

SERVICE DATE – OCTOBER 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35842

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

Digest:¹ The Board adopts modifications to a trackage rights order governing the operations of Pan Am Southern LLC over a New England Central Railroad, Inc. railroad line.

Decided: October 30, 2017

By decision served December 23, 2014, the Board instituted a proceeding to establish new terms and conditions for the trackage rights of Pan Am Southern LLC (PAS) over a New England Central Railroad, Inc. (NECR) railroad line, extending approximately 72.8 miles from White River Junction, Vt., to East Northfield, Mass. In this decision, the Board establishes terms and conditions based on modifications to the previous trackage rights order.² New terms and conditions are set forth in Appendix A, and Appendix B illustrates the changes from the previous terms and conditions in redline.

BACKGROUND

In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C.2d 761 (1988), aff'd sub nom. National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), the Interstate Commerce Commission (ICC) required Boston and Maine Corporation (B&M) to sell to Central Vermont Railway, Inc. (CV), a 48.8-mile portion of the subject line from Windsor, Vt., to Brattleboro, Vt., and CV to grant to B&M trackage rights over that portion of the line. In National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The parties designated certain information in this decision as confidential or highly confidential. While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not present its findings with respect to the issues without disclosing certain information.

Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak II), 6 I.C.C.2d 539 (1990), the ICC imposed terms and conditions (referred to as the “trackage rights order” or TO) for the trackage rights for the 48.8-mile portion at issue in Amtrak I (the Middle Segment), as well as two adjoining CV-owned segments (the Northern and Southern Segments)³ over which B&M previously had trackage rights (collectively, the line).⁴ The rights associated with Amtrak I and Amtrak II have subsequently been acquired by other railroads; NECR has acquired CV’s ownership rights, and PAS now holds the trackage rights originally assigned to B&M. (NECR Request to Set Trackage Rights Terms & Conditions 4.)

The TO allowed either party to apply to the agency for modifications of the terms and conditions after 20 years from the conveyance date of September 9, 1988. Amtrak II, 6 I.C.C.2d at 545. NECR requested that the Board open a proceeding to consider such modifications in a petition filed June 17, 2014, and the Board granted that request by a decision served December 23, 2014.⁵ NECR seeks to have the Board reset the terms and conditions of the TO to reflect what it claims are the current standards for such agreements, the increased value of the line, and the higher costs of maintenance. (NECR Opening 5-6.)

By decision served March 12, 2015, the Board granted the parties’ request to commence mediation and issued a procedural schedule to govern the proceeding should mediation be unsuccessful. Mediation ultimately was unsuccessful.

In accordance with the procedural schedule, as amended,⁶ NECR filed its opening statement and evidence on June 4, 2015. NECR proposed both an increase in the compensation it receives under the TO and detailed modifications to other terms of the TO. With respect to compensation, NECR submitted that a revised trackage rights fee should be determined under the framework used by the Board and the ICC in prior trackage rights compensation cases, as first set forth in St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW I), 1 I.C.C.2d 776 (1984) and St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW II), 4 I.C.C.2d 668 (1987) (collectively, SSW Compensation). See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 955 (1998) (applying SSW Compensation in a trackage rights compensation case). Under SSW Compensation, total compensation is the sum

³ The Northern Segment extends from White River Junction, Vt. (the location of an interchange with Washington County Railroad) to Windsor, Vt. (where the Middle Segment begins). (NECR Opening, V.S. Banks & Ireland, App. “Track & Infrastructure Valuations” 2.) The Southern Segment extends from East Northfield, Mass. (the location of an interchange with PAS) to Brattleboro, Vt. (where the Middle Segment begins). Id.

⁴ B&M and CV agreed that the final TO should govern the entire subject line. Amtrak II, 6 I.C.C.2d at 542.

⁵ The decision also determined, in response to a separate motion filed by PAS, that certain operating restrictions imposed by NECR violated the existing terms of the TO.

⁶ The procedural schedule was extended at the parties’ request by subsequent decisions served on April 17, 2015, and May 19, 2015.

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 rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. E.g., SSW I, 1 I.C.C.2d at 779-80. The interest rental component is determined by multiplying: (i) the value of the assets that comprise the trackage rights line by (ii) a rate of return equal to the current pre-tax nominal cost of capital. See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 4 S.T.B. 75, 78-79 (1999). This figure—the total interest rental—is then divided by the line's total car miles, in order to convert it to a per-car mile charge. Id. In trackage rights compensation cases, the Board has generally discussed four possible methods for determining the appropriate valuation base for the interest rental component: (1) capitalized earnings (CE) (also known as going concern value (GCV)⁷); (2) comparable line segments; (3) reproduction cost new less depreciation (RCNLD); and (4) stand-alone cost. See Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry., FD 26476 (Sub-No. 1), slip op. at 4 (ICC served Sept. 20, 1994); Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp., 8 I.C.C.2d 297, 304-305 (1992).

On July 16, 2015, NECR filed a motion (Methodology Motion) requesting that the Board adopt a new valuation methodology called value in place (VIP), which NECR claimed was a variant of RCNLD, and prohibit PAS from seeking discovery related to the CE approach. NECR's Methodology Motion specifically requested that the Board find the CE approach inappropriate for use in this case.⁸

PAS opposed NECR's Methodology Motion, arguing that discovery should be allowed on all SSW Compensation methodologies and noting that it had not yet determined which of the four interest rental component methodologies it intended to use. PAS asserted that it was entitled to gather information and data relevant to any of the elements of the SSW Compensation methodologies, evaluate the evidence, make its case for application of its chosen methodology, and critically address the method advocated by NECR. (PAS Reply to Methodology Motion 4.)

The Board denied NECR's Methodology Motion by decision served on February 12, 2016, holding that PAS should have an opportunity to build a record through discovery and obtain the data it needed to make its case on the appropriate valuation method for use in determining trackage rights compensation. The Board also recognized NECR's and PAS's agreement that SSW Compensation would be the framework for determining trackage rights compensation in this case, consistent with precedent. New England Cent. R.R.—Trackage Rights Order—Pan Am. S. LLC, FD 35842, slip op. at 2 (STB served Feb. 12, 2016).

On June 7, 2016, the Board accepted the procedural schedule jointly proposed by the parties, which set a deadline for PAS's reply, NECR's rebuttal, and PAS's surrebuttal. PAS filed

⁷ See SSW II, 4 I.C.C.2d at 674; PAS Reply, V.S. Baranowski 33, July 19, 2016.

⁸ In subsequent pleadings disputing the scope of discovery, NECR argued that the comparable line segment method would also be inappropriate. (See NECR Mot. for Suppl. Protective Order, Aug. 24, 2015.)

its reply statement and evidence on July 19, 2016. As discussed below, PAS argued for the first time on reply that SSW Compensation should not apply here, although PAS also submitted calculations under SSW Compensation in the alternative, using CE to calculate the interest rental component. Following discovery, NECR filed its rebuttal on January 23, 2017, and PAS filed its surrebuttal on February 22, 2017.⁹

DISCUSSION AND CONCLUSIONS

This decision will first address the appropriate trackage rights fee and will then address the numerous other terms and conditions disputed by the parties.

I. Trackage Rights Fee

The Board first addresses the issue of whether SSW Compensation should apply here. Because the Board holds that SSW Compensation should apply, the Board then calculates a trackage rights fee using SSW Compensation. The Board discusses each issue in turn.

A. Applicability of SSW Compensation

The SSW Compensation cases involved the establishment of compensation for trackage rights granted to redress the effects of a merger, but the methodology has been applied in other situations, including cases where the parties wanted trackage rights to continue but could not agree on compensation. See, e.g., Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 297-99. While the parties initially agreed that SSW Compensation would apply in this case (see NECR Opening 6-7; PAS Reply to Methodology Motion 3 n.2), PAS changed course in its reply statement. PAS contends in its reply that the trackage rights fee must be frozen in perpetuity because any change now would undermine assumptions made in 1988 when the Amtrak I decision set the just compensation due to B&M for the taking of its line. Specifically, PAS argues that:

in establishing the takings value of \$2,373,286 to be paid to B&M, the ICC used certain assumptions regarding future cash flows, future maintenance payments, and B&M's future obligation to pay for capital upgrades. These fundamental assumptions were extended into perpetuity [I]f the changes recommended by NECR result in PAS paying more than what was assumed under the Amtrak I Decisions, then B&M should be entitled to additional compensation for the taking.

(PAS Reply 10, July 19, 2016; see also id. at 12-13 (restating this position); PAS Surrebuttal 6-8 (same).) PAS makes the same argument with respect to the interest rental component of SSW

⁹ The parties have supplied the Board with a voluminous written record, which provides sufficient information for the Board to address the issues presented. Accordingly, the Board will deny NECR's March 14, 2017 request for oral argument.

Compensation, asserting that the inclusion of an interest rental component would invalidate the ICC's calculation of takings compensation paid to B&M. (PAS Reply 10-11, July 19, 2016.)

The Board rejects PAS's argument. The practical effect of PAS's argument is that the adequacy of compensation already paid for a taking can be called into question decades later if assumptions underlying the supporting calculations for that compensation prove unfounded. Such a position demonstrates a fundamental misunderstanding of takings law. Compensation for a taking is determined based on fair market value "at the time of the taking." E.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979). The ICC recognized this principle in Amtrak I, stating that the trackage rights arrangement "is a separate transaction" and that "the proper focus of the compensation decision is upon the value of the property at the time it is taken." Amtrak I, 4 I.C.C.2d at 790-91 (emphasis added). The ICC determined that \$2,373,286 was just compensation for the taking of B&M's line as of the time of the taking, independent of the trackage rights fee. In fact, at the time, it was not even known if B&M "would actually consummate the trackage rights." Id. Amtrak paid the required sum to B&M on September 9, 1988. Amtrak II, 6 I.C.C.2d at 540. The adequacy of compensation for B&M's loss of the line is thus no longer subject to challenge.¹⁰

PAS is wrong that the just compensation calculation of fair market value made contemporaneously with the taking in 1988, based on what was known at the time, must later be adjusted if, in retrospect, it could not accurately account for all possible future changes in revenues and costs. Calculating compensation for a 1988 taking based on what is known in 2015 or 2017, or what will be known in 2018 or 2020, is incompatible with the requirement that value be assessed "at the time of the taking." While courts have identified two exceptions to the rule that compensation is calculated at the time of the taking, neither applies in this case. The exceptions are: (1) when the market value is too difficult to find as of the time of the taking, and (2) when use of the time of the taking would result in manifest injustice to owner or public. See, e.g., 564.54 Acres of Land, 441 U.S. at 512-13; Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 747 (7th Cir. 2006) (in the context of a feeder line application, market value was too difficult to find as of the date of the taking due to volatility in the price of steel). Here, the ICC clearly did

¹⁰ Indeed, B&M exhausted its appeals on this issue shortly after the transfer of the line. On review of Amtrak I, the U.S. Court of Appeals for the District of Columbia Circuit held that the statute in effect at that time (§ 402(d) of the Rail Passenger Service Act) did not permit the ICC to require the transfer of railroad property to Amtrak if Amtrak intended to reconvey it to another railroad. See Bos. & Me. Corp. v. ICC, 911 F.2d 743 (D.C. Cir. 1990) (vacating the ICC's decision requiring transfer of the line). Amtrak, CV, and the ICC sought certiorari, which the Supreme Court granted. The Supreme Court reversed the decision of the Court of Appeals and upheld the ICC's authority to require the transfer of the line. Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407 (1992). The Court also held that "the Court of Appeals did not address the parties' challenges to the ICC's just compensation finding as well as certain other issues. . . . These questions should be resolved on remand." Id. at 424 (internal citation omitted). The parties voluntarily dismissed their appeal on remand without a decision from the D.C. Circuit on the compensation challenge. Bos. & Me. Corp. v. ICC, 976 F.2d 1444 (D.C. Cir. 1992) (unpublished) (per curiam).

not believe that the market value was too difficult to find, as it issued the Amtrak I decision calculating just compensation as of the time of the taking. See Amtrak I, 4 I.C.C.2d at 791. And it is not manifest injustice to base just compensation, as the ICC did in Amtrak I, on a GCV calculation performed at a single, discrete point in time (as of the date of the taking). A contrary rule requiring constant reevaluation of GCV as revenues and costs fluctuate would prevent any practical use of the GCV methodology because no determination of value would ever be final.¹¹

The practical wisdom of a just compensation rule that fixes the amount of compensation at the time of the taking is obvious. In Amtrak I, the ICC applied a variant of GCV that compared the net present value of B&M's profits with the Middle Segment to the net present value of B&M's profits without the Middle Segment; the ICC described this as a "before and after" approach. Amtrak I, 4 I.C.C.2d at 789 (compensation intended to make B&M "no better or worse off" after the taking as opposed to before the taking). The ICC calculation included numerous B&M revenue and expense inputs—for example, the cost of signals and interlockers, personnel costs for train and engine crews, dispatching costs, property taxes, revenues from local and interchange traffic, and lease revenues. Id. at 792. If PAS's theory were correct, a change to any of these inputs after the initial calculation would invalidate the ICC's 1988 determination, entitling B&M to more (or less) compensation than the lump sum it received at the time. Since 1988, of course, all or almost all of these inputs have changed. For example, as early as 1990, new traffic appeared on the line due to the reopening of an interchange that was out of service in 1988—a change to the revenue numbers included in the GCV, which would require compensation to be recalculated under PAS's approach. See Amtrak II, 6 I.C.C.2d at 544. Accordingly, accepting PAS's position would render the GCV approach unusable, because it would require GCV to be applied in a way that would continually invalidate its results.

PAS may be making the more limited claim that the trackage rights fee is the only component of the GCV calculation that must be frozen, but that argument also does not withstand scrutiny. PAS does not explain why every other GCV input could change dramatically after 1988 without invalidating the calculation, but even the slightest increase in the trackage rights fee would entitle B&M to additional compensation. Such an argument leads to absurd results; after a century, for example, other circumstances contributing to the GCV could change so much as to become unrecognizable, but the trackage rights fee would have to remain at the level that the ICC viewed as a proxy for the value of the traffic in 1988. See Amtrak I, 4 I.C.C.2d at 790.

