upgrade to FRA Class 3, the additional costs of maintenance, and the benefits of operating over an upgraded line, were clearly not part of the original calculation.

PAS argues that increasing the trackage rights charges and eliminating the maintenance cap would reduce its savings and would require an increase in the Amtrak purchase price. To argue that lower savings would have increased payment, but not recognize that better track (FRA Class 3 now) and speeds would have decreased costs, is disingenuous. Setting aside whether PAS actually would have reduced savings given the benefits of the increased line, PAS also conveniently ignores that its trackage rights payments for the Middle Segment are well below the cap (like the trackage rights fee, the cap has increased over time to over \$170,000). As such, PAS has enjoyed more savings than was calculated (the calculations assumed PAS would pay the cap amount every year), and under PAS' look back theory, the Amtrak purchase price should be reduced. NECR does not believe the changes that have occurred over time justify a look back or recalculation of the GCV that was calculated.

By the same token, the cap which was based on a line in FRA Class 2 condition should not continue to apply now that the conditions have changed, and the cap is subject to reopening just like the other terms and conditions of the TO. Had the ICC determined there should never be a review of maintenance or capital or interest it would have rendered those matters untouchable (like the arbitration clause) in the TO. It did no such thing. PAS is essentially

saying it can reap all the benefits of NECR's maintenance and upgrades to the rail, but never be required to pay its proportionate and fair share. The ICC's calculation in *Amtrak I* was made for a specific purpose -- to best estimate GCV at that given moment in 1988 -- and was not meant to put a perpetual strangulation on CV/NECR after the 20-year reopener of the TO was exercised.

D. NECR's SSW Proposal Does Not Undermine the *Amtrak Decisions*.

As set forth above, the right of B&M and its successors to use the Middle Segment was to run in perpetuity, but the terms and conditions for those trackage rights could clearly be modified or completely replaced by a new agreement after 20 years. See *Amtrak II* at 545; TO at §2.2. PAS, as successor to B&M, is no longer entitled to the special added value and protections it received as a result of the Amtrak taking and the just compensation paid as a result. The GCV was calculated and paid by Amtrak, and CV/NECR, have abided by the imposed terms of the TO for over twenty years. The Board has already determined that it is appropriate under the terms of the current TO for NECR to apply to re-set the terms and conditions of the trackage rights between the successor parties. Nowhere in the *Amtrak Decisions* or the Board's decision accepting NECR's Request to Set Terms and Conditions is there any requirement or mention that proposed changes be limited to only "minor modifications." That would fly in the face of the express language of *Amtrak II* that allowed that after twenty years "a new agreement" could be imposed by the ICC.

The 20-year reopener indicates that the ICC recognized that much could change over the perpetual life of the trackage rights, and that outdated provisions could be revised. It is clear that the only limitation as to the reopener is in Paragraph 2.2, which provides that arbitration requirements cannot be imposed. Indeed, the ICC in discussing the reopener noted that at the end of twenty years, either party could propose a "new agreement." *Amtrak II*, 6 I.C.C. 2d at

545. Although there is clearly no limitation in the language of the TO suggesting only "minor modifications" be permitted, PAS now suggests that is the case. PAS does not explicitly define what would be a minor modification, but asserts that changes in the trackage rights fee, and essentially any other changes in terms of the TO with which it does not agree, would not be minor. The Board should not add limitations to the language of the TO where none exist. Rather, the Board should recognize that the contemplated initial 20-year period has elapsed, and that all of NECR's changes are permitted and consistent with the reopener. Any and all proposed modifications should be considered by the Board, and adopted or rejected on their merits.

Contrary to PAS' claims that NECR seeks to alter the competitive parity achieved by the *Amtrak Decisions*, this proceeding would actually help competitive parity as it would require PAS to begin to pay its proportionate share of maintenance and capital expenses on the upgraded and well-serviced rail lines that it benefits from using. After payment in excess of \$2 million from Amtrak for just compensation for the taking, and additional benefits of capped maintenance expenses, capital costs and rental expense on the Middle Segment for over twenty years, B&M (now PAS) has received full compensation for the conversion of its rails. During those twenty years, those benefits clearly put CV (and its successor NECR) at a competitive disadvantage as B&M/PAS could charge lower rates to its shippers as it did not have to bear its fair share of the expenses attributable to the trackage rights line.

PAS' argument that allowing the parties to modify the protectionist terms of the existing TO would hurt competition is a fallacy, and an attempt to preserve its competitive advantage under the current TO. It is time that NECR be allowed to compete with PAS for new customers on a level playing field, in which PAS pays for its proportionate share of expenses for use of the

trackage rights similar to any other carrier. PAS' predecessor B&M insisted that any party be able to renegotiate the terms of the TO in question here after twenty years. That time has come, and the calculations provided by NECR in its Opening Statement (as adjusted herein) most accurately reflect the proper fee for such trackage rights agreements in recognition to the substantial improvements to the trackage rights line, and the current costs of maintenance.

As discussed above, PAS tries to creatively suggest that no changes to the economics can be made, alleging "that the ICC's GCV calculation must be honored to ensure B&M was properly compensated for the taking of the Middle Segment." The compensation due B&M was the amount due and calculated in 1988 (following multiple iterations and appeals). PAS artfully suggests that if its costs go up 20+ years later, then B&M should have been paid more. However, taking this nonsensical argument to its conclusion, PAS should also consider that there are also cost benefits that inure to PAS from a faster, safer rail line that would clearly offset these increased costs. The one-sided assertion by PAS also ignores the railroad industry's improved profitability today versus the condition in 1988. Additionally, PAS ignores that it has enjoyed additional cost savings than were calculated in 1988 because PAS' trackage rights payments have been less than the cap. In sum, to allow PAS to hide behind and question compensation paid in 1988 (when the TO reopener is clearly contemplated) is wholly without merit. PAS' subjective focus only on the additional potential costs without any acknowledgement of the additional benefits and savings it has enjoyed highlights the ends PAS will go to in order to protect their advantage, and its assertions should be rejected. Accordingly, as discussed more fully in Section III.A below, *SSW Compensation* is the accepted method for computing trackage rights compensation, and there is no reason not to apply that method here.

II. THE PUBLIC INTEREST IS NOT SERVED BY PROLONGING AN UNFAIR SUBSIDY THAT COULD EVENTUALLY GIVE RISE TO A DECAYING FREIGHT INFRASTRUCTURE. *SSW COMPENSATION* IS A RECOGNIZED APPROACH TO ESTABLISH FAIR RATES FOR PAS.

It is true that as calculated by NECR, there would be a large increase in the rate that PAS has to pay to use each of the three trackage rights segments. However, the increases are not intended to harm PAS, to the detriment of the public interest; rather they are intended to end the subsidies that NECR has been providing whereby PAS has not been paying its fair share of the maintenance expenses, or for the use of the line. PAS argues that the rate increase NECR is seeking will harm the public interest as they will need to raise rates to shippers (note – PAS has been raising rates to shippers for years with no concern for public interest) and that PAS would have to cut profits or cease to be a competitive rail alternative. Oddly, PAS is not concerned with the comparable issue – whereby NECR cannot raise rates to cover the PAS subsidy, and NECR could also cease to be a competitive rail alternative. The NECR risk is clearly more worrisome as NECR also has the burden and responsibility for maintaining the line (*i.e.* all of the attributes of ownership), as well as dispatch and other obligations. Eventually, the failure to compensate NECR will not only eliminate their competitiveness, but could lead to a degradation of the line itself to the detriment of PAS and Amtrak, as well as to NECR's detriment. PAS cited RTP competition policies to entrench its subsidy, but overlooks other crucial elements of RTP. One of the other core principles of the Rail Transportation Policy ("RTP") is "*to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board.*" 49 U.S.C. §10101(2).

As explained above, if NECR is not permitted to earn an adequate return on the value of the trackage rights segments, it will not be able to maintain the tracks in their current upgraded FRA Class III condition, or replace elements of the segments as they require replacement. That

would jeopardize the use of the segments for everyone, and run contrary to the RTP's directive to "operate transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C. §10101(8). The fact that there would be a large increase in compensation is not a factor that the Board should consider. The only limit for the Board is to prevent unreasonable charges. *See Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company*, 17 I.C.C. 2d 164, 1990 I.C.C. LEXIS 304 at *9 (1990) ("A&M II").

Each trackage rights situation is unique and compensation must be looked at in context and based on the individual trackage rights segments. There are certainly situations where the trackage rights fees are less than those proposed by NECR, and there are others where they are higher, including proposals by PAS. *See, e.g., Dardanelle & Russellville Railroad Company – Trackage Rights Compensation – Arkansas Midland Railroad Company*, ICC Finance Docket No. 32625 (served June 22, 1995) ("Dardenelle"), 1995 ICC LEXIS 156, at *9 (\$9.75 per car mile); *A&M I*, 1990 ICC LEXIS 110, at *9, *22 (initial determination of \$41,137 for maintenance and operating costs, plus \$35.43 interest rental). *See also* Agreement between Providence and Worcester Railroad and Boston and Maine Corporation, et al., dated October 17, 1997 (\$[REDACTED] per car for 1.2 miles in 1997, subject to escalation); ⁵ Agreement among Milford-Bennington Railroad Company, Inc., Boston and Maine Corporation and Springfield Terminal Railway Company dated June 22, 1992 (\$5.00 per car for approximately 3.0 miles in 1992, subject to escalator).⁶ The large increase that PAS is alleging is deplorable is actually just evidence of the immense subsidy that PAS has been receiving for the benefit of its bottom line.

⁵ A copy of the Agreement was produced by PAS in discovery and is included in Vol. II, HC Documents.

⁶ A copy of the Agreement is attached as an Exhibit to a Complaint filed by B&M and Springfield Terminal against Milford-Bennington Railroad ("MBR") to collect trackage rights fees. A copy of the complaint is included in Vol. III, Public Documents. According to an exhibit to the complaint, the rate was \$6.90 per car in 2004. As reported in an industry newsletter, in about 2011, Pam Am Railway/ST proposed a new rate of \$10.21 per car, or \$3.50 + per mile. Atlantic Northeast Rails & Ports, e-bulletin dated November 26, 2014.

PAS' reliance on competition is somewhat overplayed. Prior to the *Amtrak Decisions*, B&M was the only carrier that could offer service over the Middle Segment to shippers, potential shippers and to connecting short lines. One of the benefits of the taking was that new customers and short lines served by the Middle Segment were given access to CV, and were not stuck with just getting service from B&M. Thus, the limited additional competitive access was really set up to benefit CV. But now, with PAS getting a subsidy through reduced costs, NECR cannot fairly compete for the business.

In 2014, PAS provided service to one "exclusive" customer and to two joint customers. [Exhibit PAS-HC-00745]⁷ NECR does not know whether, as suggested by Mr. Bostwick, PAS' rates are "fully constrained" by modal competition (that any increase in rail rates will drive the business to truck). However, even if that were the case, that does not mean that NECR should be required to continue to subsidize PAS so that PAS can charge lower rates. Similarly, with respect to jointly-served customers and short lines, NECR should not have to subsidize PAS so it can compete. NECR previously provided service to the larger of the two jointly-served customers, and believes that the customer would still ship by rail even if PAS were required to compete with NECR on a level basis. Shippers with access to both PAS and NECR will not lose access to either railroad — rather they will be dealing with two railroads. The fact will be, however, that each of them will be paying its fair share for use of the tracks used to serve them.

PAS' reference to haulage is a red-herring. First, in discovery, PAS acknowledged that it and its predecessors have never used the trackage rights to handle haulage (other than to haul cars for one of its owners Norfolk Southern Railway for interchange with NECR). Additionally, the proposed haulage that it says it would handle for Vermont Rail System ("VRS") would originate on the Northern Segment and its access has nothing to do, and was not created by, the

⁷ This document was produced in discovery by PAS and contained in Volume IV hereto.

*Amtrak Decisions.*⁸ In any event, NECR is currently providing haulage for VRS, and there is no indication that its service or charges have curtailed VRS's ability to offer service to its customers.

PAS' reliance on public interest harms as an argument against leveling the playing field is misplaced. Overall, any adverse impacts to shippers and the public, primarily through possible higher rail shipping costs, have to be balanced against the public interest harm that could result if NECR is unable to earn an adequate return and is unable to maintain the tracks in their current upgraded FRA Class III condition, or replace elements of the segments as they require replacement.

III. THE BOARD SHOULD APPLY SSW TO CALCULATE TRACKAGE RIGHTS COMPENSATION.

A. As There Is No Fundamental Reason That NECR Should Not Be Fairly Compensated, The Well-Recognized Three-Part SSW Formula For Calculating Trackage Rights Fees Should Be Applied To Calculate Adequate Compensation.

Throughout this proceeding, and particularly in the discovery proceedings, PAS and the Board have acknowledged that SSW sets forth the proper method for establishing an applicable trackage rights fee where the parties are unable to agree. As the Board noted in its decision served February 12, 2016,

The Board has found, and both NECR and PAS agree, that the framework for setting compensation in trackage rights cases was set forth in St. Louis Southwestern Railway—Trackage Rights Compensation, 1 I.C.C.2d 776 (1984) and St. Louis Southwestern Railway Compensation—Trackage Rights, 4 I.C.C.2d 668 (1987) (collectively, SSW Compensation). See Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619 (1990) (applying SSW Compensation in trackage rights compensation cases). Under SSW

⁸ Similarly, Central Maine & Quebec Railway US Inc. ("CMQR") has access via VRS. While CMQR asks that "reasonable" terms and conditions be imposed as they were in Amtrak II, CMQR ignores that Amtrak II was only concerned with the Middle Segment while CMQR's access to the segments via NECR or PAS requires use of at least the Northern Segment as well. In any event NECR believes its requested terms are reasonable and consistent with SSW Compensation.

