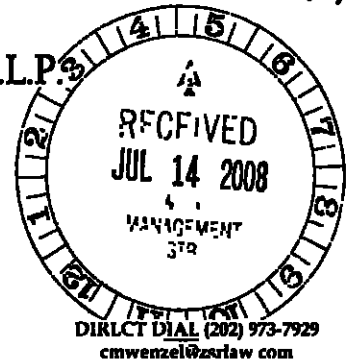


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July 14, 2008

BY HAND DELIVERY

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., S.W.
Washington, D C. 20024

ENTERED
Office of Proceedings

JUL 14 2008

**Part of
Public Record**

**Re: STB Finance Docket No. 35147, Norfolk Southern Railway Company,
Pan Am Railways, Inc. *et al.* – Joint Control and Operating/Pooling
Agreements–Pan Am Southern LLC**

Dear Secretary Quinlan:

I enclose for filing in the above-referenced docket an original and 10 copies of Applicants' Reply to Petition of United Transportation Union's and Brother of Locomotive Engineers and Trainman's for a Finding that the Proposed Transaction is a "Significant" Transaction and for Revision of the Proposed Procedural Schedule.

Sincerely,

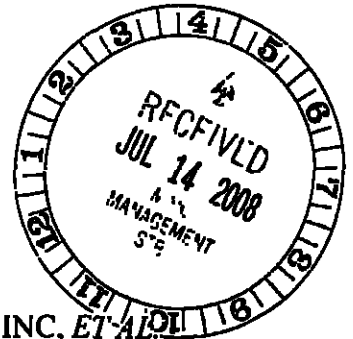
Christina M. Wenzel

Enclosure

cc: (w/encl.)
Parties of Record

Before The
Surface Transportation Board

Finance Docket No 35147



NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS INC, ET AL
—JOINT CONTROL AND OPERATING/ POOLING AGREEMENTS—
PAN AM SOUTHERN LLC

**APPLICANTS' REPLY TO PETITION OF UNITED TRANSPORTATION
UNION'S AND BROTHER OF LOCOMOTIVE ENGINEERS AND
TRAINMAN'S FOR A FINDING THAT THE PROPOSED TRANSACTION IS A
"SIGNIFICANT" TRANSACTION AND FOR REVISION OF THE PROPOSED
PROCEDURAL SCHEDULE**

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Dated July 14, 2008

Norfolk Southern Railway Company ("Norfolk Southern"), Pan Am Railways, Inc ("Pan Am"), Boston and Maine Corporation ("B&M") and Springfield Terminal Railway Company ("Springfield Terminal") (collectively "Applicants") file this reply in opposition to the petition ("UTU/BLET Petition") filed July 3, 2008 by United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers and Trainmen ("BLET"), which asks the Board to find the Transaction for which Applicants seek approval to be a "significant" rather than a "minor" transaction and to extend the procedural schedule proposed by Applicants.

The UTU/BLET Petition asserts that the Application, which was filed on May 30, 2008 stated that labor protection would apply to the Transaction, but that the Notice of Exemption that Applicants filed on June 27, 2008 to authorize Pan Am Southern, LLC ("PAS") to acquire and operate the rail lines involved "does not seem to have any labor protection attached to it." UTU/BLET Pet. at 1. The petition asserts that UTU and BLET "have some serious concerns about whether Applicants will attempt to use this transaction to avoid labor protection altogether" and that "this concern requires greater investigation." *Ibid* The petition also requests an extension of the procedural schedule established by the Board "because of [UTU's and BLET's] serious concerns which do not seem to have been addressed in a straightforward manner." *Id* at 2.

UTU's and BLET's asserted concerns are unfounded and do not in any event warrant the Board's reconsideration of its finding that the Transaction is a "minor transaction" or an extension of the procedural schedule it has established

On May 30, 2008, Applicants filed an Application and several related notices, including a "Notice of Intent to File a Verified Notice of Exemption, Pan Am Southern LLC – Acquisition and Operation Exemption – Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1) ("Notice of Intent"). The Notice of Intent explained that "on or after June 16, 2008, the undersigned intends to file a verified notice of exemption ... on behalf of Pan Am Southern LLC ("PAS"), a to-be-formed non-carrier, pursuant to 49 C.F.R. § 1150.31 et seq. to acquire and operate certain lines of Boston and Maine Corporation." Notice of Intent at 1. That Notice of Intent described, at page 6, anticipated labor impacts.

By decision served June 26, 2008, the Board accepted the Application and found that it is a "minor transaction" under 49 C.F.R. § 1180.2(c). The Board stated:

Applicants expect that the Transaction would result in no adverse effect on any of the Applicants' employees. Employees of Springfield Terminal are currently providing all of the rail service over the PAS Lines. The Transaction Agreement and the Railroad Operating Agreement (attached to the Application) state that, after consummation of the Transaction, Springfield Terminal would become the contract operator of the PAS Line, and Springfield Terminal would be required to "act in accordance with its then-current collective bargaining agreements as if the Assets were an integral part of the Springfield Terminal railroad network." Applicants state that the Capital Facilities and Management Agreement (attached to the application) provides that Springfield Terminal would perform work on any capital contract that its labor agreements would require Springfield Terminal to perform under pre-Transaction circumstances unless Springfield Terminal obtains a waiver of any such requirement. Thus, according to Applicants, the same employees would be performing the same work under the same agreements for the foreseeable future.