Ultimately, PAS's argument—that no changes to the trackage rights fee can be made because the compensation calculation in Amtrak I depended upon assumptions about trackage rights fees under the TO approved in Amtrak II—fails because the underlying premise is wrong. The ICC made clear that the compensation award in Amtrak I did not, in fact, depend on what happened with the TO. The ICC expressly allowed B&M to accept or reject the trackage rights

¹¹ Among other effects, constant reevaluation of GCV—preventing its practical use—would obstruct the valuation approach that Congress prescribed for feeder line applications. See 49 U.S.C. § 10907(b)(2) (requiring that a line be valued at the greater of net liquidation value or GCV).

arrangement and, as noted earlier, characterized the compensation decision as “a separate transaction.” See Amtrak I, 4 I.C.C.2d at 790-91. Because the ICC was perfectly willing to accept the possibility that B&M would not enter into the TO, the compensation calculation for the taking of B&M’s line could not, logically, have made assumptions that required B&M to accept the TO.

Despite the clear reasoning in Amtrak I, PAS contends that two aspects of the TO are particularly inviolate because of their potential to undermine the just compensation calculation: (1) a \$75,000 cap on annual trackage rights payments; and (2) no interest rental component for the Middle Segment. (PAS Reply, V.S. Baranowski 6-7, July 19, 2016.) As to the first, the ICC made clear that its compensation determination did not depend on B&M never paying more than \$75,000 per year for trackage rights. In fact, the ICC recognized the possibility that there might not be a TO. Therefore, the ICC included \$75,000 per year in the GCV calculation either as the trackage rights fee, if B&M accepted the trackage rights, or as a proxy for lost revenue if B&M turned down the trackage rights. Amtrak I, 4 I.C.C.2d at 790.

With respect to the second, PAS relies on language from Amtrak II to support its assertion that there must never be an interest rental payment, but Amtrak II does not undermine the separation established in Amtrak I between compensation and the TO. PAS is correct that Amtrak II rejected CV’s proposed interest rental component. See Amtrak II, 6 I.C.C.2d at 551-52; PAS Reply 10-11, July 19, 2016. However, when the ICC stated that its GCV calculation “precluded any additional interest-rental payment,” Amtrak II, 6 I.C.C.2d at 551, the ICC was referring to the inclusion of an interest rental component in the initial TO. There is no indication the ICC intended the preclusion to apply to any future versions of the TO as modified following the reopening period. See Amtrak II, 6 I.C.C.2d at 551 (as part of the same reasoning, the ICC determined that the annual cap would expire after 20 years).¹² The same is true with respect to PAS’s argument that the ICC provided “specific directives regarding what PAS is and isn’t required to pay.” (See PAS Surrebuttal 9.) The ICC’s discussion related to what B&M was required to pay during the initial term of the TO, not every subsequent term into perpetuity. See, e.g., Amtrak I, 4 I.C.C.2d at 790-91 (in the context of the GCV calculation, stating that the trackage rights arrangement “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.”).¹³

PAS also argues that the trackage rights fee that the ICC set in Amtrak II was designed to ensure competitive parity. (See PAS Reply 3-4, 11-12, July 19, 2016). However, even if the

¹² In support of its argument, PAS also cites a statement made by an expert witness for Amtrak and CV from the original Amtrak II record, who stated that there would be no interest rental payment “in any year.” PAS Surrebuttal 9-10 n.22; Amtrak II, 6 I.C.C.2d at 550-51 n.11. However, the ICC quoted that statement in summarizing B&M’s argument, not in the ICC’s conclusions. See id.

¹³ Even if the ICC’s language could be interpreted in the way that PAS proposes—a view the Board does not share—the Board would depart from that reasoning now. For the reasons discussed above, freezing the trackage rights fee in perpetuity is neither required nor appropriate.

ICC set the fee at a level intended to ensure competitive parity in 1990, we do not agree with PAS that the same fee ensures competitive parity in 2017, given the changes in costs, revenues, and other circumstances discussed above. Rather, as NECR correctly states, SSW Compensation is the Board's method of determining appropriate trackage rights compensation given current facts and circumstances. (See NECR Rebuttal 15, 19.) Retaining a trackage rights fee substantially lower than the number determined under SSW Compensation—less than half of the appropriately calculated fee, which is discussed below—would actually stand in the way of competitive parity, because it would require one carrier to subsidize its competitor's operations significantly. (See NECR Rebuttal 16, 18.)

Moreover, NECR argues persuasively that the trackage rights fee established in 1990 is no longer an adequate payment for use of the line nearly 30 years later. Indeed, aside from an annual adjustment for inflation, the current trackage rights fee does not account for the numerous factors that may have changed in the last 30 years, such as customers served, commodities carried, volumes and resulting revenues, and maintenance and operating costs, among other things. See, e.g., Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 7 (STB served May 15, 2015) (a carrier's traffic mix cannot be expected to remain unchanged after years have passed); Amtrak II, 6 I.C.C.2d at 544 (traffic increase expected due to reopened interchange); NECR Opening, V.S. Ebbrecht 3-7; NECR Rebuttal 12-15. The purpose of SSW Compensation is to “place a trackage rights tenant in the same position as a landlord.” W. Coal Traffic League v. STB, 169 F.3d 775, 781 (D.C. Cir. 1999). Maintaining a fixed fee from 1990, at a fraction of the fee appropriately calculated under SSW Compensation, would not accomplish that goal. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (Sub-No. 21), slip op. at 11 (STB served Dec. 15, 2000) (“the landlord would end up subsidizing the tenant, it would not receive an adequate return, and there would be no economic incentive for it to maintain or replace the line as necessary to continue efficient service.”).

The Board agrees with NECR that, on balance, freezing the trackage rights fee in perpetuity at a depressed level would be substantially inconsistent with the rail transportation policy (RTP) of 49 U.S.C. § 10101. As NECR points out, the RTP includes policies “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board” and “to operate transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. § 10101(3), (8). Preventing NECR from earning adequate revenues could impair its continued ability to maintain the track, which could in turn present safety concerns. (See NECR Rebuttal 16-17.) Also, as noted above, maintaining a fee far below the SSW Compensation level would have a negative impact on competitive parity, in conflict with the RTP's instruction “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.” See 49 U.S.C. § 10101(4).¹⁴

¹⁴ PAS also argues that adopting NECR's proposed trackage rights fee—which would be a 1,389% increase over the current fee—would have significant, adverse effects that are contrary to the RTP. (See PAS Reply 14-17, July 19, 2016). As discussed in more detail below, the Board is not accepting the trackage rights fee proposed by NECR and instead adopts a significantly smaller increase. See Section I.B, *infra*. Increasing the trackage rights fee in a far

(continued...)

Finally, Section 2.2¹⁵ of the TO allows either party, after 20 years, to seek modifications from the other, and if satisfactory modifications are not agreed to after a reasonable period for negotiation, to petition the ICC for modifications. Amtrak II, 6 I.C.C.2d at 561. Notably, the ICC did not exclude the trackage rights fee from this provision.¹⁶ PAS nonetheless attempts to characterize the reopening provision as doing so; PAS states that “either party was granted the right to seek minor modifications after the initial term expired.” (PAS Reply 11, July 19, 2016.) But Section 2.2 of the TO includes neither the word “minor” nor the concept that potential modifications after 20 years are limited to minor ones. Similarly, PAS argues that the reopening provision was meant to apply to the Northern and Southern Segments, but not the Middle Segment; according to PAS, terms applicable to the Middle Segment can be changed only if the parties agree to the change(s). (See PAS Surrebuttal 8.) Again, however, PAS’s claim finds no support in the TO itself. Section 2.2 contains no limitation to any particular segment, much less a specific restriction that the terms applicable to the Middle Segment can be modified only with the parties’ consent. In fact, Section 2.2 establishes nearly the opposite: if the parties cannot agree on proposed modifications after a reasonable period for negotiation, they may apply to the agency for modifications (i.e., modifications without the consent of both parties), without reference to any segment of the line.

The trackage rights fee is therefore subject to the generally applicable modification provision. For this reason, the Board disagrees with PAS’s argument that, to change the trackage rights fee, NECR would need to support reopening Amtrak I and Amtrak II under 49 U.S.C. § 1322(c) by demonstrating material error, new evidence, or substantially changed circumstances. (See PAS Reply 13 n.36, July 19, 2016.) NECR followed the correct procedure to seek changes in the TO, including the trackage rights fee, by petitioning the Board under the modification provision created in the Amtrak decisions.

Accordingly, the Board will lift the payment cap included in the original TO and set the per car mile trackage rights fee based on SSW Compensation.

(...continued)

more limited way, as this decision does, will increase PAS’s cost of providing service, but is consistent with the RTP for the reasons discussed above.

¹⁵ Unless otherwise noted, section numbers in this decision refer to sections in the current TO as set forth in Amtrak II, 6 I.C.C.2d at 559 et seq., as opposed to section numbers in the revised TO attached to this decision.

¹⁶ The Board does not need to determine whether it would have been enforceable to exclude a term from future modification, because the ICC did not do so.

B. Calculation of the Trackage Rights Fee Under SSW Compensation

As noted above, total compensation under SSW 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 rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. E.g., SSW I, 1 I.C.C.2d at 779-80. NECR and PAS agree on the first component but disagree on the second and third components. Under NECR's approach, the trackage rights fee would be \$6.70 per car mile. (See PAS Reply 3 n.9, July 19, 2016.) Under PAS's approach, the trackage rights fee would be \$0.45 per car mile. Id. As discussed below, the Board adopts PAS's approach to the second and third components, subject to some adjustment, for a final trackage rights fee of \$1.06 per car mile.

1. Variable Costs

To determine the variable cost component, NECR states that—with the exception of dispatching services—it is not seeking compensation for any variable costs that it may be incurring as a result of PAS's operations over the line, because it believes at this time that such costs are minimal. (NECR Opening 8.) NECR states that, while dispatching is often considered part of operating expenses, because dispatching in this instance is a fee based on usage, the share of these costs attributable to PAS's use of dispatching services is a variable cost. Id. NECR allocates the dispatching costs among the segments based on PAS's relative car miles, because the fee is determined by calls to the dispatcher that are not directly attributable to the segments. Id. On reply, PAS accepts NECR's calculation of variable costs. (PAS Reply, V.S. Baranowski 11, July 19, 2016.)

The Board will accept the parties' agreed-upon calculation of the variable cost component.

2. Maintenance and Operation Expenses

On opening, NECR proposed maintenance and operation expenses based on its expert witnesses' estimates regarding expenses typically incurred by railroads in general. (See NECR Opening, V.S. Banks & Ireland 10-11.) NECR also included a share of property taxes paid for the line. See id., V.S. Ebbrecht 6-7.

PAS accepts NECR's calculation of property taxes but disputes the use of a normalized maintenance expense estimate. (PAS Reply, V.S. Baranowski 12, 17, July 19, 2016.) According to PAS, the trackage rights fee should be based on actual expenses incurred by NECR. Id., V.S. Baranowski 12-13; see also SSW I, 1 I.C.C.2d at 790 ("the most appropriate means of sharing M&O expense is to allocate a portion of the actual expense incurred . . . on a percentage use basis."). PAS calculates maintenance and operating expenses based on: (1) NECR's actual maintenance of way operating expenses for 2014, and (2) average capitalized maintenance expenditures between 2008 and 2013. (PAS Reply, V.S. Baranowski 15, July 19, 2016.) PAS allocates these maintenance of way expenditures to the trackage rights segments based on the

method used by the Board to allocate system-wide expenditures to individual line segments in its standard internal cross subsidy test. Id., V.S. Baranowski 15-16; see also Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 27-29 (STB served Jan. 27, 2006) (using equations based on the Board's Uniform Railroad Costing System (URCS) to allocate expenses between segments in the cross-subsidy test). PAS applies the resulting cost allocation percentages for each segment to NECR's systemwide maintenance expenditures. It then divides this figure by segment car miles. Finally, it adds the costs per car mile for property taxes developed by NECR. The final number is the total cost per car mile for maintenance and other operating costs. Id. at 17.

On rebuttal, NECR accepts PAS's proposed use of actual maintenance costs, as opposed to the normalized approach NECR presented on opening. (See NECR Rebuttal 39.) NECR also accepts PAS's calculation of maintenance of way operating expenses using 2014 data. Id. at 40. But NECR argues that PAS omitted certain capital maintenance expenses incurred by NECR, which were included in spreadsheets that NECR produced in discovery. Id. at 39. NECR thus calculates a higher level of capital maintenance expenses using the data from those spreadsheets. See id. at 39-41. NECR bases its capital maintenance expense on only two years' worth of data—2013 and 2014—not the 2008 to 2013 period used by PAS. NECR claims that the figures for 2013 and 2014 were kept under current NECR management,¹⁷ represent the most recent two years under consideration, and are thus more accurate and representative of capital maintenance spending than the average used by PAS.

On surrebuttal, PAS argues that its reply analysis is superior to NECR's rebuttal calculation because NECR used only two years of data for capitalized maintenance, whereas PAS incorporated six years. (PAS Surrebuttal 39 & V.S. Baranowski 14.) In regard to the capital maintenance expenses that NECR claims PAS failed to include, PAS asserts that there was no way to know that these expenses should be included without information from "summary sheets" that NECR produced for the first time on rebuttal. (PAS Surrebuttal 38-39 & V.S. Baranowski 15-16.)