Compensation, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (c) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. Ark. & Mo. R.R., 6 I.C.C.2d at 622.

February 12, 2016 Decision at 2 (emphasis added) (citing NECR Opening, NECR Methodology Motion and PAS Reply to Methodology Motion). The only apparent dispute was about what methodology would be used to calculate the interest rental component, and PAS' desire to conduct discovery on every possible methodology. Now, for the first time, PAS amazingly argues in the PAS Reply that *SSW Compensation* should not apply to resetting the trackage rights fees in this proceeding. PAS argues that the ICC did not use *SSW* to set the initial rates in the TO, and therefore should not use *SSW* here. Most importantly, PAS does not offer any alternative method for resetting the fees, but merely suggests that the original rate, and adjustment inflator, be continued, likely hoping that its silence will prolong the status quo.

PAS is correct that the ICC did not use *SSW* to set the original trackage rights fee, choosing instead to impose the trackage rights fee that at the time applied to CV's use of the Middle Segment (and was approximately the same as B&M's use of the Northern and Southern Segments). However, *SSW* is the *only* formula that the ICC or STB have used to set rates for trackage rights agreements that have expired. The use of *SSW* has not been limited to trackage rights agreements being imposed in merger cases as PAS implies.

While PAS argues that the taking of the Middle Segment involved unique circumstances along with a willingness to give both B&M and CV competitive access to new customers and short lines on the Middle Segment, PAS does not explain how the application of *SSW* to calculate a fair trackage rights fee would make PAS noncompetitive. While the arrangements in

the original TO may have been set to allow B&M and CV to compete for new traffic on the Middle Segment on a level basis, because PAS is underpaying for its use of the trackage rights segments, it now is enjoying a competitive advantage over NECR such that the original objectives are no longer satisfied. Revising the trackage rights fee is merely designed to level that playing field and to have PAS pay its fair share for the use of the segments. Indeed in merger cases where trackage rights are imposed to redress competitive harms, *SSW* is the formula used to ensure that the trackage rights fees be set at a level that provides an adequate return to the owner while not being too high so as to make the trackage rights unusable. There is no basis to assert that any other approach (and PAS is unable to suggest one) would be more applicable to the instant case.

Although PAS now argues that the Board should leave the rate as it was initially set, it provides no justification for that request. While the initial rate selected by the ICC represented an agreed rate between two carriers that each operated over the other, that rate was set more than twenty years ago and there was, and has been, no analysis or determination that the rate fully reflected the costs of the owner, or a full return on the value of the lines.

Accordingly, the Board in this proceeding should recalculate the trackage rights fee by calculating the three essential elements of the *SSW* compensation methodology: (a) the variable cost that is incurred by the owning carrier but attributable to the tenant carrier's operations; (b) the tenant carrier's usage-proportionate share of track maintenance and operating expenses; and (c) an interest or rental component to compensate the owning carrier for tenant carrier's use of capital dedicated to the track by the owning carrier; determined by multiplying the value of the assets by a rate of return equal to the railroad's current pre-tax nominal cost of capital.

Importantly, even if the Board were to determine that there are reasons for the caps or capital limitations for the Middle Segment not to be changed, that determination would not be a basis for refusing to recalculate the trackage rights fee on the Northern and Southern Segments. Those segments were not part of the taking proceeding; B&M and CV voluntarily determined to add those segments to the TO for ease of administration, but CV (and now NECR) were not giving up their rights to seek changes in compensation once reopening was permitted. While the parties accepted the initial fee imposed by the ICC for the initial term of the TO, that does not mean that CV (or NECR) waived any right to change the fees in the future.

B. There Are Undisputed Elements Of The SSW Calculation Of The Trackage Rights Fee Proposed By NECR.

There are several elements of the trackage rights fee calculation that PAS has accepted.

These include the following:

1. The Total Car Miles, And PAS' 2014 Percentage Usage Of The Trackage Rights Line.

Total Car Miles:

The parties agree on the car load usage by category (although not reprinted here).

See NECR Opening, Ebbrecht VS Exhibit A; PAS Reply, Baranowski VS at 4-5.

PAS 2014 Percentage of Car Miles:

	South	Middle	North	Total
No. of PAS car miles	79,841	226,578	1,143	307,561
PAS % of car miles	18.7%	12.1%	0.2%	11.0%

See NECR Opening at 7; PAS Reply, Baranowski VS at 4-5.

2. Variable Costs Attributable To PAS Operations.

Variable Cost of PAS Dispatching

	South	Middle	North	Total
PAS annual dispatching costs by segment	\$1,450.35	\$4,127.05	\$22.40	\$5,599.80
PAS dispatching costs per car mile	\$0.02	\$0.02	\$0.02	\$0.02

See NECR Opening at 8; PAS Reply, Baranowski VS at 11.

3. The Property Taxes To Be Included In The Allocation Of Maintenance And Operating Costs.

While there is a dispute over the amount of maintenance costs to be allocated to PAS, there is no dispute over the amount of property taxes to be allocated.

Maintenance and Operating Costs - 2014

	South	Middle	North	Total
Maintenance				
Property Taxes	\$16,477	\$46,583	\$9,268	\$72,328
Total				

Maintenance and Operating Costs – 2015 and 2016

	South	Middle	North	Total
Maintenance				
Property Taxes	\$32,096	\$53,371	\$17,610	\$103,077
Total				

See NECR Opening at 10; PAS Reply, Baranowski VS at 17.

4. Pre-Tax Cost Of Capital.

NECR acknowledges that it calculated the pre-tax cost of capital by applying its tax rate to the 2013 overall cost of capital, and not just to the equity portion of the cost of capital. Accordingly, NECR accepts PAS' method of recalculation of the pre-tax cost of capital. NECR also agrees with the use of the 2014 cost of capital as established by the Board in *Railroad Cost of Capital—2014*, Docket No. EP 558 (Sub-No. 18) (served August 7, 2015), as it matches the year being used for other portions of the calculation.⁹ NECR will use the 2014 pre-tax cost of capital of 14.77%. See PAS Reply, Baranowski VS at 28 (shown in Workpapers and on p. 41).

⁹ The 2014 cost of capital was not available when NECR filed its Opening Statement.

C. VIP Is A Proper Method For Determining The Value Of The Trackage Rights Segments.

The parties agree on how interest rental is calculated under *SSW Compensation* – the pre-tax cost of capital is applied to the value of the assets that comprise the trackage rights segments, with the result being apportioned to the tenant carrier according to its share of usage. See February 12, 2016 Decision on Methodology Motion, at p. 3. The purpose of the interest rental component is to compensate the owning carrier for the tenant carrier's use of the owning carrier's capital, and to allow the owning carrier to eventually replace its capital assets. In *ATSF*, the ICC held: "As to the valuation procedure to be employed, *we believe it desirable that the procedure ultimately selected produce a valuation reflecting the current depreciated value of the line*". *Atchison, Topeka & Santa Fe Railway Company – Operating Agreement – Southern Pacific Transportation Co.*, 8 ICC 2d 297, 1992 ICC LEXIS 43 at * 15 (emphasis added). See also, *A&M II*, 1990 LEXIS 374 at *11 (purpose is to value it as an active asset that both carriers wish to continue to use); *A&M I*, 6 ICC 2d 619, 1990 ICC LEXIS 110 at *16, aff'd sub nom Missouri Pacific Railroad Co. v. ICC, 23 F3d 531 (D.C. Cir. 1994) (RCNLD is based on the reasonable assumption that there is sufficient value to the owner and tenant to replace the asset in its present condition if it did not exist).

At the core of the disagreements between NECR and PAS with respect to the interest rental component is the disagreement about the method to be used for determining the value of the assets comprising the trackage rights lines.¹⁰ Despite asserting that the VIP analysis should not be accepted, PAS once again does not present any reasonable alternative,¹¹ and instead only

¹⁰ The parties also disagree over whether any interest rental may be charged for the Middle Segment. This issue has been discussed in Section I.C(c) above.

¹¹ PAS has offered a CE analysis, but even PAS argues that the CE analysis should not be used. NECR concurs for the reasons set forth in Section IV below.

critiques how NECR has calculated value under the VIP analysis. The Board should accept the VIP analysis as presented by NECR as meeting the goal of producing a valuation reflecting the current depreciated value of the line. Although many of the cases discuss four basic valuation methodologies – “replacement cost new less depreciation” (“RCNLD”), CE, comparable line sales and S-A, the ICC recognized that these are only some of the possible choices. *ATSF*, 1992 ICC LEXIS 43, at *15. In *ATSF*, the ICC held:

“As to the valuation procedure to be employed, we believe it desirable that the procedure ultimately selected produce a valuation reflecting the current depreciated value of the line. Some of the possible methodological choices [the four listed above] are discussed briefly below. While the parties are also free to comment on other approaches, we specifically would like comments as to whether any of the methods discussed below would be appropriate and, if not, supporting reasons.”

Id. (emphasis added).

The RCNLD method is one that 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, e.g., A&M-I*, 1990 ICC LEXIS 110. The RCNLD method is based on the assumption that the line has sufficient value to both parties such that they would replace it to its present condition if it did not exist. *ATSF*, 1992 ICC LEXIS 43 at *16-17. *See also A&M I*. The RCNLD methodology attempts to determine the cost to rebuild the trackage line segments as they exist today in their current configuration with similar service and capacity. *See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company*, 1994 ICC LEXIS 175, at *12 (“TPW”). To make the calculation, one would look at present day materials, prices and labor costs, and adjust for the line segments’ current depreciation. An RCNLD calculation would include installation and construction costs including administrative, transportation (mobilization) and engineering costs,

grading and roadbed. Formal application of RCNLD generally requires that road property investment and depreciation be categorized using the ICC's/Board's "Uniform System of Accounts" found at 49 C.F.R. Part 1201. *Dardanelle*, 1995 ICC LEXIS 156, at *4-5. However, as a Class III carrier, NECR's accounts are not required to conform to the Uniform System of Accounts, and use of RCNLD is therefore not appropriate. *Id.*

Since all of the factors for use of RCNLD under the Board's standards are not available, NECR used a "value-in-place" ("VIP") methodology (an approximation of RCNLD) for the calculation of the interest rental component based on a valuation of the road property (infrastructure) in place (with an adjustment for depreciation) and an appraisal of the underlying land, as prepared by independent experts. *See ATSF*, 1992 ICC LEXIS 43, at *17 ("RCNLD can be developed through appraisals or by other means through the use of competent experts in the field.") The VIP methodology, similar to RCNLD, provides the current value of the trackage line segments in their current configuration, by looking at the current values of the materials currently comprising the rail line, depreciated as appropriate to reflect wear and tear on the assets over their useful lives in the field.¹² In this way, VIP mirrors the RCNLD goal of valuing the assets comprising the line segments in their current configuration, albeit without the inclusion of the costs of construction.¹³ While PAS has argued that VIP is not a variation of RCNLD, and is not a recognized methodology to compute value, that position is not consistent with the *ATSF* decision cited above. Even if the VIP methodology were considered as a distinct methodology from RCNLD instead of a variation, VIP clearly is one that provides the Board with a valuation

¹² The specifics of the VIP methodology as applied by NECR in this proceeding are set forth in the RLBA Verified Statement submitted as Volume 3 of NECR's Opening Statement.

¹³ Indeed, because the VIP methodology does not include the engineering and construction costs that would be included in determining the replacement costs of building the line in its current configuration, it should produce a lower valuation than RCNLD would, a result that would result in a calculation of a lower interest rental component, a result that would be beneficial to PAS.

“reflecting the current depreciated value of the line” in its current configuration and should be considered appropriate for this proceeding. Because the RCNLD/VIP methodology established value for the trackage rights lines in the configuration that they have been used by both NECR and PAS under the existing trackage rights order, NECR believes that such methodology is the most appropriate one for use in this proceeding.

- D. The Modifications To NECR’S VIP Valuation Suggested By PAS Should Be Rejected.**
- 1. The Value Of The Real Property, Whether Fee Or Easement, Is Properly Included In The Valuation Of The Trackage Line Segments.**

PAS argues that NECR should not be able to claim value for the real property comprising the railroad right of way because it has only an operating easement and not fee title, that it has not shown that the underlying property is held in fee, and that it has not shown that value was ever paid for the right of way.

It is true that NECR has only an operating easement from the CV to use the property. However, it is an exclusive easement granted by CV at the time of acquisition when there was an issue in segmenting parcels to convey title. Recognizing that NECR has paid for the lines and took responsibility for all aspects of ownership, NECR has the right at any time to acquire CV’s title to the property for additional consideration of \$1.00.¹⁴ Accordingly, NECR has the unencumbered right to operate as a railroad, and effectively the full rights to the right of way to the extent of CV’s title. NECR has all of the attributes of ownership and should be entitled to a return on the value of the right of way. PAS relies on form over substance, knowing that NECR has all of the obligations as the property owner and that NECR paid for the rail line as part of the acquisition from CV. Were that not the case, NECR would not be permitted to acquire fee

¹⁴ Copies of the Operating Easement were produced by NECR in discovery, including for example at NECR-0021548. A copy is included in Volume III – Public Documents.

simple for a mere \$1.00. The Board should disregard PAS' argument since any acceptance would illogically mean that no rail carrier would be entitled to earn a return on the value of the land.