The Board will accept PAS's calculation of maintenance and operation expenses. NECR calculates capitalized maintenance costs based on a two-year average using 2013 and 2014. (NECR Rebuttal 40 & V.S. Banks, Ireland & Loftus 7-8.) By contrast, PAS applies a six-year average from 2008 to 2013, which better controls for fluctuating year-to-year capital maintenance spending patterns. (PAS Reply, V.S. Baranowski 15, July 19, 2016; PAS Surrebuttal, V.S. Baranowski 14.) Although NECR notes that "the figures for 2013 and 2014 were kept under current NECR management" (NECR Rebuttal 40), it does not expressly argue that capital maintenance spending changed when NECR's parent company was acquired, or support such an argument with evidence as to how it might have changed. Using a longer rather than a shorter period of historic data to calculate an average is preferable in this context because it mitigates the likelihood that a single, extraordinary year may skew the result. See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 139 (STB served Nov. 22, 2011)

¹⁷ NECR's parent company, Genessee & Wyoming Inc., acquired NECR's former parent company, RailAmerica, Inc., in late 2012. (NECR Rebuttal 39.) See also Genessee & Wyoming Inc.—Control—RailAmerica, Inc., FD 35654 (STB served Dec. 20, 2012).

(choosing four-year average rather than two-year average in calculating inflation of land values); NECR Rebuttal 40 (acknowledging that “[c]apital maintenance tends to vary from year to year”) & V.S. Banks, Ireland & Loftus 8 (commenting on the “lumpy nature” of capital maintenance spending over time).

NECR also does not adequately support its proposed addition of capitalized maintenance costs. PAS argues persuasively that the Board should not rely on NECR’s rebuttal presentation because the underlying documents (produced by NECR on rebuttal) require subjective judgment to differentiate between capital improvement and maintenance projects and are inconsistent with the spreadsheets for certain projects that NECR originally produced. (See PAS Surrebuttal, V.S. Baranowski 17.) In addition, NECR’s calculation is based on summary sheets that NECR appears to have improperly withheld until rebuttal. (See NECR Rebuttal 39 n.24 (“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.”).) Again, PAS argues persuasively that without the summary sheets, the spreadsheets initially produced by NECR did not indicate how the individual projects might correspond to NECR’s overall annual capital spending, among other deficiencies. (See PAS Surrebuttal, V.S. Baranowski 16-17.)

3. Interest Rental Component

The interest rental component compensates the landlord for the cost of capital in its investment; it is developed by applying the railroad industry’s cost of capital to the value of the line. CSX Corp., 4 S.T.B. at 78. As discussed in Section I.A above, the Board rejects PAS’s argument that an interest rental component may not be included in the trackage rights fee.

a. VIP Methodology

On opening, NECR calculates the interest rental component using a new methodology that it calls value in place (VIP). NECR claims that VIP is a variant of RCNLD—one of the Board-approved methods for determining the valuation base in trackage rights compensation cases. (See Methodology Motion 7-8 (describing VIP).) NECR defines VIP as the salvage, relay and scrap market value of all rail assets (such as track) as if they were available for sale assuming market prices, combined with the estimated value of in-place fixed infrastructure (such as bridges and tunnels). NECR’s experts determine the value of both the rail assets and fixed infrastructure as of September 2, 2014. (NECR Opening, V.S. Banks & Ireland 6-8, App. “Track & Infrastructure Valuations.”) NECR also includes the value of the underlying land based on an appraisal. (NECR Opening 12.) According to NECR, because the ICC allowed the use of RCNLD, which estimates what it would cost to duplicate assets in their present condition, it is also appropriate to use VIP, which estimates a market valuation of assets. (See NECR Opening 12.)

PAS argues on reply that VIP is not even an approximation of RCNLD, as NECR characterizes it (see Methodology Motion 7), and that it is fundamentally flawed as a methodology. (PAS Reply 19, July 19, 2016.) According to PAS, NECR’s proposal conflates RCNLD and net liquidation value (NLV) by applying separate valuation techniques to what are described as “marketable” rail assets and fixed in-place infrastructure assets. Id. PAS states that,

for rail related assets, the VIP approach assumes that the rail currently in place in the NECR track structure is removed and sold on after-markets (for example, as scrap for use in steel mills), but the only way to realize the VIP market value for these “marketable assets” would be to dismantle the railroad. Id.; V.S. Baranowski 18. In other words, “[NECR]’s approach to marketable rail assets is NLV, but without subtracting the salvage costs.” Id., V.S. Baranowski 18. For the “fixed in place” assets, such as bridges and tunnels, PAS states that NECR applies a valuation generally more aligned with RCNLD but assigns values by applying assumed and otherwise undocumented unit costs to generalized groups of assets and guessing about their current condition. (PAS Reply 19-20, July 19, 2016.) In contrast, PAS argues, RCNLD calculates actual replacement costs and then depreciates those costs to reflect existing valuations. Id. at 20.

On rebuttal, NECR argues (among other things) that its VIP methodology 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, and therefore it is the most appropriate methodology for use in this proceeding. (NECR Rebuttal 27-28.)

On surrebuttal, PAS argues that the VIP approach does not indicate the market value of the line—which is a primary goal of the interest rental component (see NECR Opening 12)—but instead is strictly a cost-based appraisal of the individual components of the rail line assets, as NECR admits on rebuttal. (PAS Surrebuttal 15 & V.S. Baranowski 2-3 (citing NECR Rebuttal 27).) PAS suggests that NECR chose not to use RCNLD, even though it was available, because NECR knows that VIP produces far higher results. (See PAS Surrebuttal 15 & V.S. Baranowski 3.)

The Board will reject NECR’s VIP proposal. VIP is neither RCNLD—a previously accepted valuation method¹⁸—nor an approximation of RCNLD. RCNLD calculates the cost of replicating the line’s assets required to serve the traffic with depreciation and obsolescence. See Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619, 627 (1990). NECR’s VIP proposal, by contrast, assumes that the railroad is dismantled, with the rail removed and sold on after-markets. (See NECR Opening, V.S. Banks & Ireland 6-8 (VIP uses the salvage, relay and scrap market value of all rail assets as if they were available for sale assuming market prices on September 2, 2014).) PAS is correct that NECR’s VIP proposal inappropriately conflates RCNLD (applied to fixed in-place infrastructure assets) and NLV (applied to “marketable” rail assets). By assuming one category of assets is sold away and the other category of assets is replaced, VIP produces mismatched results that do not provide a coherent picture of the line’s value. Cf. CSX Corp., 4 S.T.B. at 78 (the interest rental component is developed using a valuation of the line). NECR contends that its reliance on scrap prices for the track and track materials is similar to how costs can be determined under RCNLD, where the two most commonly used methods are market-replacement value (retail spot pricing) or new rail and new track materials with a discount applied (wholesale pricing). (NECR Rebuttal, V.S. Banks, Ireland & Loftus 3.) Even if NECR

¹⁸ If NECR had presented a calculation using the RCNLD methodology, such a proposal might have merited consideration, as the agency has accepted RCNLD valuations in previous cases. See, e.g., Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 305.

had cited support for this claim (and it did not), it has provided no reason to assume that the salvage value of the track and track materials is identical to the cost of replacing those assets with depreciation. The fact that “RCNLD can be developed [through] appraisals or by other means through the use of competent experts in the field”¹⁹ does not mean that combining such valuations with an NLV-type approach for rail assets is equivalent to RCNLD, or that the combination is appropriate.

Similarly, even if NECR had presented support for its claim that VIP is more conservative than RCNLD, because RCNLD also includes various costs related to reconstruction (NECR Rebuttal, V.S. Banks, Ireland & Loftus 4), that would not demonstrate the appropriateness of trying to meld two incompatible valuation techniques.

NECR also argues that it could not apply RCNLD because that methodology requires that road property investment and depreciation be categorized using the Board’s Uniform System of Accounts (see 49 C.F.R. pt. 1201), and as a Class III carrier, NECR’s accounts are not required to conform to the Uniform System of Accounts. (NECR Rebuttal 27.) However, as PAS points out, NECR’s witnesses were able to group cost items in the VIP calculations consistent with the road property account descriptions in the Uniform System of Accounts. (PAS Surrebuttal 15 & V.S. Baranowski 3.)

In addition, PAS effectively contrasts the results of NECR’s VIP approach with six other valuations in the record, including the valuation performed when NECR’s parent company was acquired (discussed further below). (PAS Surrebuttal, V.S. Baranowski 2, 5 (arguing that VIP produces results that are out of line with all practical measures of fair market valuation for the line, and providing a chart that compares valuations).) As PAS points out, the VIP approach is a significant outlier, producing a value for the line many times greater than any of the other valuations. The comparisons are not dispositive, but serve as a check confirming the problems already identified in this novel approach.

PAS also raises a number of problems with NECR’s application of its VIP methodology, including omitted elements, arbitrarily assumed numbers, and unsupported accounting approaches. (See PAS Reply 21-28 & V.S. Baranowski 19-32, July 19, 2016; PAS Surrebuttal 16-26 & V.S. Baranowski 5-14). While PAS’s criticisms have merit, the Board need not specifically address these application problems or the corrections that PAS offers, because VIP is not conceptually valid for the reasons stated above.

b. CE Methodology

NECR argues on opening that a CE calculation cannot be applied here because that methodology requires line-specific earnings and a current stand-alone market valuation of NECR, which are not available. (NECR Opening 11.)

¹⁹ Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 305; NECR Rebuttal 27.

Although PAS argues that no interest rental component should be included, it presents a CE calculation in the alternative. (See PAS Reply 31, July 19, 2016.) PAS defines CE as the value of a business based on the expected profits that the business will generate in the future, *i.e.*, the net present value of future profits. *Id.*, V.S. Baranowski 33. PAS explains that its expert witness used the following steps to determine the interest rental component under the CE methodology. First, PAS's expert relied on waybill records and traffic reports produced by NECR to determine earnings and allocate NECR's revenues between the respective trackage rights segments and the rest of the NECR system. *Id.* at 30-31 & V.S. Baranowski 34-35. According to PAS, its expert then: (1) used the Average Total Cost (ATC) method to allocate revenues among different segments based on relative URCS costs; and (2) allocated operating expenses for 2014 proportional to the relative URCS variable costs assigned to each segment. (See PAS Reply 31 & V.S. Baranowski 36-38, July 19, 2016.) PAS's expert then deducted the allocated operating expenses from the allocated revenues, yielding a calculation of NECR pre-tax earnings specific to each segment. *Id.*, V.S. Baranowski 38-39. In response to NECR's position that a CE calculation would need to include PAS's earnings from traffic shipped over the NECR segments at issue (see NECR Opening 11), PAS used NECR's earnings per car mile and extrapolated PAS earnings based on PAS's car miles. (PAS Reply, V.S. Baranowski 39-40, July 19, 2016.) PAS states that its expert then divided the combined trackage rights segments' earnings (from both NECR and PAS) by the Board's 2014 pre-tax cost of capital of 14.77% to calculate a capitalized earnings valuation. (PAS Reply 31 & V.S. Baranowski 40-41, July 19, 2016.) Next, PAS states, its expert used the resulting valuation to calculate an interest rental amount by multiplying the valuation by the same cost-of-capital rate. (PAS Reply 31 & V.S. Baranowski 40-41, July 19, 2016.)

NECR takes issue with PAS's CE calculation on rebuttal. According to NECR, 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—none of which are easily ascertainable here. (NECR Rebuttal 42-44.) NECR also offers several criticisms of PAS's calculation of line-specific earnings. *Id.* at 45-46 & V.S. Banks, Ireland & Loftus 11-13.

On surrebuttal, PAS disputes NECR's position that CE cannot be applied without a contemporaneous market valuation of the landlord railroad. (PAS Surrebuttal 11.) PAS argues that, as the ICC explained, the "market value of a piece of investment property usually is based on the earnings potential of that property," and that is what PAS's CE calculation determined. *Id.* (citing *SSW II*, 4 I.C.C.2d at 674).

The Board will accept PAS's CE valuation, with one adjustment discussed below. PAS has presented a valid and adequately supported application of the CE methodology, and NECR's criticisms lack merit.

Earnings Multiplier. NECR contends that precedent requires the CE earnings multiplier to be calculated by dividing the market value of the landlord railroad's total railroad property by the landlord railroad's total railroad earnings, as opposed to PAS's use of the railroad industry pre-tax cost of capital. (NECR Rebuttal 42-44.) However, the agency has used two different

approaches with respect to an earnings multiplier in calculating CE (also known as GCV²⁰). In some cases, it has used a ratio like that advocated by NECR.²¹ In other cases, the agency has used the rail industry pre-tax cost of capital as an earnings multiplier, as advocated by PAS.²²

Here, PAS's approach is appropriate because the cost of capital reflects the required return on investment for the industry, a concept that is closely aligned with the CE methodology's inquiry into the earnings potential of the line at issue. See also R.R. Accounting Principles Bd., 2 R.R. Accounting Principles Final Report 75 (1987) (for purposes of trackage rights compensation, "[t]he RAPB has decided either individual railroad or nationally determined cost-of-capital rates are acceptable."). NECR cites cases in which the ICC and the Board have used an earnings multiplier similar to the one proposed by NECR (NECR Rebuttal 42-43), but does not acknowledge that the agency has used the industry pre-tax cost of capital for the same purpose in other cases (such as the ones cited above). NECR offers no substantive explanation for why it believes the pre-tax cost of capital approach is not appropriate. NECR also cites decisions in which the ICC declined to apply CE because one or more inputs needed to calculate total system market value or earnings, or line specific revenue, were missing. NECR Rebuttal 43; see, e.g., Atchison, Topeka & Santa Fe, 8 I.C.C.2d at 304-05. NECR incorrectly infers from these cases that the Board will apply CE only if the earnings multiplier is derived from total system value and earnings. There is no indication that the industry cost of capital was even raised as an alternative in these cases; no conclusion can be drawn from the fact that it was not used and the cases cannot be interpreted as holding that it may not be used. See Atchison, Topeka & Santa Fe, 8 I.C.C.2d at 304-05; Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry., FD 26476 (Sub-No. 1), slip op. at 5 n.10 (ICC served Sept. 20, 1994) ("The earnings multiplier ordinarily is the ratio of the landlord railroad's total system market value to its total system earnings.") (emphasis added). Accordingly, the Board will accept PAS's use of the industry cost of capital in its CE calculation.²³

²⁰ See SSW II, 4 I.C.C.2d at 674; PAS Reply, V.S. Baranowski 33.

²¹ In those cases, the agency derived the earnings multiplier by multiplying line specific earnings by the ratio of (1) the market value of the landlord's total system road property to (2) the landlord's total system earnings, i.e., $\text{Line Earnings} * (\text{Market Value}_{\text{TOT}} / \text{Earnings}_{\text{TOT}})$. See, e.g., Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 304; CSX Corp., 4 S.T.B. at 79.

²² In those cases, the agency has used the pre-tax cost of capital to derive an earnings multiplier by applying it to the earnings from the particular line, i.e., $\text{Line Earnings} * (1 / \text{Cost of Capital})$. See, e.g., Amtrak I, 4 I.C.C.2d at 792; Caddo Antoine & Little Mo. R.R.—Feeder Line Acquis.—Ark. Midland R.R. Line, 4 S.T.B. 326, 341 (1999) (feeder line GCV calculation), reconsideration granted on other grounds, 4 S.T.B. 610 (2000), aff'd in pertinent part, GS Roofing Prods. Co. v. STB, 262 F.3d 767, 775 (8th Cir. 2001); Trinidad Ry.—Aban. Exemption—in Las Animas Cty., Colo., AB 573X, slip op. at 6 (STB served Apr. 17, 2002) (offer of financial assistance valuation).

²³ We note that PAS, on surrebuttal, offers an alternative CE calculation using total system earnings and railroad property as an earnings multiplier instead of the railroad industry pre-tax cost of capital, and the valuation is very similar to that of PAS's approach on reply. (See PAS Surrebuttal 11 & V.S. Baranowski 10, 12-13.) PAS presents this alternative calculation for
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NECR Line-Specific Earnings. NECR argues that PAS's application of ATC and URCS to allocate earnings to the three segments at issue is not appropriate for short line railroads. (See NECR Rebuttal 44 n.31.) However, PAS uses the ATC method to allocate revenues among different segments based on relative URCS costs that reflect NECR's operating characteristics (e.g., shipment type, mileage, number of cars, commodity). Using URCS in this manner is consistent with Board precedent. See, e.g., Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I R.Rs., 6 S.T.B. 798 (2003) (variable costs for non-Class I railroads will be determined using regional URCS); Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 26 (STB served Sept. 5, 2007) ("If the carrier is not a Class I carrier, the Board will use the most appropriate regional URCS data"). Also, because PAS uses ATC to allocate revenues between line segments based on relative cost, what matters is the proportion of URCS costs rather than the absolute amount of costs, and NECR has not shown that using URCS costs would distort this proportion. See W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 12 (STB served Sept. 10, 2007) ("The purpose of the ATC revenue allocation is to determine how much of the revenue that the defendant carrier collects for the total movement should be allocated to each segment of the movement based on the costs that need to be recovered on each segment and the amount of other traffic on each segment available to share the joint and common costs.").

PAS effectively counters NECR's allegations that PAS slightly overstated some earnings and slightly understated others in its application of ATC (NECR Rebuttal 45 & V.S. Banks, Ireland & Loftus 11-12)—as PAS illustrates, NECR's conclusion results from an apparent calculation error by NECR, not PAS. (See PAS Surrebuttal, V.S. Baranowski 18.) The Board also agrees with PAS's arguments against factoring Amtrak payments and PAS trackage rights fees into NECR's earnings (see NECR Rebuttal 45 & V.S. Banks, Ireland & Loftus 12-13, asserting that these payments must be added), including the fact that Amtrak is merely reimbursing NECR for certain costs, and PAS earnings generated on the trackage rights segments are already included in the CE calculation, so that adding these payments again would double count them. (PAS Surrebuttal, V.S. Baranowski 19-20). Moreover, PAS is correct that adding the fees paid by PAS under the current trackage rights arrangement to a valuation determining fees going forward would be circular, with PAS's payment of trackage rights fees increasing the level of PAS's trackage rights fees. See id., V.S. Baranowski 20.

PAS Line-Specific Earnings. PAS persuasively rebuts NECR's argument (see NECR Rebuttal 46) against PAS's calculation of PAS earnings. PAS's expert calculated PAS's earnings by extrapolating from NECR's earnings based on PAS's share of car miles. (See PAS Surrebuttal, V.S. Baranowski 20-21.) PAS notes that this approach conservatively overstates PAS revenues (given the offline termination of PAS originating traffic) and that NECR did not

(...continued)

comparison purposes, while continuing to propose its reply calculation using the pre-tax cost of capital. (Id., V.S. Baranowski 12.) Because the record already provides an acceptable application of the CE methodology from PAS's reply, the Board need not adopt an alternative calculation that neither party advocates.

make any adjustments to this method in its restated CE valuation. See id. And although PAS argues that its earnings may not be included in the CE calculation for the Middle Segment because “those earnings have already been accounted for as part of the valuation in the forced divestiture of B&M to Amtrak” (PAS Reply, V.S. Baranowski 39, July 19, 2016), the Board has rejected PAS’s argument that a payment to B&M determined at the time of the taking, nearly 30 years ago, prevents the trackage rights fee from being changed now. See Section I.A, supra. In any event, PAS’s CE calculation did include PAS earnings for the Middle Segment, determined in the same way as PAS earnings for the Northern and Southern Segments. (See PAS Reply Workpaper “Trackage Rate Calculations.xlsx,” Tab “GCV Approach,” July 19, 2016.) The Board will accept the inclusion of Middle Segment PAS earnings.

Even if there were no case law supporting PAS’s application of CE here (and as discussed above, there is), NECR’s position on this issue contradicts its own arguments. With respect to PAS’s CE approach, NECR argues that it should not be accepted because it “does not reflect the type of CE calculation traditionally used by the STB in trackage rights proceedings.” (NECR Rebuttal, V.S. Banks, Ireland & Loftus 9.) But in reference to NECR’s VIP method, which NECR acknowledges is novel, NECR argues that the Board is not limited to the methodologies discussed in previous cases. (NECR Rebuttal 26 (“these are only some of the possible choices”).) Similarly, the Board disagrees with PAS’s contention that “the Board is required to apply the CE analysis by precedent.” (PAS Surrebuttal 16 & n.37 (emphasis added).) Case law confirms that the CE methodology is “preferred” (e.g., CSX Corp., 4 S.T.B. at 78), but the Board retains the ability to apply another methodology if it is appropriate based on the facts and circumstances of an individual case. See Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 304 (stating that the parties are also free to comment on other approaches); NECR Rebuttal 26. On this record, as discussed, CE is the appropriate methodology to apply.

SSW Compensation Results. Because the Board has rejected PAS’s argument against including an interest rental component at all (see Section I.A, supra), the Board will adjust PAS’s calculations to include an interest rental component for the Middle Segment. (See PAS Reply 32 & V.S. Baranowski 33 n.35, July 19, 2016 (PAS’s CE calculations omitted an interest rental component for the Middle Segment).) The overall trackage rights fee that results is \$1.06 per car mile,²⁴ to be adjusted annually as discussed below.

Finally, NECR argues that the interest rental component should be paid on an annual or a monthly basis as rent would be paid, separately from the rest of the trackage rights fee components. (NECR Rebuttal 14.) According to NECR, this approach would be the better practice “as it more closely mirrors the rental aspect of the component.” Id. However, because the trackage rights fee will already include a per car mile component, creating a separate monthly interest rental payment would add unnecessary complication to the payment structure in this

²⁴ This figure is a weighted average using PAS’s car miles over each segment, and it would apply to PAS traffic over all three segments. A single fee per car mile for all three segments is what the parties appear to expect. See NECR Opening, Ex. C at 4 (proposed Section 3.3 anticipates a single fee); Amtrak II, 6 I.C.C.2d at 561 (current Section 3.3 provides a single fee for traffic over all three segments).

case. Accordingly, the Board will include the interest rental component in the per car mile fee, calculated pursuant to the CE methodology as described above.

4. Annual Adjustments

The trackage rights payments will be adjusted annually for both inflation²⁵ and changes in the Board's annual railroad industry cost-of-capital determination, as set forth in Section 3.3 of the revised TO attached to this decision. See Ark. & Mo. R.R., 6 I.C.C.2d at 629 ("Our decisions in SSW Compensation contemplated that the rental would change when the cost of capital changes. We will follow this precedent here, in the absence of mutual agreement to the contrary."); NECR Opening 13 n.11.

Also, the parties have consented to using NECR's effective tax rate (or that of its parent company if NECR is consolidated with its parent for tax purposes) rather than the statutory tax rate in determining the pre-tax cost of capital. See NECR Opening 13; PAS Reply Workpaper "Trackage Rate Calculations.xlsx," Tab "Cost of Capital" (using the effective tax rate presented by NECR on opening for NECR's ultimate parent company); cf. SSW II, 4 I.C.C.2d at 683 (generally, the agency prefers to use the statutory tax rate in determining the pre-tax cost of capital). Therefore, the annual adjustments will also include changes in the effective tax rate of NECR, or its parent company if NECR is consolidated with its parent for tax purposes. (See NECR Opening, Ex. C at 5; NECR Rebuttal 53.)

II. Terms Other Than Trackage Rights Fee

The parties dispute a number of other proposed changes to the terms and conditions of the existing TO. In general, PAS argues for continuation of the existing terms and conditions with relatively few changes, while NECR seeks the addition of new terms and conditions or material changes to the language of the existing ones. To obtain an order from the Board changing the TO (see TO Section 2.2), the burden is on the party seeking that change. See 5 U.S.C. § 556(d) (under the Administrative Procedure Act, the proponent of a rule or order has the burden of proof). In most instances, the party seeking a change is NECR. Below, the Board addresses each of these issues in turn.²⁶

²⁵ See Amtrak II, 6 I.C.C.2d at 549-50, 562; NECR Opening, Ex. C at 4; PAS Reply, Ex. C at 4, July 19, 2016.

²⁶ Several proposed changes were consented to by the parties with little or no discussion—for example, PAS did not object to NECR's proposed addition of Sections 1.9(b), (c), and (d), which relate to obstructing or altering the line. (See NECR Opening, Ex. C at 3; PAS Reply 36, July 19, 2016.) The Board accepts these changes, which are reflected in the new terms and conditions in Appendix A. One exception is the final sentence of Section 9.3; NECR proposed revisions to this sentence, which PAS consented to, but due to typographical or other errors in the proposed revisions, the Board cannot discern the intended meaning and does not accept the revisions.

A. Single TO or Multiple TOs

NECR asks the Board to split the TO into multiple TOs, separating the Middle Segment from the Northern and Southern Segments.²⁷ NECR ties this request to its proposal to eliminate provisions that exist in the current TO (Sections 3.1, 3.3, and 3.6) that limit the amount of payment made by PAS. (NECR Opening 16.) According to NECR, if the Board removes these payment limitations, including “the limitations applicable to capital improvements,” NECR would agree that a single TO for the entire line is appropriate. *Id.* For reasons discussed elsewhere in this decision (see Section I.A, *supra*), the Board is removing the payment limitations from the TO, including the language formerly included in Section 3.1 providing that “B&M shall have no obligation to pay for or contribute in any way towards the cost of upgrading of the Former B&M Line, except as provided in Section 3.7.” Because the Board is making these changes, NECR appears to have consented to keeping a single TO.²⁸

To the extent NECR does not consent to keeping a single TO—for example, because the Board is not adopting all of the TO language proposed by NECR, including changes to Section 3.7—the Board will reject NECR’s proposal to create multiple TOs. NECR’s explanation for this proposal does not adequately support such a change in light of the Board’s removal of the payment limitations. (See NECR Opening 16 (arguing for separate TOs on the basis that the payment limitations should not be extended with respect to the Northern and Southern Segments).) Creating separate TOs would also have negative effects on administrative efficiency, multiplying the scope of future proceedings after the next reopening period has run.

B. Haulage

NECR states that it believes that the TO already prohibits haulage, but it has added language in Sections 1.9(a) and 10.7 to eliminate any prospective ambiguity. (NECR Opening 17.) Specifically, NECR proposes new language for the section currently numbered 9.7 and a new Section 1.9(a), which would expressly prohibit PAS from handling traffic moving under a haulage agreement over the line. (See NECR Opening, Ex. C at 3, 10-11.) Haulage allows a rail carrier to have its trains operated by another rail carrier over that rail carrier’s tracks. E.g., Montreal, Me. & Atl. Ry.—Discontinuance of Serv. & Aban.—in Aroostook & Penobscot Ctys., Me., AB 1043 (Sub-No. 1), slip op. at 2 n.3 (STB served July 20, 2010).

²⁷ It is unclear whether NECR seeks the creation of two TOs (one for the Middle Segment and one for the Northern and Southern Segments) or three TOs (one for each segment). (See NECR Request to Set Terms and Conditions 2 (two TOs); NECR Opening 3, 15 (three TOs); NECR Opening 16 (two TOs).)

²⁸ PAS also raises the idea of treating the segments differently, but it mentions this position in the context of its argument that the Board should not use SSW Compensation to calculate the trackage rights fee for the Middle Segment. (See, e.g., PAS Surrebuttal 10.) Because the Board rejects this argument, as discussed above, PAS’s suggestion regarding different TO terms for the different segments is moot.

On reply, PAS states that the current TO contains no restriction on the commercial terms of the traffic that can be carried. (PAS Reply 49, July 19, 2016.) PAS notes that, before the TO, B&M and CV were parties to an agreement (the 1930 Agreement) that governed the trackage rights of B&M over CV, and that agreement included references to one party performing haulage for the other. See id. PAS argues that the 1930 Agreement supports the conclusion that haulage is not prohibited under the current TO, because it shows that B&M, CV, and the ICC were aware of commercial relationships involving haulage and chose not to include a term prohibiting it. See id.

NECR asserts on rebuttal that, by including a provision that specifically allowed certain haulage, the parties to the 1930 Agreement were indicating that haulage would otherwise not be permitted. (NECR Rebuttal 57.) NECR also claims that PAS admits that language prohibiting haulage is “commonplace” in trackage rights agreements. Id. (citing PAS Reply 50, July 19, 2016).