In this instance CV acquired the northern and southern segments out of a bankruptcy in 1930 and presumably had to pay for the acquisition. See the Operating Easement description for "Burdened Property". Amtrak paid going concern value for the Middle Segment – which of course was based on the right to use the right of way for continuing rail operations.¹⁵ And finally, when NECR purchased the rail line and the operating easement from CV, a portion of the purchase price was specifically agreed by the parties to be allocated to the right of way. See Agreement between NECR and Central Vermont Railway, Inc. dated October 6, 1994, Schedule 3.1.¹⁶

In this proceeding NECR has presented a current appraisal of the right of way property. Notably, PAS once again did not present any alternative valuation of the right of way, and relies solely on its legal argument that easement property is not entitled to any value despite NECR having all of the attributes of ownership. In support of its argument, PAS cites primarily to rate cases involving western carriers where the issue is addressed in the context of the acquisition of land for construction of the required "stand alone railroad."¹⁷ Such situations are not directly applicable to the valuation being done here. PAS has not cited to any trackage rights compensation decisions to support its position that easement property should be given no value. NECR understands that in the western United States many railroads obtained their properties

¹⁵ As part of a comparative NLV analysis, the ICC determined that some of the Middle Section property is fee and some is easement. See *Amtrak I*, 1988 ICC LEXIS at *59-63.

¹⁶ A copy of the Agreement is included in Appendix IV, HC Documents.

¹⁷ PAS also cited to a feeder line case where NLV was being calculated. While it is accepted that easement property is given no value in an NLV, that is of no consequence here. The ICC has previously noted that NLV is not an appropriate method for calculating value in a trackage rights compensation matter. See *A&M I*.

through land grants and did not pay for the underlying property, and that this may explain the assumption in the cases cited by PAS. However, that is not the situation in the northeast, and in the northeast, it should be presumed that the railroads have paid for their rights of way – whether easement or fee. Where value has been paid for easement property, the Board is clear that the current value of the easement property (not the historical acquisition cost or book price) should be used to value the property. See *Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.*, STB Docket No. NOR 42121, 2016 STB LEXIS 271, at *146-147 (served September 14, 2016) (for easements, apply current value not acquisition costs); *Sunbelt Chlor Alkali Partnership v Norfolk Southern Railway Company*, STB Docket No. NOR 42130 (served June 20, 2014), 2014 STB LEXIS 150, at *210-212; *Public Service Company of Colorado d/b/a XCEL Energy v. Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057 (served June 8, 2004), 2004 STB LEXIS 335, at *314, *319 (applying current value to easements; finding \$18 million value instead of \$99,000 based on historic acquisition costs). Since it is clear that NECR paid value for the easement and has all of the responsibilities of the owner, it is entitled to consider the current value of the easement.

If the railroad continues to be operated, easement property has as much value to the railroad or any operator as fee title. Accordingly, it is appropriate for an RCNLD or VIP valuation to include full value for the real property. Moreover, since NECR has shown that consideration was paid for the right of way, the Board has been clear that NECR is entitled to use the current value of the right of way in its valuation. Since PAS has not offered an alternative valuation, the Board should accept the appraisal submitted by NECR.

2. There Is No Basis For Excluding The Value Of Rehabilitation And Capital Improvements Made To The Trackage Rights Line That Were Funded With Public Grant Monies.

NECR acknowledged in its Opening Statement at 12-13, that public grant monies have been used over the years for a portion of the rehabilitation of, and capital improvements to, the trackage rights line. PAS argues that approximately \$22,000,000 of NECR's estimated value of the trackage rights line should be excluded from the interest rental calculation because (1) the funded improvements were to benefit passenger and not freight operations, (2) were funded by federal and state grant money, and (3) are not "owned" by NECR. PAS Reply at 23-27; Baranowski V.S. at p. 23-25. PAS is wrong, and the inclusion of such value is supported by ICC precedent.

Guidance is provided by the ICC decision in *A&M-II*. In that decision, the ICC did not allow a return on the lift span portion of a bridge that was financed by the Corps of Engineers for river navigation purposes, and nor for rail purposes; however, the ICC did allow inclusion of the value of the portion of the bridge that would be used for rail purposes. The relevant portion of the decision provides:

Our prior finding did not assume that a railroad was never entitled to earn a reasonable return on property donated by government. We have not previously taken such a position and do not take this position here. We are, however, required to consider whether carriers are under "honest, economical and efficient management." This, in turn means that railroads are *not entitled to a return on capital that is not used or useful for rail purposes*. When we discussed the fact that the lift span was financed by the Corps of Engineers, our intent was not to imply that this automatically rendered the asset ineligible for a return. Rather, our intent was to call attention to the fact that *the span* was constructed by a third party *for river navigation purposes, not for rail purposes*. Thus, rail users should neither directly nor indirectly be required to bear the capital cost of a return on the value, donated or not, of the lift span.

A&M-II, 1990 ICC LEXIS at *17-18 (emphasis added). *See also*, *A&M*, 8 ICC 567 (served June 5, 1992), 1992 ICC LEXIS 110 (“*A&M-II*”), at *6 (assets devoted to rail operations excluded only if improvement represents inefficient, unnecessary improvement). Thus, the ICC clearly held there is no basis for excluding improvements just because they were publicly-funded (and not owned by) the railroad, so long as the improvements will benefit rail operations.

PAS attempts to use this same citation, proposing an overly restrictive reading of *A&M II* asserts that the grant funded improvements should not be included because they are related to passenger operation. PAS Reply, at 23-27¹⁸. As PAS does not provide any other basis for its argument, the real difference between NECR and PAS is in the interpretation of the import of *A&M II* and the reading of the phrase “used or useful for rail use.” PAS ignores that the improvements to track, signaling, bridges and infrastructure are just as valuable to the freight rail operations of both NECR and PAS as they are to Amtrak. PAS has reaped all of the same benefits of the improvements as Amtrak has. Even if the improvements were funded to improve Amtrak passenger operations, the freight operators (both NECR and PAS) have clearly also benefited from the improvements, which included the installation of welded rail, bridge improvements, increased weight capacity to 286 thousand pounds, and increased speeds. As indicated in the awards, the purposes of the awards include to reduce slow orders and travel time, and to increase track speeds. It would be different if the grant funded improvements were used on passenger-only improvements such as station buildings, as the lift span was solely for the navigable waters. But they were not; here all of the improvements have benefited all of the rail operators. While the improvements may not have all been made, or made at that time, but for the availability of the grant funds, that does not make the improvements superfluous even if the existing tracks were adequate for freight. *A&M-III*, 1992 ICC LEXIS 110 at *7, n.6 (it may be

¹⁸ A copy of the Vermonter and several other public grant documents were included with the PAS Reply.

cost effective to accelerate improvements not otherwise scheduled; replacement with an identical asset is not always a sound investment). Certainly, upgrades to welded rail and 286 lbs weight limits would have been made by now as they are becoming basic requirements for freight railroads to stay competitive. Thus, although these improvements may have benefited Amtrak, they also benefitted freight rail operations.

Additionally, the ICC in *A&M II* went on to note that it is particularly appropriate to include publicly-funded improvements where the railroad has the obligation to maintain the government-financed infrastructure (as is the case in this proceeding). 1990 ICC LEXIS, at *18, fn 16. As explained above, NECR has all of the ownership obligations, including maintenance. Interest rental is intended to allow the owning railroad to earn a sufficient return so that it can replace its assets at the end of their useful life. Thus, even for publicly funded improvements, a railroad needs to earn a sufficient return to be able to later replace the asset. Under all of the public funding agreements cited by PAS and included in their Reply, NECR has the clear obligation to pay for all maintenance. Accordingly, there is no basis for excluding any publicly funded improvements from the valuation¹⁹.

PAS also argues that, based on the ICC's decisions in *Amtrak I* and *Amtrak II*, it should not have to pay for any improvements that benefit Amtrak, or that relate to improving the infrastructure of the rail line beyond FRA Class 2 (because, they argue, the value of the taking was based on the grant back of trackage rights). As discussed in Section I above, NECR believes that such restrictions were intended to cover the then-planned Amtrak improvements that B&M had refused to make, and the caps were established based on the planned upgrade to FRA Class

¹⁹ PAS gratuitously indicates that NECR did not produce any documents related to New Hampshire grants. PAS Reply at 25, n. 70. However, PAS includes in its Confidential Documents a New Hampshire Force Account that indicates it was produced by NECR (NECR-000551). The comments by the State of New Hampshire raised concerns based on the use of public funds generally, but not with respect to any particular public funds provided by that State.

2. and normalized maintenance at that level. They were not intended to cover later improvements to the trackage rights line made decades later. Further, in order to have these improvements funded for all of the carriers, NECR was required to put up the local match. In the case of the Vermontor grant, NECR provided funds and materials totaling \$19.5 million. PAS has also received the benefit of NECR's matching funds.

Accordingly, it is clear that NECR should be permitted to include the value of value of rehabilitation and capital improvements made to the trackage rights line that were funded with public grant monies. Although PAS, like B&M before it, seems loathe to pay for any improvements, and clearly does not want to have to pay for improving or maintaining the track above FRA Class 2, PAS does want the benefit of those improvements, and opposed an attempt by NECR to limit PAS' speed to what it was willing to pay for. PAS cannot have it both ways — it cannot argue that there was no benefit or need to contribute to the upgrades, but then argue it is improper to deny them the benefits of the upgrades.

In any event, PAS' argument must be limited to the Middle Segment as that was the only segment that was "taken" from B&M and valued in the *Amtrak* decisions. Segregating the publicly-funded improvements by segment, indicates that approximately \$4.8 million and \$2.6 million could be included in the value of the Northern and Southern Segments, respectively. Baranowski VS, workpapers (Public Funding Allocation).

3. NECR Presented An Accurate Market Value For The Trackage Rights Segments. There Is No Basis For Applying An Economic Obsolescence Factor To The VIP Valuation.

As set forth in detail in the RLBA Verified Statement submitted as part of the NECR Opening Statement, RLBA physically inspected the trackage rights segments, and based its valuation on the types and quantities of materials, and their condition, as determined in the

inspection. PAS raises questions regarding the values RLBA used for track and track materials. To clarify, RLBA confirms in the RLBA Rebuttal VS that it assigned values based on prevailing market prices at the time. The prices reflected "like kind" track and materials in "like kind" use/conditions. Deductions for liquidation costs were not made, and would not have been appropriate because the materials are not being removed; the track and materials were being valued in place. While the VIP valuation is not the same as RCNLD, the valuation of the track and materials in their current condition is consistent with how rail and materials may be valued under RCNLD. Moreover, the valuation under VIP is likely more conservative than an RCNLD valuation in that RCNLD would also include various costs related to reconstruction that were not included in the VIP calculations. RLBA Rebuttal VS, at 3-4. RLBA believes that the estimates of the values and conditions of the bridges and tunnels on the trackage rights segments prepared by its engineering expert, based on his railroad experience, recent construction experience, and his actual inspection of the NECR line segments, are reliable estimates and should be accepted by the Board. RLBA Rebuttal VS, at 4.

NECR does not believe that in calculating interest rental in this proceeding, it is appropriate to adjust further the already depreciated values of NECR's road property by an economic obsolescence factor as suggested by PAS. PAS suggests that the remaining VIP values should be adjusted to reflect the economic obsolescence of NECR's assets as reflected in that certain Duff & Phelps Determination of Fair Value dated November 14, 2013 (the "D&P Report"). PAS Reply at 27-30. PAS does not suggest that the Board adopt the RCNLD or the valuations otherwise set forth in the D&P Report, but just selectively seeks to apply the economic obsolescence adjustment. To cherry pick this one aspect of the D&P Report is flawed.

Examination of this proposed adjustment requires a deeper look at the D&P Report at its purposes rather than the limited excerpt provided by PAS with its Reply. Additional relevant pages of the D&P Report are attached in Volume IV. The D&P Report is an allocation of purchase price, not a valuation. In 2012, GWI acquired control of NECR together with 45 other railroads (and several other businesses) controlled by RailAmerica through the acquisition of stock of RailAmerica – there was not a purchase of the specific assets of any of the subsidiary railroads. However, GWI retained Duff & Phelps to allocate the purchase price amongst the assets of the various railroads in order to establish the books and records of the railroads based on purchase accounting as required by United States generally accepted accounting principles (“GAAP”). See D&P Report excerpts.²⁰ The Board has acknowledged in other proceedings that book values do not necessarily reflect current value.

With respect to track and structures, D&P used a “unit-in-place” approach. They began with a calculation of RCNLD (although without the use of railroad accounts the Board generally requires for RCNLD calculations). After calculating the cost to replace an asset with like utility using current material and labor rates, D&P adjusted the value downward to reflect physical depreciation. It is only after RCNLD was calculated that D&P considered economic obsolescence. D&P Report, NECR-0027887-0027888.

Economic obsolescence does not reflect a change in the physical condition of an asset; it is an adjustment to account for external factors. Essentially it is an adjustment if the assets used in the business are not being used to their full economic potential – i.e., that the assets are not generating an adequate return based on their depreciated value. D&P Report, NECR-0027894. It is more reflective of a market value. However, as discussed hereafter in connection with the

²⁰ PAS included only the excerpt dealing with economic obsolescence. To give the Board a better understanding of what the D&P Report is and isn't, NECR is including additional pages of the Report in the form produced in discovery as part of Volume IV – HC Documents.

discussion of the CE method, there is no readily available market value, and accordingly, NECR believes that the interest rental component should be based on the value of the assets in their current condition. *See A&M-I*, 1990 ICC LEXIS 110 at *12-13 (adopting RCNLD in the absence of a reliable market valuation). Economic obsolescence is not the same as physical depreciation, and is not and should not be part of the RCNLD or VIP findings of the value of the assets in place in their present condition. Moreover, it is clear that D&P applies the economic obsolescence factor after it calculates, and not part of how it calculates, RCNLD. D&P Report at NECR-0027960.