On surrebuttal, PAS argues that NECR’s arguments suggest that it does not understand haulage as a marketing matter. (PAS Surrebuttal 57-58.) Haulage, PAS states, is merely a way of marketing a rail move involving more than one railroad, and a car follows the same path, covered by the same operating waybill, whether it is moving in haulage or in interchange. Id. at 58. PAS states that the difference is on the marketing side, affecting the way in which prices are negotiated with a customer. Id. Therefore, PAS contends that NECR’s arguments are irrelevant. Id.

As an initial matter, NECR has not adequately supported its position that the current TO prohibits haulage. NECR first relies on Section 1.1, which gives B&M the right to operate “B&M’s trains, locomotives, cars and equipment with B&M’s crews over the line.” (See NECR Opening 17 (incorporating a 2014 NECR pleading by reference); NECR Reply 5, Oct. 9, 2014, New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC, FD 31250 (Sub-No. 1).) But as PAS points out, Section 9.7 defines “the trains, locomotives, cars or equipment of [a party to the agreement]” as “the trains, locomotives, cars or equipment in the possession of or operated by one of the parties . . .” (PAS Reply 49-50, July 19, 2016.) Because a train being moved in haulage by PAS is inarguably “in the possession of or operated by” PAS, these two provisions together appear to give PAS an affirmative right to perform haulage under the current TO. NECR’s reliance on Section 1.8 (preserving NECR’s right to allow another carrier to use the line) and Section 9.8 (limiting PAS’s ability to assign the trackage rights) is similarly ineffective. (See NECR Reply 5, Oct. 9, 2014, New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC, FD 31250 (Sub-No. 1).) Section 1.8 clarifies that PAS’s trackage rights are not exclusive (as NECR could allow a third carrier to operate on the line). Section 9.8 limits PAS’s ability to transfer its TO rights to another entity by assignment. Neither of these sections states or reasonably implies that PAS is prohibited from moving trains in haulage.

NECR’s argument that the current TO prohibits haulage is further undermined by its own acknowledgement that PAS and its predecessors have performed haulage for Norfolk Southern Railway (NS). (See NECR Rebuttal 57.) NECR’s attempts to distinguish the NS haulage (see NECR Reply 5, Oct. 9, 2014, New England Cent. R.R.—Trackage Rights Terms & Conditions—

Pan Am S. LLC, FD 31250 (Sub-No. 1)) are unpersuasive. There is nothing in the TO indicating that there is a prohibition on haulage, much less an exception from such a prohibition solely for NS traffic. Even NECR appears to acknowledge the relevance of the haulage that PAS has performed for NS; NECR's proposal for the section currently numbered 9.7 adds an exception allowing PAS to perform haulage "where the cars or equipment are being transported under a haulage agreement for Norfolk Southern Railway for interchange with NECR." (NECR Opening, Ex. C at 11.)

The parties both argue that the 1930 Agreement (which the ICC incorporated into the current TO at Section 9.3.1) supports their respective positions as to whether the TO permitted haulage. PAS claims the agreement shows that B&M, CV, and the ICC were aware of haulage arrangements and chose not to include a provision in the TO expressly prohibiting haulage, thus demonstrating that haulage was allowed. Conversely, NECR claims that, by incorporating the 1930 Agreement, which specifically allowed for certain haulage, the parties and the ICC meant to indicate that haulage was otherwise prohibited. Here, the relevance of the 1930 Agreement is, at best, ambiguous; there is no indication that the ICC factored it into its thinking when creating the TO in Amtrak II. However, had the ICC wanted to prohibit haulage as NECR claims, it seems more likely that it would have included language specifically making this clear, rather than leaving it ambiguous. The fact that it did not do so, combined with language in the other provisions of the TO and NECR's tacit acceptance of haulage of NS's traffic, suggests that no prohibition was intended.

The Board also finds that NECR has not adequately supported its proposal to add a provision prohibiting haulage in the new version of the TO. NECR argues that allowing PAS to provide haulage service would be inconsistent with the purpose of preserving B&M's operating rights and would be tantamount to giving such other carriers trackage rights. (NECR Reply 5, Oct. 9, 2014, New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC, FD 31250 (Sub-No. 1).) However, as discussed above, it appears that the current TO has allowed haulage traffic for decades, without dispute until the last few years. PAS also claims that haulage has resulted in more options for shippers, thereby encouraging greater use of rail over truck, and that by now restricting haulage, PAS could be left at a competitive disadvantage. (PAS Reply, V.S. Bostwick 3-4.) Because NECR has not demonstrated a sufficient basis to disrupt this long-standing, workable arrangement, the Board will continue to permit PAS to carry haulage traffic under the new TO.

NECR also argues that allowing haulage would extend PAS's subsidies to others (NECR Rebuttal 50), but it does not fully explain how haulage would pass on PAS's cost advantages any more than serving a customer in interchange. Moreover, as discussed above, the Board is lifting the TO's payment limitations, and the new trackage rights fee is calculated under SSW Compensation to reflect an appropriate valuation of the trackage rights—removing any subsidy that may have existed.

NECR asserts that there are questions about whether PAS is responsible for haulage cars (NECR Rebuttal 56), but Section 9.7 (quoted above) answers those questions clearly and affirmatively.

NECR also argues that it should not have to allow haulage on the Northern and Southern Segments because they were not the subject of Amtrak I and Amtrak II. (NECR Rebuttal 57.) Although those segments were not part of the takings analysis at the center of Amtrak I, they were the subject of Amtrak II—that decision established trackage rights over those segments and set the terms and conditions. See Amtrak II, 6 I.C.C.2d at 542. As discussed, the current TO—as set forth in Amtrak II—does not prohibit haulage, and Sections 1.1 and 9.7 together appear to authorize haulage. Therefore, the premise of NECR’s argument is incorrect.

Finally, although it is unclear whether PAS acknowledged that language prohibiting haulage is “commonplace” in trackage rights agreements (see NECR Rebuttal 57), it is clear that PAS objects to the inclusion of one here. (See PAS Reply 50, July 19, 2016 (referring ambiguously to “such language”).) Regardless, as the examples cited by PAS indicate, haulage prohibitions are included in some trackage rights agreements and not in others, depending on whether the parties to those agreements negotiated and agreed to include such a term. Because NECR has not demonstrated that it is warranted, the Board will not add a haulage restriction to the TO.

C. Insurance

NECR proposes to add a number of insurance requirements that would apply only to PAS. (See NECR Opening, Ex. C at 8 & Schedule A.) On opening, NECR argues that it is now standard for trackage rights agreements to include insurance provisions to back up the liability and indemnification provisions, and for the owning railroad to be named as an additional insured. (NECR Opening 17.) NECR further argues that the level of insurance is directly linked to the operations of Amtrak over the trackage rights line, and correlates with the Amtrak liability statute. Id. Accordingly, NECR proposes a new “Schedule A” to the TO that would specify different types of insurance coverage that PAS would be required to carry. Id., Ex. C.

On reply, PAS argues that NECR does not justify the levels of insurance it proposes in Schedule A, other than to link the liability insurance levels to Amtrak operations on the line. (PAS Reply 44, July 19, 2016.) PAS asserts that NECR’s reliance on Amtrak ignores the extensive liability protections that NECR receives in its operating agreement with Amtrak, including significant indemnification of NECR by Amtrak irrespective of fault. Id. at 45. PAS also argues that imposing these requirements would require an examination of the specific types of insurance proposed—for example, “products and completed operations” coverage, which is usually only for manufacturers placing products into the marketplace. Id. at 44-45.

On rebuttal, NECR adds that these insurance requirements are appropriate where the user is not a Class I railroad or other public company whose financial wherewithal can be readily evaluated. (NECR Rebuttal 55.) NECR asserts that requiring insurance is consistent with public policy as railroads, including PAS, carry dangerous goods, and the Lac-Mégantic incident²⁹ demonstrates that underinsured entities can create significant burdens on local and federal

²⁹ For a description of the Lac-Mégantic incident, see <http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054-r-es.asp>.

governments. Id. With respect to Amtrak operations, NECR argues that even though Amtrak has indemnified NECR, the current Amtrak agreement will expire in 2020 and there is no guarantee that the current indemnification provisions will be continued. Id. at 55-56.

On surrebuttal, PAS states that the proposed terms would require PAS to “provide NECR with written notice and all reasonable particulars and documents related to any damages, losses, incidents, claims and potential claims concerning” the TO and “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,” even if the matter was a simple cargo claim. (PAS Surrebuttal 71 (quoting NECR’s proposed Schedule A, Sections 1.1 & 1.2).) PAS argues that these requirements unjustifiably intrude into the relationship between PAS and its customers. Id. PAS also notes that NECR’s proposed terms would allow NECR to “request reasonable changes to the required insurance coverage” every three years. Id. (quoting NECR’s proposed Schedule A, Section 1.1). PAS notes that, although this provision is phrased as a request, it follows a paragraph that characterizes the following terms as requirements. The effect, according to PAS, is that NECR would reserve the ability to impose further requirements at its discretion. See id.

The Board rejects NECR’s proposal to add provisions imposing additional insurance requirements. None of NECR’s arguments provide support for the specific types and levels of insurance that NECR includes in Schedule A of its proposed TO, and they certainly do not support applying these requirements to PAS alone. PAS has also identified several problems with the specifics of NECR’s proposal, including the types of insurance that would be required and the associated requirements that would be imposed on PAS. Moreover, NECR acknowledges that PAS already carries a substantial amount of insurance, which undermines NECR’s reasoning for including PAS-specific insurance requirements. (See NECR Rebuttal 56.) NECR states that its indemnification from Amtrak may expire in 2020, but it offers no reason to believe that it and Amtrak would not reach a new agreement on indemnification or, if they do not, why the Board should make PAS responsible for filling the gap in that situation.

NECR claims that insurance requirements are standard in trackage rights agreements, but again, this argument is beside the point. As noted above, by seeking an order modifying the TO, NECR is asking the Board to impose an additional term, and NECR bears the burden of proof with respect to that proposed change. See 5 U.S.C. § 556(d). The fact that other entities may have obtained similar terms through bargaining does not, in and of itself, prove that such a requirement is warranted here.³⁰

Accordingly, NECR has not carried its burden to support the insurance requirements it proposes in Schedule A, and the Board will not add these requirements to the TO.

³⁰ NECR makes a similar argument—contending that certain trackage rights provisions are commonplace—with respect to hazardous materials, auditing, and consent to assignment, all discussed further below. These arguments are not persuasive for the same reason.

D. Hazardous Materials

NECR proposes a variety of new environmental requirements that would apply only to PAS. (See NECR Opening, Ex. C at 1 (defining “hazardous substance”), 3 (new Section 1.9(e) prohibiting PAS from fueling locomotives on the line, among other things), 8-10 (new Section 9.2).) These include requirements mandating: an emergency response plan, reporting and response to accidents or derailments, and NECR inspections to enforce PAS’s compliance. See *id.* at 9-10. Also, under proposed Section 9.2(e), NECR would be authorized to add new requirements at any time “that it considers necessary or desirable, in its reasonable opinion.” *Id.* at 10. On opening, NECR does not explain its specific reasoning for these proposed requirements, stating only that the provisions would “clarify the responsibilities of the parties” and that “[s]uch provisions have become customary, especially given the new regulations issued by FRA with respect to the handling of such materials.” (See NECR Opening 17.)

On reply, PAS argues that NECR’s proposed requirements are unnecessary. Some of these proposed requirements, according to PAS, duplicate the requirements of federal and state environmental laws. (PAS Reply 46-47, July 19, 2016 (citing a list of federal and state laws that already accomplish the goals stated by NECR with respect to its proposed requirements).) PAS argues that other proposed requirements are onerous and subject to abuse—for example, requiring Pan Am to notify emergency responders even if there is a two-wheel derailment or some other minor event. See *id.* at 47-48.

On rebuttal, NECR asserts that “additional provisions with respect to the responsibilities of the parties” regarding hazardous materials should be added to the TO “[i]n light of the heightened sensitivities and increased FRA regulations post Lac Megantic.” (NECR Rebuttal 50.)

On surrebuttal, PAS responds to NECR’s proposed justification—that these hazardous materials provisions are necessary to ensure that PAS acts responsibly—by reiterating that PAS is subject to extensive state and federal laws governing the transportation of hazardous materials, and that those laws include enforcement mechanisms to ensure compliance. (PAS Surrebuttal 56.)

As the party seeking this additional restriction, NECR has not carried its burden with respect to the hazardous materials requirements it proposes. NECR argues that its goal is to create incentives for PAS to act responsibly (NECR Rebuttal 56), but as PAS points out, it is subject to a variety of state and federal laws that already address these issues and that include enforcement mechanisms to ensure compliance. NECR also argues that the requirements it proposes would not burden PAS, but PAS offers persuasive examples to the contrary, demonstrating that some of the requirements would be unduly onerous. (See, e.g., PAS Reply 47-48, July 19, 2016.) Moreover, although NECR states repeatedly that its proposed requirements would address “the responsibilities of the parties” regarding hazardous materials, the requirements would apply only to PAS. Given this unequal applicability, the proposed requirements would be inconsistent with Section 5.1 of the TO, which requires PAS and NECR trains to “be operated without prejudice or partiality to any party to this Agreement . . .” See *Amtrak II*, 6 I.C.C.2d at 563; NECR Opening, Ex. C at 5. Proposed Section 9.2(e), which would

allow NECR to add new requirements at its discretion, exacerbates this problem; for example, it would allow NECR to reinitiate the prejudicial speed restrictions that the Board previously held to be inconsistent with Section 5.1. See New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC, FD 31250 (Sub-No. 1) et al., slip op. at 6 (STB served Dec. 23, 2014); PAS Surrebuttal 57.

Because the Board is not accepting NECR's proposed hazardous materials requirements, the Board will also reject NECR's proposal to add a supporting definition of hazardous substance. That definition would be unnecessary in any event; as PAS notes, there is a standard, objective definition of "hazardous materials" available in 49 C.F.R. § 171.8. (PAS Reply 35, July 19, 2016.)

Finally, NECR offers no justification—on opening or rebuttal—for the restrictions on PAS's ability to fuel locomotives and other activities it proposed in Section 1.9(e), and because these restrictions would apply only to PAS, they also conflict with Section 5.1. In any event, it appears that NECR chose to drop this provision on rebuttal, as it does not include Section 1.9(e) in its rebuttal redline, stating that it was "intentionally omitted." (See NECR Rebuttal 49 n.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."), Ex. A at 3.)

E. Reopening and Modification Timing

On opening, NECR reduces the time period for reopening from 20 years to 10 years, without explanation. (See NECR Opening 17.)

On reply, PAS argues that shortening the reopening period to 10 years would significantly undermine the ability of PAS and its customers to plan and would undermine the value of the competitive access provided for in this agreement. (PAS Reply 37, July 19, 2016.)

On rebuttal, NECR argues that, "[g]iven the current rate of change in the railroad industry," a 20-year period is too long. (NECR Rebuttal 51.) NECR states that the 20-year term is what led to PAS's argument that the compensation increase proposed by NECR—from \$0.45 per car-mile to \$6.70 per car-mile—is too large. See id. NECR suggests a 15-year reopening period "[a]s a compromise." See id.

PAS does not accept NECR's 15-year compromise on surrebuttal. Instead, it argues that rail customers make strategic decisions based in part on the stability or volatility of the costs they will face for rail transportation, and shortening the reopening period from 20 years would introduce volatility for PAS and its customers. (PAS Surrebuttal 60.)

The Board will reject NECR's proposal to shorten the reopening period. NECR has not carried its burden, particularly given PAS's compelling arguments about the need for finality and commercial certainty. This includes the benefits that stability provides for rail customers' strategic decisions, as opposed to the negative effects of volatility. We also note that the TO reopening process, including litigation, requires significant time and resources from the parties

and the Board, and NECR has not shown that increasing the frequency of this process is warranted.

F. Effective Date of New Trackage Rights Fee

NECR notes on opening that the parties had agreed to make any new compensation retroactive to June 17, 2014. (NECR Opening 15.)

On reply, PAS states that it previously agreed to NECR's request for retroactivity only in order to facilitate mediation. (PAS Reply 52, July 19, 2016.) At the time, PAS states, both parties felt that mediation would be successful and that any period of retroactivity would be short and not create disruptions in the marketplace. Id. PAS argues that retroactivity thus made sense at the time to incentivize expeditious resolution of the proceeding, but later became an incentive to prolong the proceeding. See id. at 52-53. PAS contends that NECR has extended the proceeding by resisting discovery, including substantial litigation regarding NECR's Methodology Motion, in which it sought to avoid discovery as to any interest rental methodology other than VIP. See id. at 53-54. PAS states that, over the nearly 11 months that NECR resisted discovery, PAS made business decisions, moved traffic, priced shipments, and collected revenues based upon the belief that the existing trackage rights fee would govern. Id. at 54. PAS states that if the Board now increases the fee retroactively, PAS will not be able to go back and collect the higher fee from its shippers. Id. PAS argues that it should not have to come up with money to cover the difference because of NECR's actions delaying the proceeding. See id. PAS also cites cases in which the agency has decided not to apply new terms retroactively, absent the parties' consent. See id. at 55 (citing Nat'l R.R. Passenger Corp. Appl. Under Section 402(a) of the Rail Passenger Serv. Act, 1 I.C.C.2d 243 (1984); Nat'l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Compensation, 348 I.C.C. 926, 935-37 (1977)).

On rebuttal, NECR argues that, when PAS agreed to retroactivity, it did not expressly limit that agreement to the context of mediation. (See NECR Rebuttal 47.) NECR contends that it agreed to mediation only because PAS agreed that any new compensation terms would be retroactive. Id. at 48. NECR also argues that it is not at fault for the length of the proceeding, asserting (notwithstanding the Board's decision denying NECR's Methodology Motion) that PAS contributed significantly to the length by seeking discovery on interest rental methodologies other than VIP. See id.

On surrebuttal, PAS states that when mediation was jointly requested, retroactive application would have covered only a few months. (PAS Surrebuttal 47.) PAS argues that the Board has previously refused to reward parties for causing unnecessary delays in trackage rights compensation cases. Id. at 49 (citing N. Carolina R.R.—Pet. to Set Trackage Comp. & Other Terms & Conditions—Norfolk S. Ry., FD 33134, slip op. at 5 (STB served May 29, 1997) (“We will not, however, accede to an indefinite delay of the proceeding. NS cannot reasonably be expected to provide rail service indefinitely at current freight rates while NCRR seeks a lease compensation prescription at a significantly higher level and requests that it be made retroactive to the expiration of the lease agreements.”)).

The Board is aware that PAS changed its position on retroactivity, but concludes that it did so appropriately based on changed circumstances. Applying the new fee retroactively over PAS's objection, under the circumstances of this case, would unfairly penalize PAS for the length of the proceeding, including mediation and discovery. Denying NECR's request would also be consistent with the cases cited by PAS, which made new terms effective prospectively unless the parties consented to retroactivity—and here, at this stage, the parties do not. Accordingly, the new trackage rights fee will be effective on the effective date of this decision, together with the rest of the modified TO.

G. Definitions of “CV Lines,” “Former B&M Line,” and the “Line”

NECR proposes to add the phrase “and which are currently owned by NECR,” or similar wording, to the definitions of “CV Lines,” “Former B&M Line,” and the “Line,” in Sections 0.7, 0.9, 0.13. (NECR Opening, Ex. C at 1.) NECR offers no explanation on opening.

On reply, PAS opposes this change, stating that it potentially introduces a meaning that is not otherwise intended by the parties. (PAS Reply 34, July 19, 2016.)

On rebuttal, NECR states that it added this phrase to establish it as the current party in control of the lines. (NECR Rebuttal 49.) NECR states that it owns the track and structures and has an exclusive, unrestricted operating easement as to the right of way; according to NECR, the Board has treated the holder of an unrestricted freight easement as the owner of a rail line (for example, in State of Maine cases). See id. If the Board does not choose the language that NECR proposed initially, NECR proposes an alternative: “and which have subsequently been conveyed to NECR.” Id.

On surrebuttal, PAS argues that control of the lines is not in dispute and is not ambiguous in the current TO. (PAS Surrebuttal 51.) According to PAS, characterizing the easement and ownership could have an unintended effect: the next time the TO is reopened, NECR could argue that this language means the Board made a determination as to the nature of the NECR easement and whether that equates for all purposes as ownership. Id. at 52.

NECR, which proposes this language, has not explained why it is necessary to “establish it as the current party in control of the lines.” Without such an explanation, NECR has not carried its burden, and the Board will not accept the proposed language.

H. Maintenance in FRA Class 2 Condition

NECR proposes to delete the following sentence from Section 3.2: “CV shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class [2] condition.” (NECR Opening, Ex. C at 4.) It provides no explanation on opening.

PAS argues on reply that the provision NECR proposes to delete only imposes a minimum standard, not a maximum standard, and so NECR cannot oppose it as requiring a level

of maintenance greater than previously required of NECR under the TO. (PAS Reply 34, July 19, 2016.)

On rebuttal, NECR argues that there is no need to include a minimum maintenance standard. (NECR Rebuttal 51.) NECR states that this provision was included in Amtrak II only because CV voluntarily suggested it, and the ICC would not have included it otherwise. Id. NECR also states that it is unlikely to downgrade the line unless Amtrak service stops and other use declines. Id. at 52. According to NECR, PAS is paying less than its share of maintenance, and NECR would not object to leaving this requirement in the TO if NECR is awarded the compensation it requests. Id.

According to PAS, it is necessary to keep this provision, as NECR implies that it would not feel bound to maintain the track at FRA Class 2 standards absent this requirement (and if it is not awarded the compensation it seeks). (PAS Surrebuttal 62.) PAS contends that NECR would be able to downgrade particular trackage as a tool to punish customers who choose PAS service instead of NECR. See id.

The Board will retain this language. NECR argues that the provision is unnecessary because NECR is unlikely to downgrade the track, but if that is the case there is no need to delete this language. NECR also argues that it should not be held to a minimum maintenance standard because the trackage rights fee is too low to ensure that PAS pays its share of maintenance costs. However, as discussed above, the Board is removing the compensation cap and raising the trackage rights fee, using SSW Compensation, to a level that is consistent with the value of the trackage rights.

I. Addition of Variable Costs Identified by NECR

NECR proposes to add the following sentence to Section 3.3: “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.” (NECR Opening, Ex. C at 4.) NECR does not provide any explanation on opening.

On reply, PAS argues that this provision would allow NECR to add costs to PAS on top of what it proposes in this proceeding, and to do so in a manner that is not subject to any review or oversight. (PAS Reply 38, July 19, 2016.)

On rebuttal, NECR states that the proposed language would create the opportunity to have PAS pay for additional variable costs without waiting for the TO’s reopening period to pass. (NECR Rebuttal 52.) NECR adds that it would calculate the additional variable costs based on SSW Compensation. See id.

PAS argues on surrebuttal that NECR wants the Board to grant NECR the unilateral right to modify the compensation that the Board establishes in this proceeding. (PAS Surrebuttal 62-63.)

The Board agrees that inserting a term that would allow one party to change the compensation at will, without the other party's consent, would be inconsistent with fixing trackage rights terms (including compensation) for a set period of time, and with having the agency decide on disputed modification proposals. The Board will therefore reject NECR's proposed addition.

J. Restriction of Inflation Adjustment to Positive Changes Only

In Section 3.4, which establishes the inflation adjustment to payments under the TO, NECR proposed to add the phrase, "provided however that in no event shall the annual rate adjustment be less than 0%." (NECR Opening, Ex. C at 4.) NECR does not explain this proposal on opening.

On reply, PAS argues that this change would preclude any decrease in the cost of service, and by default magnify any subsequent increase in the cost of service. (PAS Reply 39, July 19, 2016.) The effect over time, according to PAS, would be to inflate the compensation amounts far out of proportion to the actual costs of service. Id.

On rebuttal, NECR states that it has conceded to the removal of the provision that changes cannot be less than zero. (NECR Rebuttal 52.)

Given the parties' consent following rebuttal, the Board will not add this language.

K. Payment Window

PAS states that, under current Section 3.6, NECR submits a bill by the 15th day of each month, and PAS must pay by the last day of the month. (PAS Reply 39, July 19, 2016.) PAS proposes to increase the payment deadline to 45 days, citing "the gravity of the potential for missing this two week window and the routine need for accounting and other business processes." Id.

NECR does not respond to this proposal on rebuttal, and the redlined TO that NECR attaches as Exhibit A includes this change. (NECR Rebuttal 49 n.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."), Ex. A at 4.)

Because this change is unopposed, and PAS provides support for the change, the Board will include the proposed revision.

L. Major Capital Projects

NECR proposes several changes to Section 3.7, which makes PAS responsible for its share of certain major capital projects. In terms of calculating PAS's share, the current TO uses PAS's percentage of traffic volumes during the previous five years; NECR would change that to the previous two years. (NECR Opening, Ex. C at 5.) NECR also proposes to add billing and payment procedures, including penalties for late payment by PAS. Id. In addition to capital

projects that are “necessary” due to a list of specified causes, NECR on opening proposed to require PAS to pay for a share of major capital projects that are “desirable in NECR’s discretion in the ordinary course.” Id. NECR does not explain any of these changes on opening.

On reply, PAS opposes the addition of major capital projects that are “desirable in NECR’s discretion in the ordinary course,” arguing that it would allow NECR to transfer new costs to PAS and force PAS to subsidize NECR’s operations and capital. (PAS Reply 40, July 19, 2016.) PAS also removes the billing procedures added by NECR and returns the traffic volume calculation from two years back to the five years currently in the TO. Id., Ex. C at 4-5.

On rebuttal, NECR agrees to the deletion of “or desirable in NECR’s discretion in the ordinary course.” (NECR Rebuttal 52.) With respect to the traffic volume calculation, NECR states that “[a] 2 year period seems more reflective of the parties’ proposed prospective use of the improvements.” Id. at 53. And NECR argues that it needs the billing procedures, or else it would have “no contractual way to collect.” See id.

PAS argues that NECR has a contractual way to collect even without the addition of these billing terms because the TO contains payment terms that apply generally—for example, Section 8.2 states that if PAS is more than 14 days late in submitting payment, NECR is entitled to advance payment from PAS for each PAS train seeking access to the line until PAS satisfies the delinquency. (PAS Surrebuttal 63-64.) According to PAS, the proposed billing terms would allow NECR to bill PAS immediately upon acceptance of a bid for a project without regard to when the project would be initiated, how long it would take to complete, or how much it would cost. Id. at 64. PAS asserts that, under the proposed billing procedures, the charges are not triggered by costs being imposed on NECR, but by the mere anticipation that such costs will be imposed in the future. Id.

Except for the revisions that both parties have consented to, the Board will not accept NECR’s proposed changes to Section 3.7 because NECR has not carried its burden. NECR does not explain what it means when it says, “[a] 2 year period seems more reflective of the parties’ proposed prospective use of the improvements,” which is the only rationale NECR offers in either pleading for the proposed change from five years to two years. In any event, the Board finds the longer period of time used by PAS to be a better indicator of traffic volumes, as it would better mitigate the effects of short-term spikes or drops in volume. Similarly, NECR’s only attempt at supporting its proposed addition of billing procedures is its claim that it would have no contractual way to collect otherwise. But as PAS points out, the TO already has generally applicable billing procedures, including mechanisms to address late payment. PAS also shows that the billing procedures NECR proposes to add would allow NECR to collect from PAS well before NECR knows the final cost or has itself incurred the cost.