PAS seeks to apply economic obsolescence because it is a convenient factor that it saw was used to reduce the asset values down to book value. PAS suggests that the adjustment should be made to reflect market value. However, the VIP analysis is being used because there is no available contemporaneous market value. Because economic obsolescence is an adjustment based on external factors and the earning power of the assets, it does not reflect a reduction of the value of the assets in their current physical condition as presented in the VIP analysis.

In *ATSF*, ICC Finance Docket No. 22218, 8 ICC 2d 297 (1992), 1992 ICC LEXIS 43, at *13-18 the ICC noted, in the context of discussing RCNLD, that the goal is to estimate what it would cost to duplicate assets in their present condition. *See also A&M-II*, 1990 ICC LEXIS 374. That cost is certainly not affected by economic obsolescence.

Over dissent the ICC in *A&M* did allow "actuarial adjustments" to the bridge that considered other factors that could affect the life expectancy of the bridge. In that proceeding, MP had done an actuarial assessment based on a 1946 ICC bridge study, applying "Iowa curves" to evaluate the various elements of the bridge in question. *A&M-III*, 1992 ICC LEXIS 110, at *46-65. No such actuarial evidence has been introduced here to adjust improvements such as

bridges and tunnels. Although the ICC considered actuarial adjustments to the bridge, it did not apply similar adjustments to the appraised value of track, ties, signals or other assets, or to land value.²¹ See *A&M-III, Appendices*. The decision to allow consideration of these factors seems inconsistent with the ICC's earlier decisions that had rejected MP's argument that the bridge would not be replaced because of economic factors (it was not generating enough income).

4. NECR Restated Interest Rental Using VIP Approach.

Based on the foregoing, NECR does not believe that any adjustments to the value of the trackage rights lines is appropriate. However, as noted in Section III B.4 above, NECR has agreed that the pre-tax cost of capital is 14.77%, instead of the 15.97% set forth in its Opening. Applying the adjusted pre-tax cost of capital yields the following results for interest rental:²²

Interest Rental Component



E. Although NECR Accepts PAS' Proposed Use Of Actual Maintenance Expenses, PAS' Calculation Of Capital Maintenance Is Wrong, And Thus Its Calculation Of This Element Of *SSW* Is Flawed.

One of the elements of *SSW* is the allocation to the tenant carrier of its proportionate share of share of track maintenance and property taxes. The parties have agreed on the

²¹ The D&P Report does not apply economic obsolescence to land values.

²² As discussed in NECR's Opening Statement, interest rental is sometimes charged monthly (or annually), and sometimes by the car mile.

allocation of property taxes. *See* Section III.B above. The parties also agree that track maintenance includes both routine maintenance and capital or program maintenance.

PAS proposes that the parties use actual maintenance expenses of NECR as opposed to the maintenance model the NECR presented in its Opening Statement.²³ NECR is willing to accept use of actual maintenance costs as the basis for the calculation of the new trackage rights fee as proposed by PAS.

However, PAS' estimate for capital maintenance expenses of approximately \$[REDACTED] is grossly understated, and thus its proposed allocation of maintenance expenses is wrong as well. Despite arguing that the calculations must be based on actual maintenance costs, PAS does not use actual 2014 capital maintenance expenses. Instead it uses an average maintenance expense based on a summary document produced by NECR during discovery. However, PAS ignored the additional documents produced by NECR with detailed information on the capitalized maintenance expenses incurred in 2013, 2014 and 2015 through May 31.²⁴ These records were all maintained in the ordinary course after NECR came under the common control of GWI as part of the RailAmerica acquisition that closed in late 2012. The documents show that NECR spent the following amounts on capitalized maintenance applicable generally to all of NECR's tracks,²⁵ not including any amounts that were reimbursed through public funding:

²³ In its Opening, NECR presented normalized maintenance costs using a model for routine and program maintenance using certain assumptions that would keep the rail in a current state of good repair for current classes of track, to cover contingencies for damage to the rail and bridges, to generally maintain the railroad infrastructure. *See* RLBA Rebuttal VS at 6-7.

²⁴ Although PAS says no capitalized maintenance information was produced except for the one spreadsheet it referenced, it must have overlooked the spreadsheets that were produced as NECR_004594, NECR_004595, and NECR_004596. Each document included the over 20 sheets for the year that were applicable to NECR. Each of the complete original spreadsheets also included information on the other railroads in GWI's Northeast Region which were not produced. For ease of review, NECR is now producing the portions of the summary sheets for each period applicable to NECR that were not produced with the originals. Copies are included in Volume IV HC Documents.

²⁵ NECR has not included capital maintenance on specific projects located outside of the trackage rights lines, or spent on non-maintenance of way items.

NECR Capital Maintenance (net of public funding)

2013	\$ [REDACTED]
2014	\$ [REDACTED]
2-Yr. Avg.	\$ [REDACTED]

Capital maintenance tends to vary from year to year, and accordingly, NECR suggests using a 2-year average. RLBA Rebuttal VS at 8. Because the figures for 2013 and 2014 were kept under current NECR management, and represent the most recent two years under consideration, NECR believes this 2-year average is more accurate and representative of capital maintenance spending than the average used by PAS from a form which was clearly not complete.

PAS has accurately reported the amount NECR spent on ordinary/routine maintenance of way in 2014 as being \$ [REDACTED]²⁶

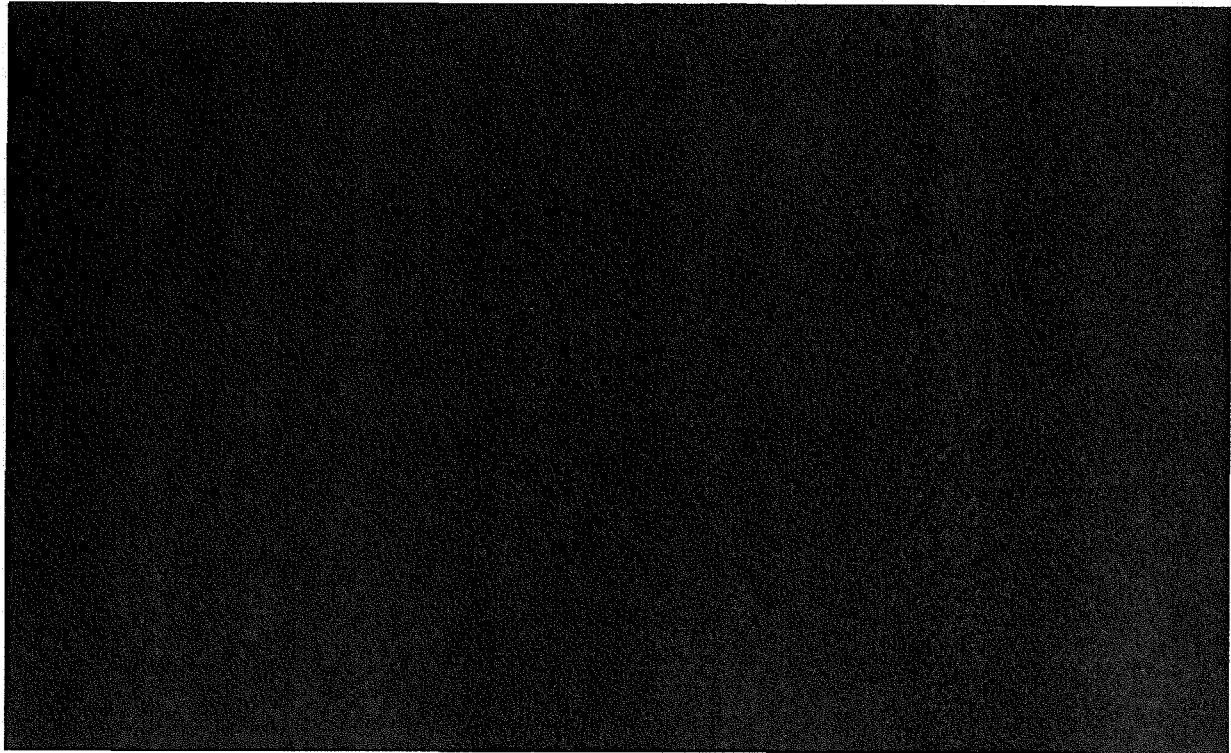
Using this 2-year average for capital maintenance and the agreed upon routine maintenance, the total maintenance costs to be allocated to the trackage rights segments would be:

2014 Ordinary Maintenance	\$ [REDACTED]
Avg. Capital Maintenance	\$ [REDACTED]
Total:	\$ [REDACTED] ²⁷

NECR does not object to PAS' proposed URCS regression analysis for allocating maintenance costs to the trackage rights segments. Adjusting for the change in the capital maintenance calculated by NECR results in the following PAS cost per car mile for maintenance and property taxes:

²⁶ PAS asserts that it should not be required to pay for maintaining the track in excess of FRA Class 2 despite the fact that it insists on operating at the currently allowed Class 3 speeds. However, PAS accepts the reported routine maintenance costs.

²⁷ This equates to \$ [REDACTED] mile based on NECR's total track miles of 394 miles.



F. NECR Restated SSW Trackage Rights Compensation Using VIP Approach.

Based on the agreed upon and adjusted calculations of the elements of SSW as set forth above, NECR restates the SSW trackage rights compensation using the VIP approach, and allocating interest rental to car miles, as follows:

	Southern	Middle	Northern
Maintenance Costs per Car Mile	\$0.61	\$0.54	\$0.56
Property Taxes per Car Mile - 2014	\$0.04	\$0.02	\$0.02
Agreed Property Taxes per car mile 2015-2016	\$0.08	\$0.03	\$0.04
Dispatching Costs per Car Mile	\$0.02	\$0.02	\$0.02

Interest Rental per Car Mile	\$2.81	\$5.68	\$4.48
Total Costs per Car Mile - 2014	\$3.48	\$6.26	\$5.08
Total Costs per Car Mile – 2015-2016	\$3.52	\$6.27	\$5.10

IV. THE BOARD SHOULD REJECT THE OF USE OF A CE APPROACH IN THIS PROCEEDING TO CALCULATE THE TRACKAGE RIGHTS FEE UNDER SSW.

A. The CE Approach Is Not Appropriate For Use In This Proceeding.

NECR has previously argued to the Board in connection with its Methodology Motion why the CE method is not appropriate for this proceeding. PAS in its Reply acknowledges as well that its CE analysis should not be applied in this proceeding.

As traditionally applied by the ICC and the Board, the CE method generates a valuation base for calculating interest rental by multiplying the specific earnings assigned to the trackage rights line by an earnings multiplier. The earnings multiplier is determined by dividing the market value of the owning railroad's total railroad property by the owning railroad's total railroad earnings. *ATSF*, 1992 ICC LEXIS 43 at *15-16.²⁸ See also *TPW*, 1994 ICC LEXIS 175 at *10-11; *CSX Corporation, Norfolk Southern Corporation, et. al. – Control and Operating Leases / Agreements – Conrail et. al. – Responsive Application – State of New York, by and through its Department of Transportation and New York City Economic Development Corporation*, 4 STB 75 (1999), 1999 STB LEXIS 297 (“*East of Hudson Trackage Rights*”).²⁹

²⁸ The CE method was applied, and tweaked by the ICC, in the series of SSW Compensation cases.

²⁹ PAS does not use the same CE method. See *Baranowski VS.* Rather Mr. Baranowski merely calculates the earnings attributable to the trackage rights segments, and then “capitalizes” them by dividing the earnings by a discount rate based on the current pre-tax cost of capital.

The CE method has been used primarily in merger cases where trackage rights have been granted to address a competitive harm, and where there is a contemporaneous market valuation of the owning/landlord railroad. See, e.g., *East of Hudson Trackage Rights*, 1999 STB LEXIS 297; *SSW Compensation* cases. The use of the CE method requires, among other items, a current market valuation of the landlord railroad, overall earnings for the landlord railroad and accurate line specific earnings. It is only appropriate to use the CE method if *all* of the factors are easily ascertainable from the facts and circumstances of the particular proceeding. See *TPW*, 1994 ICC LEXIS 175, at *11; *ATSF*, 1992 ICC LEXIS 43, at *16; *A&M-I*, 1990 ICC LEXIS 110, at *2-3, *10-11. That is not the case in this proceeding.

B. In Any Event, The CE Approach As Presented By PAS Is Not Consistent With Board Precedent.

Baranowski ignores the fact that there is no “contemporaneous market value” available for NECR, and PAS does not even suggest that there is one. The most recent transaction involving NECR was the acquisition by Genesee & Wyoming Inc. (“GWI”) of RailAmerica. *Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al.*, STB Docket No. FD 35654 (served December 20, 2012). The RailAmerica acquisition was not a stand-alone acquisition as was present in the *SSW Compensation* cases, and the purchase price for the Rail America acquisition cannot in any way be framed as “contemporaneous market value” for the NECR, or the specific line segment in question in this proceeding. NECR was one of 41 U.S. subsidiary railroads owned by RailAmerica, and the acquisition also included four Canadian subsidiary railroads and several non-railroad businesses. The purchase price was based on a public auction of the publicly-traded stock of RailAmerica, based on the data and market conditions at the time of the auction. The transaction was valued and announced in July 2012, based on financials from

2011, over 5 years ago.³⁰ Neither NECR, nor any of the other RailAmerica subsidiary railroads, were offered for sale as separate entities, so there was no separate bidding or market price set for NECR. 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 nearly as reliable as the lump sum purchase price considered in the *SSW Compensation* cases. See *A&M-I*, 1990 ICC LEXIS 110, at *12-13. See also, *TPW*, 1994 LEXIS 175, at *11 (CE method requires a market value for the owning railroad).