M. Auditing

NECR proposes a new Section 3.9, which would give NECR the right to audit PAS’s records and activities to verify PAS’s compliance with the TO. (NECR Opening, Ex. C at 5.) Among other things, it would require PAS to make its car volume records available to NECR upon request. See id. If charges are revised based on NECR’s audit of these records, PAS’s

payment would be due within 30 days of the audit. Id. NECR does not offer an explanation for this proposed addition on opening.

PAS argues that this provision would permit NECR to do exactly what the Board has told NECR it does not have the right to do under the current TO—review the revenue waybills of traffic PAS moves over the line. See PAS Reply 40, July 19, 2016; see also New England Cent. R.R., FD 31250 (Sub-No. 1) et al., slip op. at 5 (finding NECR’s waybill production requirement inconsistent with Section 5.1 of the TO). PAS asserts that the proposed addition would also allow NECR to review PAS customer contracts and employee records. (PAS Reply 40-41, July 19, 2016.) PAS states that these are only examples and that the problem is exacerbated by the phrase, “[w]ithout limiting the generality of the foregoing . . .” See id. at 41.

On rebuttal, NECR argues that auditing provisions are now commonplace and are particularly essential to make sure that all users of the rail lines are complying with all FRA and other safety requirements. (NECR Rebuttal 53.) NECR states that it “must have the right and ability to confirm whether PAS is acting in accordance with the terms of the TO.” Id. NECR offers to delete the phrase, “[w]ithout limiting the generality of the foregoing.” Id. NECR also offers 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. Id.

On surrebuttal, PAS notes that NECR’s offer to limit this requirement to billing and payment records is unrelated to safety, which is NECR’s stated reason for proposing this requirement, as FRA and other safety requirements do not deal with billing and payment. (See PAS Surrebuttal 65.)

NECR has not carried its burden with respect to the proposed auditing provision. NECR claims that it needs this provision to make sure that all users of the rail lines are complying with all FRA and other safety requirements. But as PAS points out, NECR also states that it would require only billing and payment records, which are not the subject of FRA and other safety requirements.

Also, despite NECR’s stated concern about safety compliance by “all users of the rail lines,” the proposed requirement would apply only to PAS. PAS argues persuasively that this requirement is likely to be burdensome, and because the provision applies unequally, it would not be consistent with Section 5.1, which requires NECR and PAS trains to be operated without prejudice or partiality to one another. For instance, NECR could require PAS to provide documents before NECR allows a PAS train to move over the line, delaying PAS traffic—as NECR attempted to do with the waybill production requirement that the Board determined to be inconsistent with Section 5.1. See New England Cent. R.R., FD 31250 (Sub-No. 1) et al., slip op. at 5. In fact, the provision now proposed by NECR appears to be wider-ranging and therefore potentially more burdensome than the already-rejected waybill production requirement.

As for NECR’s argument that it must have the right and ability to confirm PAS’s compliance with the TO, the Board stated in its December 23, 2014 decision:

The parties are encouraged to confer and attempt to resolve privately issues surrounding the TO, such as . . . acceptable methods for monitoring compliance with the TO. However, absent private resolution of such matters, either party may file a formal Board action requesting enforcement of the TO . . . and seek to obtain discovery of necessary documents to make its case.³¹

New England Cent. R.R., FD 31250 (Sub-No. 1) et al., slip op. at 5. Such a procedure remains available, and unlike NECR's proposed auditing requirement, it does not enable NECR to burden its competitor's operations unevenly or prejudicially. The Board will therefore reject NECR's proposed auditing requirement.

N. Scheduling Upgrade Work

Among other things, Section 5.1 of the TO requires NECR to "use its best efforts in scheduling the work required for [upgrades] and any future maintenance or repair of the Line to minimize any interference with or disruption of" PAS's operations over the Line. Amtrak II, 6 I.C.C.2d at 563. On opening, NECR proposes to replace "best efforts" with "reasonable efforts," without explanation. (NECR Opening, Ex. C at 6.)

PAS opposes this change on reply, arguing that NECR has not provided any justification for the proposed downgrade and that it would be inconsistent with the spirit of the Amtrak decisions. (PAS Reply 41, July 19, 2016.)

On rebuttal, NECR asserts that the term "best efforts" in the current TO 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. (See NECR Rebuttal 54.) According to NECR, "reasonable efforts" would allow NECR to balance the burdens in a more fair and evenhanded way. Id.

PAS argues on surrebuttal that there is no reason the host railroad should stop considering the operations of all of its tenants when scheduling maintenance and repair so as not to impact service to customers on the line. (See PAS Surrebuttal 66.) PAS contends that maintenance expenses are compensated through the trackage rights formula, and NECR has not shown a burden it has experienced to support this proposed change. Id.

NECR does not cite an instance over the current TO period, which has lasted more than 20 years, when the phrase "best efforts" caused the type of problem that NECR anticipates. And in fact, PAS does contribute to maintenance costs under the new trackage rights fee calculated using SSW Compensation. Accordingly, NECR has not carried its burden with respect to the

³¹ We note that the Board's involvement in enforcement of the TO, which the ICC imposed, differs from the Board's approach to private contracts. As a general matter, the Board leaves enforcement of private contracts to the courts. See, e.g., Sierra R.R. v. Sacramento Valley R.R., NOR 42133, slip op. at 4 & n.12 (STB served Nov. 28, 2012).

proposed replacement of “best efforts” with “reasonable efforts,” and the Board will reject this proposal.

O. Definition of “Operating Rules”

Section 5.3 of the TO provides that NECR operating rules shall govern all operations over the line. Amtrak II, 6 I.C.C.2d at 563. NECR proposes to add a definition of “operating rules” that includes NECR’s operating and safety rules, timetables, special instructions, bulletins, general orders, authoritative directions and amendments, special rules governing the transportation of hazardous materials, and any supplements and replacements communicated from NECR to PAS. (NECR Opening, Ex. C at 6.) NECR does not explain this proposal on opening.

PAS argues that this new section would permit NECR to impose—in its sole discretion—any operating rule regardless of whether it was imposed for an anticompetitive purpose or not. (PAS Reply 41, July 19, 2016.) For purposes of contrast, PAS quotes language included in another trackage rights arrangement expressly providing that operating rules shall not unjustly discriminate between the parties. See id. at 42.

On rebuttal, NECR states that 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 Rebuttal 54.) NECR agrees to modify the language to indicate that operating rules must be non-discriminatory. See id.

NECR’s offer on rebuttal to include non-discrimination language may resolve PAS’s concern about NECR using this provision for anticompetitive purposes. However, NECR’s minimal description on rebuttal—that the provision would allow NECR to issue and change its operating rules—does not adequately explain why this new section is necessary. There is nothing in the current language of Section 5.3 that prevents NECR from modifying its operating rules, and NECR fails to indicate why it could not continue to do so (provided the rules are non-discriminatory) without the proposed section. Consequently, NECR has not carried its burden with respect to this proposal, and the Board will reject it.

P. Liability, Release, and Indemnification: Proposed New Section

NECR proposed to add a new Section 1.9(f), which would prevent PAS from making claims against NECR due to NECR’s failure to maintain or repair the line. (See NECR Opening, Ex. C at 3.) NECR did not explain why it proposed this section.

On reply, PAS argues that proposed Section 1.9(f) would address liability inconsistently with Section 7, and PAS removes the proposed new section. (PAS Reply 36-37, July 19, 2016.)

NECR does not respond on rebuttal, and its rebuttal redline excludes Section 1.9(f), stating that it was “intentionally omitted.” (NECR Rebuttal, Ex. A at 3.)

Because NECR appears to have conceded this issue, the Board will not include proposed Section 1.9(f).

Q. Liability, Release, and Indemnification: Edits to Existing Section

NECR proposes several changes to the existing indemnification provision in Section 7.3. (NECR Opening, Ex. C at 7.) The primary change relates to the scope of the indemnification; the current provision requires PAS or NECR, if there is a collision or accident between its train and a third person, to indemnify the other party (NECR or PAS) for any damages or injuries the other party (NECR or PAS) suffers as a result of the incident. See Amtrak II, 6 I.C.C.2d at 564. Under NECR's proposed revisions, if a PAS or NECR train has a collision or accident with a third person, the party involved in the collision would additionally be required to: (1) indemnify the other party (NECR or PAS) for damages claimed against that party; (2) indemnify the other party (NECR or PAS) for injuries to third persons; and (3) defend the other party in litigation over any of these damages or injuries. (See NECR Opening, Ex. C at 7.) NECR also proposes to change an existing clause, which states that the indemnification applies "irrespective of negligence of either party or such third person or other entity." NECR would modify it to state, "irrespective of the ordinary negligence or fault of either party or such third person or other entity" Id. (emphasis added). On opening, NECR does not explain why it proposes any of these changes.

On reply, PAS objects to the proposal that PAS be required to defend and indemnify NECR for Amtrak passenger injuries. (PAS Reply 43, July 19, 2016.) PAS notes that the language NECR proposes to add is not currently in the TO, and states that NECR's agreement with Amtrak already protects NECR against this liability. Id. PAS argues that the proposed addition of indemnification for damages "claimed against" a party would allow NECR to settle every claim made against it, regardless of the nature of the claim or whether it was valid, with the comfort that the only impact would be on PAS. See id. at 43-44.

NECR argues on rebuttal that the proposed language would apply equally to either party. (NECR Rebuttal 54.) NECR claims that its proposed 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. Id. at 55.

On surrebuttal, PAS argues that the proposed changes are material, uneven, and unfair. (PAS Surrebuttal 66.) According to PAS, the changes would shift risk, liability, and expense to PAS. Id. at 67. PAS sets out two scenarios involving a collision, one under the current TO language and one under NECR's proposed revisions. See id. at 67-68. Comparing these scenarios, PAS argues that the proposed revisions could leave PAS (and not NECR) responsible for damages to Amtrak passengers even if the collision were due to NECR's conduct. See id. at 68. PAS further argues that the addition of "and defend" would, in practice, impose a requirement to defend against claims only on PAS, because PAS does not control, maintain, or dispatch the line and therefore is unlikely to have claims against it following a collision between NECR and a third person. See id. at 68-69.

Whether NECR's proposed revisions would change the "overall" effect of the provision is a matter of characterization. But the revisions would certainly have a substantive effect on the meaning of the indemnification provision, as described above. And as PAS illustrates on surrebuttal, although the changes appear on the surface to be neutral, their effect would be skewed decidedly in favor of NECR because NECR has an indemnification from Amtrak and NECR controls the line. For example, if the revisions were adopted, PAS would have to defend and indemnify NECR for a variety of potentially large third person claims in the event of a collision or accident involving a PAS train and an Amtrak train. But if the revisions were adopted and the situation were reversed, NECR's Amtrak indemnification would protect NECR from much or all of the responsibility for those claims. NECR attempts to refute this concern by arguing that the current Amtrak agreement will expire in 2020 (NECR Rebuttal 54), but that does not mean the next agreement will remove the indemnification term, and even if it did, there will be several years between the new TO's effective date and the new Amtrak agreement. Finally, NECR included no explanation for its proposed change to "ordinary negligence or fault" in either pleading. Because NECR has not supported its proposed changes to Section 7.3, the Board will not accept these changes.

R. Assignment

Under Section 9.8 of the current TO, PAS may assign its trackage rights to a PAS affiliate following "consultation" with NECR, and PAS may assign its trackage rights to a non-affiliate with NECR's prior "consent," which shall "not be withheld unreasonably." Amtrak II, 6 I.C.C.2d at 567. NECR proposes changes that would eliminate PAS's ability to assign its rights to a non-affiliate and would require NECR's "consent" to assign rights to a PAS affiliate, rather than consultation. (See NECR Opening, Ex. C at 11.) NECR does not provide an explanation for this proposal on opening.

On reply, PAS objects to the revision, noting that NECR had not justified its proposed change. (See PAS Reply 52, July 19, 2016.)

On rebuttal, NECR argues that adding a consent requirement for the transfer to a PAS affiliate would have no substantial impact. NECR emphasizes that the provision would require NECR not to be unreasonable, and it claims that a consent requirement is commonplace and appropriate. (NECR Rebuttal 58.)

On surrebuttal, PAS argues that the changes would have a substantial impact. (PAS Surrebuttal 72.) PAS states that the phrase "after consultation" implies a full briefing but no right to object, whereas the phrase "following written consent that will not be unreasonably withheld," not only implies the right to object, but a potential disagreement about that objection and whether the objection is reasonable, and the potential adjudication of that dispute. See id.

Consent is not the same as consultation, and NECR has not sufficiently explained why it needs more control over assignments now than was necessary under the existing TO. NECR argues that its proposed changes are necessary because NECR should be concerned and informed about the identity of any proposed operator on the line (NECR Rebuttal 58)—but that is precisely what the assignment term of the current TO provides. As noted, Section 9.8 requires

consultation with NECR before PAS assigns its trackage rights to an affiliate, and it requires NECR's consent, not unreasonably withheld, before PAS assigns its trackage rights to a non-affiliate.

NECR's explanation fails to support any change to this provision (including the elimination of assignment to non-affiliates, which NECR does not address in either pleading), and therefore the Board will not accept its proposed revisions.

III. Conclusion

Accordingly, the Board will grant or deny the parties' requests to modify the terms and conditions for trackage rights to PAS to the extent discussed above.

It is ordered:

1. The parties' requests to modify the terms and conditions for trackage rights to PAS are granted or denied to the extent discussed above.
2. Trackage rights terms and conditions are imposed as described in this decision and set forth in Appendix A and will be effective when this decision becomes effective.
3. NECR's March 14, 2017 request for oral argument is denied.
4. This decision will be effective on November 30, 2017.

By the Board, Board Members Begeman and Miller.

APPENDIX A

TERMS AND CONDITIONS OF TRACKAGE RIGHTS GOVERNING THE USE BY PAN AM SOUTHERN LLC OF CERTAIN LINES OF NEW ENGLAND CENTRAL RAILROAD, INC.

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" means Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, Massachusetts 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, Vermont 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.

0.8 "Effective Date" means 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.

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

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

0.12 "Line" means the CV Lines and the Former B&M Line together.