Without such a contemporaneous market value, the CE method is not appropriate. Moreover, Baranowski's method of merely capitalizing the segment earnings does not reflect how the ICC and the Board have determined the valuation base for calculating interest rental rights earnings under the CE method.

Although NECR does not agree that the use of the CE method is appropriate, or that Baranowski's method properly determines the valuation base, NECR has reviewed the Baranowski calculations and believe that there are other errors as well. Accordingly, NECR comments on those errors, and presents an adjusted interest rental using PAS' formula in the event the Board were to consider that formula, reiterating that applying CE in this proceeding is not appropriate.

I. Allocation Of NECR Costs.

To determine NECR earnings attributable to the trackage rights segments, Baranowski allocates both NECR freight revenues (derived from waybills) and NECR costs. As part of the allocation, Baranowski uses URCS³¹ to calculate the fixed and variable costs of NECR which are then allocated to the trackage rights segments. Fixed costs are allocated by traffic density.

³⁰ The acquisition of RailAmerica closed in October 2012, over 4 years ago.

³¹ Aside from other flaws, it is widely recognized that URCS is not designed nor accurate in calculating short line costs. *General Purpose Costing System*, Docket No. EP431 (Sub. No. 4), and the comments filed therein.

NECR believes that PAS has significantly overstated the variable cost portion and understated the fixed cost portion of NECR's total expenses. *See* RLBA Rebuttal VS, at 11-13 (including restated Table 19). Because income is allocated based on total costs, the effects of the error are somewhat muted. However, NECR calculates that the result is a small overstatement of operating earnings allocated to the non-trackage rights line (and slight understatements of the earnings attributable to the Middle and Northern Segments). *See* RLBA Rebuttal VS, at 13 (including restated Table 21).

2. PAS Fails To Include NECR Earnings From Trackage Rights Revenues.

Moreover, Baranowski in his calculation of NECR earnings excluded trackage rights income from his allocation of revenue. As such, he did not consider or include NECR's income or earnings related to the trackage rights fees paid by users of the trackage rights segments (PAS and Amtrak). NECR has calculated the amount of trackage rights income it receives from use of each of the trackage rights segments. (Because the revenues are directly attributable to the particular segments, the income does not need to be allocated under Baranowski's ATC method.) Accordingly, NECR adds \$ [REDACTED] of Amtrak trackage rights income, and \$ [REDACTED] of PAS trackage rights income to the analysis. *See* RLBA Rebuttal VS, at 14-15.

3. PAS Understates The Earnings Attributable To The Trackage Rights Segments.

Further, NECR believes that the CE method requires consideration of all earnings attributable to the line segments in question, including those of the trackage rights tenant, here PAS. This is particularly true here where PAS, the tenant carrier, not only has overhead trackage rights, but it also has the exclusive right to use the Middle Segment of the trackage rights line to

serve customers and locations that were being served by PAS' predecessor B&M in 1989,³² and to compete for new business to and from the Middle Segment. Importantly, because the current trackage rights fee is too low (as NECR contends in and seeks to rectify in this proceeding), PAS has had an unfair competitive edge over NECR in obtaining traffic on and from the Middle Segment, and NECR's earnings are artificially depressed. *See TPW*, 1994 ICC LEXIS 175 at *11 (exclusion of the tenant carrier's earnings from the line would exclude a portion of the line's earnings, but inclusion would be circular to the calculation of compensation).³³

PAS acknowledges that its earnings attributable to its overhead traffic should be included, and includes a figure in its calculations for such earnings.³⁴ However, Baranowski does so by applying NECR's earnings per car mile without any explanation of why he believes that PAS' revenue per car mile and/or costs per car mile are the same or similar to NECR's. (Since NECR is effectively providing a subsidy to PAS, PAS' costs should be lower.) Moreover, Baranowski does not include any PAS earnings related to the substantial revenues PAS received for services to non-exclusive customers located on the Middle Segment. *See RLBA Rebuttal VS* at 13-14.³⁵ This notable exclusion would also clearly detract from the CE value of the NECR.

Notwithstanding these omissions, for the purposes of recalculating earnings and interest rental under the Baranowski CE approach, NECR has included the PAS earnings as set forth by

³² The Middle Segment was first transferred in 1989 from B&M to Amtrak (and subsequently to NECR's predecessor CV). Prior to the transfer, B&M was the owner of, and the serving carrier on, the Middle Segment.

³³ In the case where trackage rights are imposed as a merger condition, of course, there are no existing earnings by the trackage rights tenant since the rights are prospective.

³⁴ PAS does not include PAS earnings for the Middle Segment, arguing as discussed previously, that it should not have to pay interest rental on the Middle Segment. As discussed above, NECR does not agree. Although not shown in the Baranowski VS, his calculation of PAS earnings for the Middle Segment were shown in his workpapers.

³⁵ A spreadsheet of the on-line customers and revenues was produced by PAS in discovery. (PAS-HC-745) and is included in Volume IV HC Documents. Because these earnings are not from pre-existing customers or locations to which PAS has exclusive rights, there can be no argument that the earnings from such customers were included in the Amtrak I compensation calculation.

Baranowski, including for the Middle Segment. The adjusted results as shown in the RLBA Rebuttal VS, indicate that if the CE method were applied as proposed by PAS, the interest rental per car-mile for the segments would be:

	Per NECR	Per PAS
Southern Segment:	\$ [REDACTED]	\$ [REDACTED]
Middle Segment	\$ [REDACTED]	\$ [REDACTED]
Northern Segment	\$ [REDACTED]	\$ [REDACTED]

While NECR has adjusted the Baranowski CE analysis for comparison purposes, since there is no recent NECR transaction, there are flaws in the calculation of revenues and expenses and there are omitted earnings, the CE analysis presented is not reliable or accurate and should not be considered by the Board.

V. THE BOARD SHOULD ENFORCE PAS' PREVIOUS AGREEMENT TO GIVE CHANGES IN THE TRACKAGE RIGHTS FEE RETROACTIVE EFFECT.

There can be no question that PAS agreed to have the Board's decision in this matter have retroactive effect. In a letter to the Board dated and filed June 30, 2015, in connection with the submission of a proposed schedule, PAS wrote: "The parties agree that any new compensation determined either in mediation or by the Board will be retroactive to the date of NECR's filing with the Board of its Request to Set Trackage Rights Terms and Conditions."³⁶ The Board acknowledged this agreement in its decision served March 12, 2015. Although PAS now argues that it did not know how long the proceeding would take, and that it thought mediation would be successful, the agreement of the parties, as recited by PAS, clearly did not apply only to mediation.

³⁶ NECR's request was filed on June 17, 2014.

NECR only agreed to mediation because PAS agreed to make any new compensation terms retroactive. NECR did not believe that mediation would be successful, and believed that it would cause a delay in the proceedings. This turned out to be correct.

Moreover, NECR is not at fault for the length of these proceedings. This is a litigated matter, and both parties have sought to protect their proper interests. A good portion of the time for this proceeding was due to PAS' insistence on pursuing wide-ranging discovery on every conceivable *SSW* methodology, although it now argues that none of them should be applicable, and submits a CE method analysis that even it says should not be applied.

In terms of fairness, it is particularly unfair for PAS to raise its objection at this late date. The Board should enforce the agreement of the parties and give the terms retroactive effect.

VI. THE BOARD SHOULD ADOPT THE CHANGES TO THE AGREEMENT PROPOSED BY NECR, MODIFIED AS SET FORTH HEREIN.

As discussed above, Paragraph 2.2 of the TO provides that if the parties cannot agree on modifications of terms, the Board can be asked to impose modifications. Other than a restriction on the imposition of arbitration requirements, Paragraph 2.2 does not restrict the terms that can be modified. This is consistent with ICC's decision in *Amtrak II*, that after 20 years either party have the right to request a "new agreement",

As noted in its Opening Statement at 16, NECR would voluntarily accept a single trackage rights agreement covering all three segments if the Board lifts the limitations applicable to capital improvements and eliminates the Middle Segment cap on payments for maintenance/trackage rights fees payments.³⁷ If the Board does not do so, the NECR requests that the Board impose separate agreements for each segment.

³⁷ This bifurcation is consistent with the findings the Board should make that PAS' arguments related to limits on paying interest rental and maintenance caps are grounded in the Amtrak Decisions and relate only to the Middle Segment.

In its Opening Statement, NECR set forth a suggested revised form of revised trackage rights terms and conditions marked to show changes from the TO. PAS in its Reply addresses the provisions of the TO, and includes a draft marked to show changes from NECR's draft. In this Rebuttal, NECR will limit its comments to those provisions with which it continues to have disagreements, noting that there are many sections on which the parties agree.³⁸

0.7 Definition of "CV Lines"

NECR added the phrase "which are currently owned by NECR" not to assert a title claim, but to establish it as the current party in control of the lines. NECR owns the tracks and structures, and as discussed above, with respect to the right of way property has an exclusive unrestricted operating easement (with the right to purchase any or all for \$1.00). In for example, *State of Maine* proceedings, the Board has treated the holder of an unrestricted freight easement as the owner of a rail line. If the Board does not choose to impose the language initially proposed by NECR, then NECR suggests the following alternative: "and which have subsequently been conveyed to NECR."

0.8 Definition of "Effective Date"

As discussed more fully in Section V above, PAS agreed that any new compensation would be retroactive June 17, 2014, and the Board should enforce that agreement and reflect the agreement in this section.

0.9 Definition of "Former B&M Line"

As with the definition of "CV Lines" above, NECR does not understand PAS' objection to the proposed language "and which are currently owned by NECR." NECR certainly owns the Former B&M Line to the same extent CV owned the Line. If the Board does not choose to

³⁸ Attached hereto as Exhibit A is proposed form of TO showing changes from PAS' draft. Where there is agreement, no changes have been marked.

impose the language initially proposed by NECR, then NECR suggests the following alternative:
“and which has subsequently been conveyed to NECR.”

0.11 Definition of “Hazardous Substance”

In light of the heightened sensitivities and increased FRA regulations related to the transporting and handling of hazardous substances post Lac Megantic and other instances, NECR believes the TO needs to include additional provisions with respect to the responsibilities of the parties with respect to the handling of hazardous substances. The proposed requirements on the handling of hazardous materials are consistent with public policy and the RTP’s focus on operational and public safety. 49 U.S.C. §10101(8). As is customary, the definition is broad. For example, these provisions were included in a Class I/short line trackage rights agreement in *Rapid City, Pierre & Eastern Railroad, Inc. – Acquisition and Operation Exemption – Dakota, Minnesota & Eastern Railroad Corporation*, STB Docket No. FD 35799. However, the specifics of the requirements are covered in what was proposed in Section 9.2.

0.13 Definition of “Line”

See the responses with respect to the definitions in Sections 0.7 and 0.9 above. Consistent changes should be made to all three definitions related to the Line and its components.

1.9 Restrictions on Trackage Rights

Because there has been a dispute about whether the trackage rights allowed PAS to “haul” cars in the account of another railroad over the Line, NECR added proposed Sections 1.9(a) and 10.7 to eliminate any continued ambiguity. As PAS did, NECR will address this issue more fully in its response to Section 10.7 below. NECR believes that allowing PAS to market haulage equates to extending PAS’ subsidies to others – which was clearly not intended or

contemplated in the original TO. To allow haulage would pass PAS' cost advantages on to any other railroad that shows up with a train. If the Board agrees that haulage is or should not be permitted, then NECR requests that this Section 1.9 be included in the new TO.

2.2 Term and Termination: Reopener

NECR proposed shortening the reopener provision from 20 years to 10 years. Because the agreement itself remains perpetual as provided in *Amtrak II*, this should not create any significant uncertainty for either PAS or shippers. Given the current rate of change in the railroad industry, the 20 year period initially imposed by the ICC is too long. The 20 year term has led to the argument by PAS that the proposed increases in compensation requested by NECR are too large. As a compromise, NECR suggests a 15 year reopener.

3.1 Compensation

Throughout its Opening Statement and Rebuttal, NECR has set forth its view that compensation should be based on the three elements described in *SSW Compensation* (set out in NECR's proposed provision), and how those amounts should be calculated for each of the three segments. Even if the Board were to carry forward some of the specific terms related to the Middle Segment, there is no reason that all of the elements of *SSW Compensation* should not apply to the Northern and Southern Segments. NECR's proposed language merely reflected the addition of the *SSW Compensation* factors. The language of Section 3.1 and other sections of Compensation should be made consistent with the Board's findings on compensation.

3.2 Compensation: Minimum Track Condition

There is no need to include a minimum maintenance standard. As noted in *Amtrak II*, 1990 ICC LEXIS 52, at *17-18, the minimum standard was only included in the TO because CV voluntarily suggested it. The ICC would not otherwise have required it. PAS' concern that the

trackage rights segments might be downgraded is misplaced, but perhaps motivated by PAS' recognition that it may be difficult for NECR to maintain the infrastructure since PAS does not pay its fair share. Under its agreement with Amtrak, NECR is required to maintain the track to an even higher level (FRA Class 3), and unless Amtrak service stops, and other use declines, there is little likelihood of NECR downgrading the line. While PAS is paying for a portion of the maintenance, as discussed above, NECR does not believe that it is paying its full share to maintain the Line in its current condition. (If NECR is awarded the compensation requested herein, NECR would be willing to agree to maintain the track to FRA Class 2.)

3.3 Compensation: Variable Costs

NECR has proposed only having the opportunity to have PAS pay for additional variable costs that arise, without waiting for the reopener, allocated in the same manner that variable costs are allocated under *SSW Compensation*. NECR's proposed language merely reflected the addition of the *SSW Compensation* factors.

3.4 Compensation: Rate Adjustments

NECR's suggested language is intended to make sure that the inflator reasonably keeps PAS payments, originally based on a static date in time, on pace with anticipated increases in costs. Otherwise, at the next reopener the parties will be back to arguing over whether the increases are too high. NECR has conceded to the removal of the provision that changes cannot be less than zero.

3.7 Compensation: Allowed Capital Projects

NECR agrees to the deletion of the language "or desirable in NECR's discretion in the ordinary course." Notwithstanding giving up a direct reimbursement of a capital project, NECR as noted in response to Section 3.1 and above, that it should be entitled to an interest rental return

for the value of the upgraded infrastructure. However, NECR does not agree to unexplained deletion on billing procedures, or the change in the allocation basis from the NECR suggested 2 year period to the PAS suggested 5 year period. A 2 year period seems more reflective of the parties' proposed prospective use of the improvements. PAS' deletion of the payment terms is inappropriate and would leave NECR with no contractual way to collect.

3.8 Compensation: Interest Rental.

PAS' objection to this section seems to be because NECR is not clear on what tax rate will apply in calculations of interest rental. Currently NECR is consolidated with its parent company for tax purposes; and that is the tax rate that NECR would propose to apply. (Because NECR's parent company is publicly traded, that tax rate is readily available and transparent.) However, this is a perpetual agreement, and NECR cannot be sure that will always be the case. Therefore, if and when, NECR were not consolidated with its parent then NECR's standalone tax rate would be used.

3.9 Compensation: Auditing.

Auditing provisions are now common place, and are particularly essential to make sure that all users of the rail lines are complying with all FRA and other safety requirements. Given how PAS sometimes agrees to something, and then changes its mind (for example on the retroactivity of compensation), NECR feels it must have the right and ability to confirm whether PAS is acting in accordance with the terms of the TO. NECR would agree to the deletion of the objected to phrase "Without limiting the generality of the foregoing." NECR is also willing to limit the records to be audited to those related to billing and payment, and to agree that the audit would be by an independent auditor if the records would involve confidential shipper information.

5.1 Scheduling of Maintenance

The term “best efforts” requested by PAS could imply that NECR has to take any measures, regardless of additional cost, to accommodate PAS’ operations – despite the fact that PAS would not be contributing to such additional cost. “Reasonable efforts” as proposed by NECR, would allow NECR to balance the burdens in a more fair and evenhanded way.

5.5 Operating Rules

The intent of this section was to allow NECR to issue and change its operating rules that govern all users of the trackage rights segments – NECR as well as PAS and anyone else. NECR would agree to modify the language to indicate that they are talking about non-discriminatory rules as suggested by the language cited by PAS.

7.3 Release and Indemnification

Initially it should be noted that PAS presents its objections to the proposed changes in this section as if they are being imposed solely on PAS. That is not the case. The section, and the changes, apply to a collision between the train of “either party” and a third person. The additional reference to Amtrak is for clarity – Amtrak is clearly a third party (not one the parties to the TO) and already covered. Although the current Amtrak agreement provides for indemnification, that will expire in 2020 (long before this one reopens), and there is no guarantee that the current indemnification provisions will be continued or continued in the same form. Adding third party injuries makes sure that all possible damages are covered. Of course, this is only providing indemnification – i.e., it provides coverage if a claim is brought against the other party for damages – and the claim is settled or succeeds in litigation. Adding the “and defend” obligation allows the indemnitor to control the response to the litigation, and to prevent any unnecessary or unreasonable settlements by the other party (about which PAS has expressed

concerns). A cooperation on defense clause could be added as well. PAS' affiliate Springfield Terminal is a party to an agreement with Amtrak that provides for defense as well as indemnity including for injuries to Amtrak passengers.³⁹ NECR's changes do not change the overall effect of the provision, and to the extent it does make changes it does so evenly with respect to each party. There is no reason not to accept the NECR proposed changes.

9.2[sic] Insurance.

While there were no specific insurance requirements to back up the liability and indemnification provisions in the original TO, that does not make them unreasonable to be added in the context of the new TO. It is common practice for trackage rights landlords to require their tenant users to carry insurance of the types, in particular if the user is not a Class I railroad, or other public company whose financial wherewithal can be readily evaluated. The individual trackage rights agreements cited by PAS that involved NECR affiliates involved just such considerations. (The NECR affiliate was required to continue its existing coverage – but NECR and its affiliates are covered by in excess of \$200 million of insurance – more than is being requested here.). Further, requiring insurance is consistent with public policy as railroads, including PAS, carry dangerous goods and the Lac Megantic incident demonstrates that underinsured entities can create significant burdens on local and federal governments, which is clearly contrary to public interest, as it is likely any compensation paid to victims would come from tax assessments. The burden of maintaining insurance is one that PAS should bear.

As noted above the current arrangements with Amtrak will expire in 2020, and there is no guarantee that the current indemnification provisions will be continued or continued in the same

³⁹ A copy of the Agreement between Amtrak and Springfield Terminal dated December 9, 1988 is included in Volume IV – HC Documents. See Section 5(a), (f).

form. As a consequence, PAS' citation to the existing Amtrak agreement provisions is short-sighted.

As a practical matter, according to documents produced by PAS in discovery, PAS already carries a substantial amount of insurance,⁴⁰ and this requirement should not be any additional burden on PAS.

9.2 Transportation of Hazardous substances.

As PAS notes, the proposed language that it has deleted, would in large part require PAS to comply with applicable laws and regulations, and lays out requirements necessary for compliance. NECR as the effective owner (despite PAS' arguments to the contrary) of the rail lines has responsibility for what happens on its lines, and to exclude these provisions as PAS proposes would create ambiguity as to NECR's ability to collect for any failures of PAS, thus reducing incentives for PAS to act responsibly. These provisions require PAS to act in compliance to protect both the public and NECR. The provisions do not add additional burdens on PAS, but ensure that it acts responsibly and lawfully with respect to its handling of Hazardous Substances, and gives NECR a direct way to require PAS to comply or to compensate NECR for non-compliance.

10.7 General Provisions: Haulage

Both here and in Section 1.9(a), NECR has added language to make clear that PAS cannot use the trackage rights to haul cars for other carriers. Because haulage cars would remain in the account of carrier for whom PAS was providing the haulage, there are questions about whether PAS is responsible. The parties have previously presented arguments on whether haulage is permitted under the TO. NECR's position is set forth in its Reply to PAS Claims filed

⁴⁰ In discovery PAS provided a schedule of its excess liability insurance, a copy of which is included in Volume IV - HC.

October 9, 2014. As the Board noted in its December 23, 2014 decision, "PAS does not rebut NECR's argument." As PAS points out in its Reply, at 49, before the TO, B&M and CV were parties to a "1930 Agreement" that governed the trackage rights of B&M over CV. In that agreement, there were references to one party performing haulage for the other. PAS uses that to argue that the parties knew what haulage was and could have prohibited it if they wanted to. NECR believes that the 1930 Agreement demonstrates just the opposite. By including a provisions that specifically allowed certain haulage, the parties were indicating that haulage would otherwise not be permitted. Further, in discovery, PAS confirmed that neither it nor its predecessors have ever used the trackage rights to perform haulage for another carrier (except in the limited instance where PAS is hauling cars for Norfolk Southern Railway that are interchanged with NECR)⁴¹. This confirms the parties' understanding of whether haulage is permitted.

Regardless, there is no reason not to add such a provision to the new TO on reopening. As discussed above the reopening provision does not restrict the terms that can be modified. As PAS acknowledges in its Reply at p. 50, "Such language [prohibiting haulage] has become commonplace in trackage rights agreements today."

The prohibition on haulage does not restrict PAS' access to any carriers, and cannot be said to upset any competitive balance that may have been considered in the *Amtrak Decisions*. PAS has the right to interchange traffic and provide joint moves with carriers that connect to the Middle Segment. Of course, PAS' proposed haulage for VRS would involve not only the Middle Segment, but also the Northern Segment which was not the subject of the *Amtrak Decisions*. There is certainly no reason that NECR should have to allow haulage on the Northern and Southern Segments.

⁴¹ A portion of PAS' response to NECR's deficiency letter is included as part of Volume III – Public Documents.

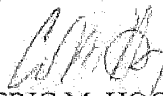
10.8 Assignment.

NECR reiterates that although the language proposed would require consent, it also requires that NECR not be unreasonable. Such a requirement is commonplace and appropriate. NECR should be concerned and informed about the identity of any proposed operator whose trains will be commingled with Amtrak (and NECR) on rail lines for which NECR is responsible. In any event, there is no substantial impact that would result from the change from "after consultation" to "following written consent that will not be unreasonably withheld" as it applies to the assignment by PAS to an affiliate.

CONCLUSION

For all of the foregoing reasons, NECR request that the Board determine new compensation for the trackage right lines and establish new terms and conditions for the PAS trackage rights over each of the three segments as requested and justified by NECR.

Respectfully submitted,



ERIC M. HOCKY
LISA CARNEY ELDRIDGE
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: January 23, 2017

Attorneys for
New England Central Railroad, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on this date by the method indicated below:

By email on:

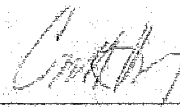
William A. Mullins
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
WMullins@bakerandmiller.com

Eric R. Benson
1 Railway Lane
Burlington, VT 05401
bensonpatentlaw@comcast.net

Jeremy R. Fischer
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101
jfischer@dwmlaw.com

By US first class mail, postage pre-paid on:

Brian R. Searles
State Of Vermont
One National Life Drive
Montpelier, VT 05633-0001


Eric M. Hocky

Dated: January 23, 2017

VERIFICATION

I, Dave Ebbrecht, President of New England Central Railroad, Inc., verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on January 23, 2017.


Dave Ebbrecht

PROPOSED TRACKAGE RIGHTS TERMS AND CONDITIONS

0. DEFINITIONS

As used herein, the following capitalized terms have the following meanings (any other capitalized terms being defined in context hereafter):

0.1 "Agreement" means the terms and conditions of trackage rights as a whole set forth herein, as though the instant terms and conditions had been agreed to contractually by PAS and NECR.

0.2 "Amtrak" means the National Railroad Passenger Corporation.

0.3 "B & M" mean Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, MA 01862.

0.4 "CCR" means Claremont and Concord Railway (including its successors and assigns).

0.5 "Conveyance Date" means September 9, 1988; the date on which B & M conveyed the Former B & M Line to Amtrak, and on which Amtrak conveyed the same to CV, pursuant to the Order.

0.6 "CV" means Central Vermont Railway, Inc., a corporation with its principal office at 2 Federal Street, St. Albans, VT 05478.

0.7 "CV Lines" means the approximately 13.4-mile rail line between White River Junction, Vermont, and Windsor, Vermont, and the approximately 10.6-mile rail line between Brattleboro, Vermont, and East Northfield, Massachusetts, both of which belonged to CV before the Conveyance Date and which have subsequently been conveyed to NECR.

~~0.8 "Effective Date" means~~ 0.8 "Effective Date" means with respect to the compensation terms in Section 3 hereof, June 17, 2014, the date on which the parties agreed revised compensation would be effective, and with respect to other terms and conditions hereunder, the effective date established by order of the STB.

0.9 "Former B & M Line" means the approximately 48.8-mile rail line between Windsor, Vermont, and Brattleboro, Vermont, conveyed by B & M to Amtrak, and by Amtrak to CV, on the Conveyance Date pursuant to the Order and which has subsequently been conveyed to NECR.

0.10 "GMRC" means the Green Mountain Railroad Corporation (including its successors and assigns).

~~0.11 [Intentionally omitted.]~~

0.11 "Hazardous Substance" means any substance which is hazardous to persons or property and includes, without limiting the generality of the foregoing (i) radioactive, explosive, poisonous, corrosive, flammable or toxic substances; (ii) substances that endanger the health and safety of persons; and (iii) substances declared to be hazardous, toxic or dangerous under any law or regulation now or hereafter enacted by any governmental authority having jurisdiction.

0.12 "ICC" means the U.S. Interstate Commerce Commission.

0.13 "Line" means the CV Lines and the Former B & M Line together and which has subsequently been conveyed to NECR.

0.14 "NECR" means New England Central Railroad, Inc., a corporation with its principal office at [INSERT ADDRESS].

0.15 "Order" means the decision of the ICC in National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire, dated August 4, 1988,

served August 9, 1988, and published at pages 761 through 817 of volume 4 of the ICC Reports, Second Series.

0.16 "PAS" means Pan Am Southern LLC, a limited liability company with its principal office at [INSERT ADDRESS].

0.17 "ST" means the Springfield Terminal Railway Company (including its successors and assigns).

0.18 "STB" means the U.S. Surface Transportation Board (including any successor agencies).

1. GRANT OF TRACKAGE RIGHTS

1.1 Subject to the terms and conditions of this Agreement, PAS shall have the nonexclusive right to operate PAS's trains, locomotives, cars and equipment with PAS's own crews over the Line, as more particularly defined as follows:

All main line track and passing sidings between a point at the interlocking at East Northfield, Massachusetts (approximately MP NECR MP 110.51) to the Bank switch at White River Junction, Vermont (approximately NECR MP 13.40).

1.2 PAS shall have only overhead running rights over the CV Lines.

1.3 PAS shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the Former B & M Line as of the Conveyance Date, including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided that PAS makes available a minimum three day per week service along the Line. PAS must consult with the shippers and ensure their needs are met up to three day per week service.

1.3.1 For purposes of this Section 1.3, "existing shippers and shippers' facilities" shall mean industries and facilities at rail sidings which received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date.

1.3.2 For purposes of this Section 1.3, "three day per week service" shall mean the provision of local set-off and pick-up service to shippers on the Former B & M Line at least three times per week (Monday through the following Sunday) in each direction.