0.13 "NECR" means New England Central Railroad, Inc., a corporation with its principal office at 2 Federal Street, Suite 201, St. Albans, Vermont 05478.

0.14 "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.

0.15 "PAS" means Pan Am Southern LLC, a limited liability company with its principal office at 1700 Iron Horse Park, North Billerica, Massachusetts 01862.

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

0.17 "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 non-exclusive 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 NECR MP 110.51) to the Bank switch 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 9.6.

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 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.

1.8 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) 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;

(b) 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

(c) 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.

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 20 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 notice to NECR.

3. COMPENSATION

3.1 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 2 condition.

3.2 In full satisfaction of any and all obligations of PAS to pay for the trackage rights provided herein or contribute 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), including an interest rental component, PAS shall pay to NECR \$1.06 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.

3.3 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: (a) changes in the STB's annual railroad industry cost-of-capital determination since the previous year's determination, to the extent payments under this Agreement were calculated using the STB's cost-of-capital determination; (b) changes in the effective tax rate of NECR, or its parent company if NECR is consolidated with its parent for tax purposes, to the extent payments under this Agreement were calculated using a pre-tax cost of capital; and (c) 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 12 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.

3.4 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.

3.5 NECR shall issue its bill to PAS for the payments specified by Sections 1.4.1 and 3.2 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 the month in which such bill is issued. Payments not received by NECR by such last day of the month following 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.

3.6 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.

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 Conveyance 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 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. 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.

6. CLEARING OF DERAILEMENTS 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 rerailling 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 rerailling 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 any action done in the process of trying to avoid an accident or a collision, such party shall save harmless and indemnify the other party forthwith for all damages suffered by the other party including damages to equipment and structures 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 negligence 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. GENERAL PROVISIONS

9.1 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.

9.2 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.

9.3 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 agreements 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 in effect until cancelled according to the terms of such other agreement(s).

9.4 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.

9.5 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.

9.6 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.

9.7 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. 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.

9.8 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 NECR and the receipt of any required regulatory or other approvals. PAS shall have the right to assign any or all of PAS's rights and obligations under this Agreement to any other person with NECR's prior consent, which shall not be withheld unreasonably, and following the receipt of any required regulatory or other approvals.

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

APPENDIX B

TERMS AND CONDITIONS OF TRACKAGE RIGHTS ~~IMPOSED BY THE INTERSTATE COMMERCE COMMISSION~~ GOVERNING THE USE BY ~~BOSTON AND MAINE CORPORATION~~ PAN AM SOUTHERN LLC OF CERTAIN LINES OF NEW ENGLAND CENTRAL ~~VERMONT RAILWAY~~ RAILROAD, INC.

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 ~~B&M~~ PAS and ~~CV~~ NECR.

0.2 "Amtrak" means the National Railroad Passenger Corporation.

0.3 "B&M" means Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, Massachusetts 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, Vermont 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 ~~have~~ belonged to CV ~~since~~ before the Conveyance Date.

~~0.8~~ 0.8 "Effective Date" means 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.

~~0.9~~ 10 "GMRC" means the Green Mountain Railroad Corporation (including its successors and assigns).

~~0.10~~ 11 "ICC" means the U.S. Interstate Commerce Commission.

0.112 "Line" means the CV Lines and the Former B&M Line together.

0.120.13 "NECR" means New England Central Railroad, Inc., a corporation with its principal office at 2 Federal Street, Suite 201, St. Albans, Vermont 05478.

0.14 "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.

0.1315 "PAS" means Pan Am Southern LLC, a limited liability company with its principal office at 1700 Iron Horse Park, North Billerica, Massachusetts 01862.

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

0.17 "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, B&MPAS shall have the non-exclusive right to operate B&M'sPAS's trains, locomotives, cars and equipment with B&M'sPAS'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 ~~B&M MP 49.67~~ and CVNECR MP 110.51) to the Bank switch ~~at the termination of B&M ownership at~~ White River Junction, Vermont (approximately CVNECR MP 13.40).

1.2 B&MPAS shall have only overhead running rights over the CV Lines.

1.3 B&MPAS 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 B&MPAS makes available a minimum three day per week service along the Line. B&MPAS 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 CVNECR shall be permitted to commence service to existing shippers and shippers' facilities upon B&M'sPAS'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 9.6.

1.4 Except as provided in Section 1.3, CVNECR and B&MPAS 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 ~~havedid~~ not ~~receivedreceive~~ or ~~tenderedtender~~ 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 B&MPAS does not provide a minimum three day per week service, as specified in Section 1.3.

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

1.5 CVNECR and B&MPAS 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. B&MPAS shall have the exclusive right to interchange traffic at Charlestown, New Hampshire, with the ST.

1.6 B&MPAS shall have the right of entry over the Line for any and all B&MPAS employees, agents or representatives, machinery, vehicles or equipment which B&MPAS may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of B&MPAS 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 B&M shall without charge to CV dispatch the interlocking CPR 50 located at East Northfield, Massachusetts, until seven (7) days after CV notifies B&M that CV is prepared to assume such responsibility and all applicable regulatory requirements have been satisfied.~~

~~1.7~~

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

1.8 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) 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;

(b) 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

(c) 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.

2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on the ~~Conveyance~~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 20 years from the ~~Conveyance~~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 ~~ICGSTB~~ for modifications. Nothing in this section shall authorize the ~~ICGSTB~~ to impose arbitration requirements upon either party to this Agreement.

2.3 ~~B&M~~PAS may terminate this Agreement immediately upon notice to ~~CV~~.

~~2.4 Notwithstanding the foregoing, the parties hereby acknowledge and agree that B&M has appealed the Order, and that in the event the Former B&M Line is reconveyed to B&M in connection with or resulting from such appeal, this Agreement shall terminate upon such reconveyance, and that thereafter the terms and conditions of the April 1, 1985 and January 1, 1930 Trackage Rights Agreements shall govern their operations over and use of the Line, and such agreements shall be deemed re-executed in their current forms~~NECR.

3. COMPENSATION

~~3.1 B&M shall have no obligation to pay for or contribute in any way towards the cost of upgrading of the Former B&M Line, except as provided in Section 3.7.~~

~~3.2 Except as provided in Section 1.7, CV~~3.1 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. ~~CV~~NECR shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class ~~H2~~ condition.

3.32 In full satisfaction of any and all obligations of B&MPAS to pay for the trackage rights provided herein or contribute 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), B&M ~~including an interest rental component,~~ PAS shall pay to CV-20-NECR \$~~14.06~~ per car mile (whether loaded or empty including locomotives, cabooses and work equipment) of traffic actually operated by B&M ~~(or its assignee) over the Line. Notwithstanding the foregoing, the sum of such payments in respect of the Former B&M Line shall not exceed one hundred forty two thousand dollars (\$ 142,000) per year during the first three years this Agreement is in force and shall not exceed seventy five thousand dollars (\$ 75,000) in any year thereafter, provided, however, that the foregoing limitation shall not apply if the annual gross traffic volume on the Former B&M Line attributable to B&M's overhead or local service, including traffic for interchange to GMRC, CCR, or ST, exceeds 32,500 carloads. Locomotives, cabooses and work equipment shall not be included in determining whether traffic attributable to B&M has exceeded 32,500 carloads in a given year. In any year that the amount of traffic attributable to B&M on the Former B&M Line exceeds 32,500 carloads, B&M shall pay CV as additional compensation 20.1¢ per car mile for all the cars in excess of 32,500 cars, whether loaded or empty, including locomotives, cabooses and work equipment~~ PAS (or its assignee) over the Line.

3.43 All payments to be made by B&M and CVPAS under this Agreement ~~(including the caps set forth in Section 3.3)~~ shall be adjusted effective on March 31, 1989, and semi-annually thereafter ~~31st of each year during the term of the Agreement,~~ for: (a) changes in the STB's annual railroad industry cost-of-capital determination since the previous year's determination, to the extent payments under this Agreement were calculated using the STB's cost-of-capital determination; (b) changes in the effective tax rate of NECR, or its parent company if NECR is consolidated with its parent for tax purposes, to the extent payments under this Agreement were calculated using a pre-tax cost of capital; and (c) price level changes from July 1, 1988, 2015 (using Second Quarter ~~1988~~ 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 ~~six~~ 12 months previous. The first adjustment to be made shall be based on the comparison of the ~~Fourth~~ Second Quarter ~~1988~~ 2015 index value to the Second Quarter ~~1988~~ 2016.

3.5 B&M ~~4~~ 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 B&M's PAS's trains on the Line.

3.6 ~~CV~~ 5 NECR shall issue its bill to B&MPAS for the payments specified by Sections 1.4.1 and 3.32 by the fifteenth (15) day of each month for the traffic transported during the preceding calendar month. B&MPAS shall pay to CV NECR the amount shown on such bill by the last day of the month following the month in which such bill is issued: ~~B&M shall not be required to pay mileage charges attributable to its operations over the Former B&M Line once payments made in the preceding months of that year with respect to those operations equal the payment cap as adjusted in accordance with Section 3.4 for that year, until traffic attributable to B&M's operations over the Former B&M Line exceeds 32,500 carloads for that year.~~ Payments not received by CV NECR by such last day of the month following 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.

3.76 In the event that CVNECR 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, B&M or implementation of Positive Train Control, PAS or its assignee shall pay its proportionate share of the expenditures actually made by CVNECR for such capital projects based upon the percentage of total car miles on the Line attributable to B&M's PAS's (or its assignee's) average traffic volume during the preceding five (5) year period preceding the capital project.

4. ADDITIONS AND ALTERATIONS

4.1 CVNECR 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 B&MPAS 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 Conveyance Date, are required to accommodate B&M's PAS's operations beyond that required by CVNECR to accommodate CV's NECR's and Amtrak's operations over the Line, B&MPAS 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, CVNECR 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 CV's 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 B&M, CVPAS, 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 CVNECR 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, B&MPAS shall have the right, in consultation with CVNECR, to establish the schedules of B&M's PAS's trains over the line. Trains performing local work, whether B&M, CVPAS, NECR or otherwise, are not entitled to priority over trains that are not performing such work. CVNECR shall establish CV's NECR's train schedules with due regard to the trains to be operated by B&MPAS. 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. B&M acknowledges that the upgrading work will require a twelve (12) hour work block scheduled for between 7:00 a.m. and 7:00 p.m. CVNECR shall coordinate with B&MPAS and use its best efforts in scheduling the work required for the upgrading any upgrades of the Former B&M Line

and any future maintenance or repair of the Line to minimize any interference with or disruption of B&MPAS's operations over the Line.

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

5.3 CVNECR operating rules shall govern all operations over the Line, and CVNECR shall report to B&MPAS any incidents of violation of such rules by a B&MPAS employee. CVNECR 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.

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a B&MPAS train, B&MPAS shall clear the Line to allow for the passage of other trains within a reasonable time. B&MPAS shall perform any rerailling 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 B&MPAS. In the event that B&MPAS does not begin rerailling 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, CVNECR may clear the Line for passage of trains, and B&MPAS shall reimburse CVNECR for all reasonable costs CVNECR 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 CV'sNECR's and B&M'sPAS'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 CV'sNECR's or B&M'sPAS'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 any action done in the process of trying to avoid an accident or a collision, such party shall save harmless and indemnify the other party forthwith for all damages suffered by the other party including damages to equipment and structures 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 negligence 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 B&MPAS or CVNECR, 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 B&MPAS of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from CV, CVNECR, NECR shall have the right to terminate this Agreement upon ninety (90) days' notice.

8.2 If B&MPAS becomes delinquent in payment of any amount by more than fourteen (14) days under the terms of Section 3.6, CV, NECR shall be entitled to receive advance payment from B&MPAS for each B&MPAS train seeking access to the Line until B&MPAS satisfies the delinquency in full. If B&MPAS fails to tender the advance payment, CVNECR shall be further entitled to exclude and eject B&MPAS from the Line until B&MPAS tenders the advance payment. CVNECR shall be entitled to these remedies for delinquencies even if B&MPAS has disputed the billed amount by invoking arbitration or otherwise. During the pendency of any such exclusion or ejection, CVNECR shall nevertheless accept B&MPAS cars for interchange at any point on the Line.

9. GENERAL PROVISIONS

9.1 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.

9.2 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.

9.3 Integration. ~~Except for the Order and the documents executed in pursuance thereof, this~~ 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 Conveyance Effective Date, ~~and except as provided in Section 2.4 and 9.3.1 hereof, all prior trackage rights agreements between the parties or their predecessors with respect to the Line or any segments of the Line, including the Trackage Rights Agreements Order imposed by and between B&M and CV the ICC by decision dated as of April 1, 1985, and January 1, 1930~~ February 6, 1990 in ICC Finance Docket No. 31250, are hereby terminated. Any provisions of any other agreement(s) between CVNECR and B&MPAS which are not inconsistent with the provisions of this Agreement shall remain in effect until cancelled according to the terms of such other agreement(s).

~~9.3.1 The provisions of Section 8, Freight Haulage, of the January 1, 1930 Trackage Rights Agreement between CV and B&M, as amended from time to time, shall remain in effect until cancelled by either party upon ninety (90) days' prior written notice to the other.~~

9.4 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.

9.5 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.

9.6 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.

9.7 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. 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, ~~except where the cars or equipment are being transported under the Haulage Agreement referred to in Section 9.3.1 of this Agreement.~~

9.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. ~~B&M~~PAS shall have the right to assign any or all of ~~B&M's~~PAS's rights and obligations under this Agreement to any affiliate of ~~B&M~~PAS, following consultation with ~~CV~~. ~~B&M~~PAS ~~and the receipt of any required regulatory or other approvals.~~ PAS shall have the right to assign any or all of ~~B&M's~~PAS's rights and obligations under this Agreement to any other person with ~~CV's~~NECR's prior consent, which shall not be withheld unreasonably. ~~In the event of an Agreement, and following the number receipt of earloads attributable to the assignee's operations over the Former B&M Line shall be included in the number of cars attributable to B&M's operations for the purposes of Section 3.3 of this Agreement~~ any required regulatory or other approvals.

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