1.3.3 NECR shall be permitted to commence service to existing shippers and shippers' facilities upon PAS's failure to make available three day per week service during two weeks out of any four week period, unless such failure is excused by Section 10.6.

1.4 Except as provided in Section 1.3, NECR and PAS shall each have the right to compete for and serve the following shippers and shippers' facilities on the Former B & M Line:

- (a) shippers and shippers' facilities located on the Former B & M Line which did not receive or tender rail shipments during the twelve months immediately prior to the Conveyance Date;
- (b) any other new shippers;
- (c) any existing shippers and shippers' facilities to which PAS does not provide a minimum three day per week service, as specified in Section 1.3.

[1.4.1 NECR shall, upon request by PAS, provide reciprocal switching to permit PAS to serve such shippers and shippers' facilities as PAS may serve hereunder. NECR shall not be required to switch cars on PAS's behalf at shippers' facilities which NECR serves by virtue of PAS's failure to make available a minimum three day per week service along the Line as specified by Section 1.3, but PAS shall retain the right to provide service directly to such shippers and shippers' facilities. PAS shall pay to NECR a per switch charge as established by NECR, provided that such per switch charge is not greater than 180% of the NECR variable cost of providing such switching service computed using NECR's costs computed in accordance with formulas generally used or accepted in STB

| proceedings.}}

1.5 NECR and PAS shall each have the right to compete for and to interchange traffic at Bellows Falls, Vermont, with GMRC and at Claremont Junction, New Hampshire, with the CCR. PAS shall have the exclusive right to interchange traffic at Charlestown, New Hampshire, with the ST.

1.6 PAS shall have the right of entry over the Line for any and all PAS employees, agents or representatives, machinery, vehicles or equipment which PAS may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of PAS trains on the Line or otherwise conducting its operations over the Line; provided in each case that such entry shall not unreasonably interfere with operations on the Line by other carriers.

1.7 [Intentionally Omitted -- No Longer Applicable].

1.8 Except as provided herein, this Agreement does not diminish in any way NECR's right to use the Line, or NECR's right to lease or otherwise allow another carrier to use the Line.

1.9 Notwithstanding anything to the contrary contained in this Agreement or otherwise agreed by the parties hereto prior to the Effective Date, PAS (or any agents or affiliates acting on their behalf) shall not:

(a) ~~[Intentionally omitted];~~

(a) permit or admit, without permission in writing from NECR, any third party to the use of all or any part of the Line, nor contract, or make any agreement to provide haulage over the Line of trains or cars of any third party which in the normal course of business would not be considered as the trains or cars of PAS or ST, as applicable;

(b) obstruct or leave any train or locomotive unattended on the Line, or stop its trains or locomotives on the Line except in the case of mechanical failure or emergency;

(c) construct or alter tracks connecting to the Line, including the construction, installation or alteration of any switches from the Line without the express written consent of NECR; or

(d) construct, erect or place, or cause to be constructed, erected or placed on or near the Line, any structure, signage, fixture or any other work without the prior written consent of NECR.

(e) [Intentionally omitted.]

(f) [Intentionally omitted.]

2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on the Effective Date.

2.2 Except as provided in Section 2.3 and Section 8.1, and subject to the provisions of this section, the term of this Agreement shall be perpetual. After ~~twenty (20)~~fifteen (15) years from the Effective Date, either party to this Agreement may seek modifications from the other and, if satisfactory modifications are not agreed to after a reasonable period for negotiation, may apply to the STB for modifications. Nothing in this section shall authorize the STB to impose arbitration requirements upon either party to this Agreement.

2.3 PAS may terminate this Agreement immediately upon written notice to NECR.

3. COMPENSATION

3.1 PAS shall be obligated to pay the compensation set forth in Appendix A.

3.1 PAS shall be obligated to pay for and contribute towards (i) the cost of continued maintenance and operating

costs, and variable costs attributable to PAS' usage of the Line through payments set forth in Section 3.3 below; (ii) emergency repairs, capital upgrades and material alterations and additions not included in routine and program maintenance set forth in Section 3.7 below; and (iii) interest rental due to NECR set forth in Section 3.8 below.

3.2 NECR shall be solely responsible for dispatching all operations over the Line and for the maintenance and repair of the Line, including the signals and the signal and dispatching system which controls operations on it. NECR shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class II condition.

~~3.3 [[Intentionally omitted.]]~~

3.3 PAS shall pay to NECR \$[] per car mile (whether loaded or empty including locomotives, cabooses and work equipment) of traffic actually operated by PAS (or its assignee) over the Line to pay for the trackage rights provided herein as a contribution towards the costs of dispatching, maintenance and repair of the Line (including the maintenance, repair and operation of the signals and the signal and dispatching system which controls operations on it). Additionally, if NECR identifies additional variable costs attributable to PAS' use of the Line, the per car mile fee shall be adjusted by the annual amount of such variable costs divided by PAS' car miles during the previous 12 months.

3.4 Except as otherwise provided herein, all payments to be made by PAS under this Agreement shall be adjusted on March 31st of each year during the term of the Agreement, for price level changes from July 1, 2015, (using Second Quarter 2015) based on the relationship of the most recent quarter's Association of American Railroads (AAR) Eastern District, Quarterly Indices of Chargeout Prices and Wage Rates (Table C)—"Material prices, wage rates and supplements combined (excluding fuel)" to comparable indices of the quarter twelve months previous. The first adjustment to be made shall be based on the comparison of the Second Quarter 2015 index value to the Second Quarter 2016.

3.5 PAS shall have responsibility for and shall report and pay directly to the owner of the cars, all mileage, car hire and other charges accruing on cars in PAS's trains on the Line.

3.6 NECR shall issue its bill to PAS for the payments specified by Sections 1.4 and Section 3.3 and Section 3.8 hereof by the fifteenth (15) day of each month for the traffic transported during the preceding calendar month. PAS shall pay to NECR the amount shown on such bill by the last day of the month following in which such bill is issued. Payments not received by PAS by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a month by which the payment is late.

3.7 In the event that NECR is required to undertake any major capital projects (not generally included in routine or program maintenance) which may become necessary due to changes in applicable local, state or federal statutes, ordinances or regulations, or by catastrophic occurrences on the Line, including but not limited to, floods, washouts or destruction of bridges, or implementation of Positive Train Control, PAS or its assignee shall pay its proportionate share of the expenditures actually made by NECR for such capital projects based upon the percentage of total car miles on the Line attributable to PAS's (or its assignee's) average traffic volume during the five (5)-year period preceding the capital project ~~two (2) year period preceding the capital project~~. NECR shall issue its bill to PAS for the payments specified by this Section 3.7 as soon as practicable following the acceptance of a bid or commencement of the capital project. Payments not received by PAS by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a month by which the payment is late.

~~3.8 [[Intentionally omitted.]]~~

3.8 In full satisfaction of any and all obligations of PAS to pay for the interest rental component for the use of the Line, PAS shall pay to NECR \$[] monthly during the term of this Agreement. The interest rental component shall be adjusted each year based on changes in NECR's pre-tax cost of capital, as determined by considering the post-tax cost of capital as determined by the STB, and the effective annual tax rate of NECR, or its parent company if NECR is consolidated with its parent for tax purposes.

3.9 NECR reserves the right to audit the records and activities of PAS solely for the purpose of verifying PAS's compliance with the billing and payment provisions of this Agreement. To the extent such audit includes the review of any confidential shipper information, such audit shall be conducted by an independent auditor mutually agreed to by the parties (the "Independent Auditor") who shall keep confidential information confidential and not disclose such information to NECR. Without limiting the generality of the foregoing, PAS shall keep and maintain true and correct books, records and accounts with respect to its volume of cars along with any annual statements and summaries, for a period of three (3) years after the term of this Agreement. PAS shall, upon request of NECR, make available on reasonable advance notice and during normal business hours and permit NECR, or the Independent Auditor, as applicable, during such period to inspect, make copies of, and audit all such records. If there is any revision to charges as a result of an audit, payment shall be made within thirty (30) days of the audit. The provisions of this Section 3.9 shall survive the termination of this Agreement.

4. ADDITIONS AND ALTERATIONS

4.1 NECR shall pay for and be responsible for the construction, maintenance, repair and renewal of any additional connections to the Line which it may require.

4.2 If PAS determines that changes in or additions and betterments to the Line, including changes in communication, dispatching or signal facilities as they existed immediately prior to the Effective Date, are required to accommodate PAS's operations beyond that required by NECR to accommodate NECR's and Amtrak's operations over the Line, PAS shall pay for the construction of such additional or altered facilities, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities. Notwithstanding the foregoing, NECR shall have the right to approve of any such addition or alteration prior to its construction, which approval shall not be unreasonably withheld, and such addition or alteration shall be constructed in such a manner as to minimize interference with NECR's or Amtrak's operations over the Line.

5. SCHEDULING OF TRAINS AND MAINTENANCE; OPERATING RULES

5.1 The trains, locomotives, cars and equipment of PAS, NECR, Amtrak, and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to any party to this Agreement or any such other user and in such a manner as will result in the most economical and efficient manner of movement of all traffic; provided, however, that NECR shall give priority to intercity rail passenger trains of Amtrak to the extent required by Section 402 of the Rail Passenger Service Act. Notwithstanding the foregoing, PAS shall have the right, in consultation with NECR, to establish the schedules of PAS's trains over the Line. Trains performing local work, whether PAS, NECR or otherwise, are not entitled to priority over trains that are not performing such work. NECR shall establish NECR's train schedules with due regard to the trains to be operated by PAS. Each party shall use reasonable efforts to provide five (5) days' notice of changes in its traffic and operating patterns and procedures which may affect the Line. NECR shall coordinate with PAS and use its best reasonable efforts in scheduling the work required for any upgrades of the Line and any future maintenance or repair of the Line to minimize any interference with or disruption of PAS's operations over the Line.

5.2 Any and all training that may be required to qualify PAS operating personnel as to NECR's operating rules (after the initial training of such personnel, which will be provided by NECR) shall be performed by PAS, and the determination as to whether such operating personnel are qualified under NECR's operating rules shall be made in the discretion of PAS (giving consideration to any comments or recommendations of NECR). NECR shall train, and periodically recertify in accordance with NECR's operating rules, PAS operating personnel who act as instructors for PAS personnel regarding NECR's operating rules.

5.3 NECR operating rules shall govern all operations over the Line, and NECR shall report to PAS any incidents of violation of such rules by a PAS employee; provided, however, that such NECR operating rules shall not unjustly discriminate against PAS or any other third-party user of the Line. NECR may at its option, for good cause shown, exclude such employee from the Line.

5.4 In the event that any dispute arises as to the interpretation of any operating rules, the interpretations of the Uniform Code of Operating Rules, as amended, shall govern.

5.5 For the avoidance of doubt, NECR's 'operating rules' means NECR's operating and safety rules, timetables, special instructions, bulletins, general orders, authoritative directions and amendments, and special rules governing the transportation of Hazardous Substances, and any supplements and replacements thereto as communicated from time to time by NECR's designated operating officer to PAS's designated operating office.

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a PAS train, PAS shall clear the Line to allow for the passage of other trains within a reasonable time. PAS shall perform any rerailing, wrecking or wrecking train service as may be required in connection with such derailment or wreck, in accordance with its customary practices. Except as provided in Section 7, the cost, liability, and expense of the foregoing, including, without limitation, loss of, damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be the responsibility of PAS. In the event that PAS does not begin rerailing operations for passage of trains over the Line within twelve (12) hours of an occurrence or does not complete the process of clearing the Line within a reasonable time, NECR may clear the Line for passage of trains, and PAS shall reimburse NECR for all reasonable costs NECR incurs in performing such service.

7. RELEASE AND INDEMNIFICATION

7.1 Save as herein otherwise provided, each party hereto shall be responsible for and shall assume all loss, damage or injury (including injury resulting in death) to persons or property, including the cost of removing any trackage, repairing trackage and correcting environmental damage, which may be caused by its engines, cars, trains or other on-track equipment (including damage by fire originating therefrom) whether or not the condition or arrangement of the trackage contributes in any manner or to any extent to such loss, damage or injury, and whether or not a third party may have caused or contributed to such loss, damage or injury, and for all loss or damage to its engines, cars, trains or other on-track equipment while on said trackage from any cause whatsoever, except in the case of collision, in which event the provisions of Section 7.2 shall apply.

7.2 In the event of a collision between NECR's and PAS's engines, cars, trains or other on-track equipment while on the Line, the apportionment of liability between the parties hereto for all loss, damage or injury (including injury resulting in death) to any person (including NECR's or PAS's employees, agents or representatives) or property shall be governed by the following provision:

7.2.1 If the employees of one party are solely at fault, that party shall be responsible for all such loss, damage or injury including the cost of removing wreckage, repairing trackage, and correcting environmental damage.

7.2.2 If the employees of both parties hereto are at fault, or if the cause of the accident is so concealed that it cannot be determined whose employees are at fault, each party shall bear and pay for all such loss, damage or injury which its own engines, cars, trains or other on-track equipment and their contents or property in its custody, or its employees or others claiming for them, may have suffered by reason or in consequence of the accident. Responsibility for all other such loss, damage or injury shall be apportioned equally between the parties hereto.

7.2.3 The words "all other such loss, damage or injury" referred to in this Section 7.2 shall be deemed to include but not be limited to the cost of removing wreckage, repairing trackage, correcting environmental damage, and third party claims.

7.2.4 As between the parties hereto, the foregoing provisions of this Section 7.2 shall be applicable whether or not a third party may have caused or contributed to the accident.

7.2.5 The words "trackage" referred to in this Section 7 shall be deemed to include but not be limited to the tracks, structures or facilities pertaining to operation of the Line.

7.3 Without in any way restricting the terms of this Section 7, in the case of a collision or accident between the train of either party to this Agreement and the property of a third person or other entity, including Amtrak, including any action done in the process of trying to avoid an accident or a collision, such party shall save harmless and indemnify and defend the other party forthwith for all damages suffered by (or claimed against) the other party including

damages to equipment and structures and third party injuries (including death) or injuries (including death) to the employees or agents of the other party (including also the results of those actions done in the process of avoiding a collision or accident), and irrespective of the ordinary negligence or fault of either party or such third person or other entity, and with a right of subrogation in favor of such party against any such third person or other entity.

7.4 Each party hereto shall forever indemnify and save harmless the other party, from and against all claims, liability or judgments by reason or on account of any injury to or death of any person or of any loss or damage to property, the liability for which is herein assumed by such first mentioned party, and such first mentioned party shall pay and discharge any judgment that may be obtained by reason thereof, and all costs, charges and expenses payable thereunder, including legal counsel fees.

7.5 The parties shall settle, as between themselves, any claim for loss or damage according to the terms of this Agreement, notwithstanding any judgment or decree of any court or other tribunal in a proceeding brought by other parties. In case a suit or proceeding shall be commenced by any person or corporation against either party hereto for or on account of any loss, damage or injury for which the other party hereto is liable under the provisions of this Agreement, the party so sued or proceeded against shall give to the other party reasonable notice, in writing, of the pendency of such suit or proceeding and thereupon the other party shall assume the defense of such suit or proceeding or shall save and hold the party so sued harmless from all loss and costs by reason thereof. Neither party hereto shall be bound by any judgment against the other party unless it shall have reasonable notice that it is so required to defend and has reasonable opportunity to make such defense. When such notice and opportunity has been given, the party notified shall be bound by the judgment as to all matters that could have been litigated in such suit or proceeding.

7.6 In every case of death or injury suffered by an employee of either PAS or NECR, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

8. DEFAULT; PAYMENT DELINQUENCY

8.1 In the event of a material breach by PAS of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from NECR, NECR shall have the right to terminate this Agreement upon ninety (90) days' notice.

8.2 If PAS becomes delinquent in payment of any amount by more than fourteen (14) days under the terms of Section 3, NECR shall be entitled to receive advance payment from PAS for each PAS train seeking access to the Line until PAS satisfies the delinquency in full. If PAS fails to tender the advance payment, NECR shall be further entitled to exclude and eject PAS from the Line until PAS tenders the advance payment. NECR shall be entitled to these remedies for delinquencies even if PAS has disputed the billed amount by invoking arbitration or otherwise. During the pendency of any such exclusion or ejection, NECR shall nevertheless accept PAS cars for interchange at any point on the Line.

9. ~~Intentionally Omitted.~~ INSURANCE AND HAZARDOUS SUBSTANCES

9.1 Insurance. PAS shall maintain the insurance coverage required by Schedule "A" attached hereto.

9.2 Transport of Hazardous Substances. In the event that PAS transports Hazardous Substances over the Line, PAS shall:

- (a) comply with all applicable federal, state and municipal laws, rules and regulations including, but not limited to, applicable rules and regulations as set forth by the, Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the Surface Transportation Board, and the Association of American Railroads (AAR) respecting the handling and transporting of Hazardous Substances; and

- (b) ensure its personnel comply with such applicable laws, rules and regulations and meet all the requirements and qualifications for training and certification set forth by such laws.
- (c) prepare and have at all times, an Emergency Response Plan with respect to its response to incidents or derailments involving Hazardous Substances over the Line and upon request provide a copy to NECR. The Emergency Response Plan must include at a minimum: (i) reporting and response procedures in the event of a derailment, accident or spill on the Line; (ii) emergency response service providers and contacts and their phone numbers; and (iii) incident reporting phone numbers including phone numbers for NECR incident reporting and local NECR personnel.
- (d) In the event any accident or derailment involving PAS rail cars, including rail cars carrying Hazardous Substances shall occur on any segment of the Line, PAS agrees to:

 - (i) immediately notify local emergency response service providers (including the local fire stations) in accordance with its Emergency Response Plan, and ensure that such local emergency response service providers have appropriate information.
 - (ii) immediately report any release, leak, deposit or spill of a Hazardous Substance (e.g. fuel spill from an accident) to NECR dispatch, whether or not such releases are required to be reported to any federal, state or local authority, and to any regulatory authorities as required by law.
 - (iii) promptly respond to an accident, or a leak, spill or deposit of any substance (including without limitation any Hazardous Substance, waste or pollutant), except to the extent such leak, spill or deposit is *de minimis* in nature and results from the day to day operation of trains by PAS over the Line. PAS shall take all reasonable actions to contain the spill and respond in accordance with its Emergency Response Plan; provided, however that NECR may elect to reasonably remediate, repair and restore the roadbed, track and related structures impacted by any Hazardous Substance, at the expense of the PAS.
 - (iv) provide a written follow-up report to NECR within five (5) working days of any release, leak, deposit or spill on the Line, or any event on or affecting NECR property which constitutes an offence or is reportable under any laws, by-laws, or regulations relating to the protection of the environment, or is in breach thereof. Such follow-up report will describe the incident, substance and volume released, and measures undertaken or planned to clean up and remove the released substance and any contaminated soil, water and materials and waste.
 - (v) provide NECR with copies of any and all reports made to any governmental agency that relate to such incidents and/or releases. In addition, PAS shall provide NECR with a copy of any alleged violation of applicable environmental laws relating to such incident on the Line, as well as a copy of any written responses made by PAS to governmental authorities regarding said violations.
 - (vi) commence and complete, at NECR's request, the cleanup, disposal, and remediation of any spill or environmentally unsound condition occurring on the Line as a result of PAS's operations over the Line. PAS shall completely clean up any such spill or condition; shall dispose of any contaminated soil or waste in a properly licensed disposal facility; and shall replace contaminated soils with clean fill as appropriate under the circumstances. PAS shall demonstrate to NECR's reasonable satisfaction that any impacted lands and any impacted adjacent lands have been restored to a condition existing immediately prior to the contamination.
 - (vii) if PAS and NECR are in disagreement as to whether any such release has been completely cleaned up, the contaminated soil or waste properly disposed of and replaced with appropriate clean fill, to retain a reputable environmental consulting firm to review PAS's activities and report whether PAS has fulfilled its obligations. If PAS's obligations have not been fulfilled, PAS shall take further action as is necessary to rectify any deficiencies and obtain a report from the environmental consultant verifying the same.

(viii) be solely responsible for all costs related to the clean-up and remediation of any releases or incidents resulting from PAS's operations on the Line.

(e) NECR may from time to time perform inspections and environmental, safety, risk and security assessments of the Line. NECR may at any time implement any environmental, safety or security measures, procedures or requirements that it considers necessary or desirable, in its reasonable opinion. NECR agrees to notify PAS regarding any such measures, procedures or requirements and PAS agrees to cooperate, as necessary, in implementing such measures.

10. GENERAL PROVISIONS

10.1 No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

10.2 Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified above, or at such other address for a party as that party may specify by notice as provided herein, by (i)(A) delivery in hand or by postage prepaid, United States first class mail and (B) registered or certified mail, return receipt requested, or (ii)(A) telefax and (B) registered or certified mail, return receipt requested, or (iii)(A) Federal Express or other form of expedited mail that provides for delivery to the sender of a signed receipt, or (iv) telegram. Notice so sent shall be effective upon receipt.

10.3 Integration. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect. Except for any and all obligations incurred or causes of action accrued thereunder prior to or as of the Effective Date, all prior trackage rights agreement between the parties or their predecessors with respect to the Line or any segments of the Line, including the Trackage Rights Order imposed by the ICC by decision dated February 6, 1990 in ICC Finance Docket No. 31250, are hereby terminated. Any provisions of any other agreement(s) between NECR and PAS which are not inconsistent with the provisions of this Agreement shall remain are hereby terminated.

10.3.1 [Intentionally Omitted- No Longer Applicable]

10.4 Miscellaneous. This Agreement: (i) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by both parties; (ii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iii) is not intended to inure to the benefit of any party not a party to this Agreement.

10.5 Availability of Equitable Relief. The obligations imposed by this Agreement are unique. Breach of any of such obligations would injure the parties to this Agreement; such injury is likely to be difficult to measure; and monetary damages, even if ascertainable, are likely to be inadequate compensation for such injury. Protection of the respective interests provided herein would require equitable relief, including specific performance and injunctive relief, in addition to any other remedy or remedies that the parties may have at law or under this Agreement.

10.6 Force Majeure. No party to this Agreement shall be responsible for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical breakdown, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays in suppliers, derailments or failure of transportation, communication or power supply.

10.7 Trains, Locomotives, Cars or Equipment. As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. By way of clarification, the foregoing does not imply that PAS may handle trains, cars or equipment in haulage service for

another rail carrier, except where the cars or equipment are being transported under a haulage arrangement for Norfolk Southern Railway for interchange with NECR. Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

10.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. PAS shall have the right to assign any or all of PAS's rights and obligations under this Agreement to any affiliate of PAS, following consultation with written consent of NECR, which shall not be unreasonably withheld and the receipt of any required regulatory or other necessary approvals, including from the STB.

10.9 Governing Law. This Agreement is imposed and entered into in, and shall be governed by the laws of, the District of Columbia.

SCHEDULE "A"
Insurance Coverage

1.1 General

PAS, at its sole cost and expense, shall take out and keep in full force and effect and pay all premiums for, throughout the term and during such other time as this Agreement remains in force, the following insurances:

- (a) Railroad Liability insurance with a limit of not less than Two Hundred Million Dollars (\$200,000,000) for any one loss or occurrence for personal injury, bodily injury, or damage to third party, including but not limited to NECR property including loss of use thereof, and a self insured retention of not more than One Million Dollars (\$1,000,000). This policy shall by its wording or by endorsement include but not be limited to the following:
 - (i) NECR and its associated or affiliated companies (and the directors, officers, employees, agents and trustees of all of the foregoing) as an additional insured with respect to obligations of PAS under this Agreement and incidental thereto;
 - (ii) "cross liability" or "severability of interest" clause which shall have the effect of insuring each entity named in the policy as an insured in the same manner and to the same extent as if a separate policy had been issued to each;
 - (iii) blanket contractual liability, to include the insurable liabilities assumed by PAS under this Agreement;
 - (iv) shall not exclude operations on or in the vicinity of the railway right of way, if applicable;
 - (v) products and completed operations;
 - (vi) insure against all Federal Employer's Liability Act claims for liability arising out of PAS's operations under this Agreement; and
 - (vii) sudden and accidental pollution, or named perils pollution including the release or dispersal of pollutants as a result of a collision, overturning or derailment of any vehicle or railway rolling stock;
- (b) Automobile Liability insurance covering bodily injury and property damage in an amount not less than One Million (\$1,000,000) Dollars per accident, covering the ownership, use and operation (including the loading and unloading) of any motor vehicles and trailers which are owned, non-owned, leased or controlled by PAS and used in regards to this Agreement;
- (c) "All Risks" property insurance covering PAS's owned property and the property of NECR in the care, custody, or control of PAS, or for which PAS has assumed liability, on a replacement cost basis. With respect to the property of NECR, such policy shall contain a loss payable clause in favor of NECR, and include NECR as an additional insured.

Not more frequently than once every three years, NECR may request reasonable changes to the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

PAS agrees that the insurance it maintains is primary and not excess of any other insurance that may be available.

PAS shall provide NECR with written notice and all reasonable particulars and documents related to any damages, losses, incidents, claims and potential claims concerning this Agreement as soon as practicable after the damage, loss, incident or claim has been discovered. PAS is responsible for any deductible and excluded loss under the insurance.

If PAS fails to maintain the insurance required under this Agreement, NECR may at its option terminate this Agreement.

1.2 Replacement Insurance

If the insurance procured by PAS pursuant to this Schedule A takes the form of a claims made policy and is cancelled or allowed to expire without renewal, PAS shall provide evidence of replacement insurance that provides coverage as required by Section 1.1. Such coverage must be retroactive to the original inception date of the cancelled or non-renewed policy. PAS further agrees to promptly give notice to NECR's Risk Manager of any claim or notice of incident, or notice of potential claim related to this Agreement, that is required to be reported to PAS's liability insurance company.

1.3 Notice to NECR

Each policy of insurance obtained by PAS pursuant to Section 1.1 shall contain provisions requiring that the insurance carrier to endeavor to give NECR, through its Risk Manager, at least 30 days' notice in writing of any proposed cancellation of any policy PAS is required to maintain pursuant to this Schedule A. Such notice shall be by registered mail to the specific attention of: [INSERT ADDRESS].

1.4 Certificate of Insurance

All policies of insurance stipulated in this Schedule A will be with insurers with a minimum A.M. Best Rating of "A- VII" and in a form satisfactory to NECR, and PAS will see that a copy of all certificates of insurance are delivered to NECR prior to the date that PAS commences operations and prior to any insurance renewal thereof. NECR shall have no obligation to examine such certificate(s) or to advise PAS in the event its insurances are not in compliance herewith. Acceptance of such certificate(s) which are not compliant with the stipulated coverages shall in no way whatsoever imply that NECR has waived its insurance requirements.

1.5 No Limitation

Neither compliance with the requirements of this Schedule A nor NECR's approval of the terms and conditions of any such policy will in any way limit or modify the obligation of PAS to provide specific insurance coverage as required by Section 1.1 of this Schedule A. The insurance coverage acquired by PAS pursuant to this Schedule A shall not in any manner restrict or limit the liabilities assumed by PAS under this Agreement.