In any event, Applicants expect that, as required by 49 U.S.C. 11326 (a), the Board would impose the labor protective conditions set forth in New York Dock Railway – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), *on the elements of the Transaction that are subject to 49 U.S.C. 11323*

Slip op. at 7 (emphasis supplied, footnote omitted). The decision also noted that the Application included three related notices, including, the Notice of Intent *Id* at 8. The decision also established a procedural schedule, which provides interested parties with two weeks more time than the schedule the Applicants had proposed to file comments, protests and requests for conditions.

The Board's comments regarding the expected impacts of the Transaction on Applicants' employees are correct, and the UTU/BLET Petition presents no grounds for concluding otherwise. Indeed, the UTU/BLET Petition does not dispute, or even address, any of those comments, although it notes the Board's decision. Thus, UTU and BLET do not dispute that, under the agreements described in and included with the Application, "the same employees would be performing the same work under the same agreements for the foreseeable future."

Nor is there any basis for the claim that Applicants were not "straightforward" in describing the Transaction, its expected impact on employees and the labor protection that would be imposed on the various elements of the Transaction. As explained above and as the Board noted in its decision, the Application included as a related filing a Notice of Intent to file a notice of exemption on or after June 16, 2008, to authorize PAS to acquire and operate the lines involved and to acquire incidental trackage rights from Springfield Terminal to operate over the lines of third parties.

The Application explained, and the Notice of Intent expressly stated, that the Notice of Exemption would be filed pursuant to 49 U.S.C. §10901. It has long been firmly established in Board precedents that labor protections are not imposed on transactions subject to §10901 unless the Board finds that a transaction is being entered

into for the purpose of avoiding labor protection and that the entity controlling the newly established rail carrier would be operating it as its alter ego.¹ Thus there is no basis for UTU's and BLET's suggestion that they were first apprised by the Notice of Exemption filed on June 27, 2008 that one element of the Transaction would not be subject to labor protection. The Application and Notice of Intent filed on May 30, 2008 made that clear, and the Board plainly understood as much in its June 26, 2008 decision, when it noted that the Applicants expected that *New York Dock* protections would be imposed "on the elements of the Transaction that are subject to 49 U.S.C. 11323."

In this case, there would clearly be no basis for concluding that the element of the Transaction by which PAS will be established to acquire and operate the PAS lines was structured for the purpose of avoiding labor protection, in view of the fact that, as noted in the Board June 26, 2008 decision, under the agreements described in and included with the Application, "the same employees would be performing the same work under the same agreements for the foreseeable future."² There would also be no basis for concluding that any of the Applicants will, post-Transaction, operate PAS as its alter ego. That PAS will exist and operate as an entity separate and distinct from other rail carriers is ensured by the Transaction agreements, which will infuse substantial capital into PAS, most of which will be expended on specific projects to improve PAS infrastructure, and

¹ See, e.g., *Sault Ste. Marie Bridge Company – Acquisition and Operation Exemption – Lines of Union Pacific R.R. Co.*, STB F.D. No. 33290 (served July 7, 2008), *Mountain Laurel R.R. Co. – Acquisition and Operating Exemption – Consolidated Rail Corp.*, STB F.D. No. 31974 (served May 15, 1998)

² It should also not be forgotten that major elements of the Transaction will be subject to labor protection. The joint control and operating pooling agreements and Springfield Terminal contract to operate PAS will be subject to the labor protective conditions set forth in *New York Dock Ry. – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), while the Norfolk Southern and Springfield Terminal acquisition of trackage rights over PAS would be subject to *Norfolk & Western Ry. Co. – Trackage Rights – BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc. – Lease and Operate*, 360 I.C.C. 653 (1980), as the Board noted in its June 26, 2008 decision.

will also give Norfolk Southern and Pan Am equal and joint control of PAS, thereby precluding either from operating PAS as its alter ego.³

In any event, there would be no ground for the Board to reverse its finding that the Transaction for which approval is sought in the primary Application and its related filings is a “minor transaction” under 49 C.F.R. § 1180.2(c) or to extend the procedural schedule that it established in its June 26, 2008 decision. That decision reflects that the Board understands the Transaction and its different elements. It reflects the Board’s determination that the Transaction meets the requirements of 49 CFR 1180.2(c), specifically defining a minor transaction as one “not involving the control or merger of two or more class I railroads . . . if a determination can be made either: (1) that the transaction clearly will not have any anticompetitive effects, or (2) that any anticompetitive effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs.”

This Transaction does not present significant issues concerning impacts on either competition or employees. To date, no parties other than UTU, BLET and the commonly-controlled short lines calling themselves the Vermont Rail System, whose petition seeking the same relief as UTU and BLET Applicants replied to on June 27, 2008, have filed any opposition to the Transaction or to the Board’s procedural schedule, and a number have already submitted expressions of support although comments are not due until August 11, 2008.

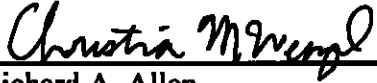
³ Even in cases where one carrier will have full ownership and control of a carrier newly established pursuant to 49 U.S.C. §10901, the Board will not conclude that the new carrier is operated as the alter ego of its parent, and will not impose labor protection, so long as the new carrier is operated as a separate corporation and there are valid business reasons, apart from avoiding labor protection, for establishing it as a separate corporation. *See, e.g., Sault Ste. Marie Bridge Company – Acquisition and Operation Exemption – Lines of Union Pacific R.R. Co.*, S1B F.D. No. 33290 (served July 7, 2008).

CONCLUSION

The Board should deny the UTU/BLET Petition's request that it reconsider its finding in its decision served June 26, 2008 that the proposed Transaction is a "minor" transaction and should extend the procedural schedule established by that decision

Respectfully submitted,


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July 14, 2008

CERTIFICATE OF SERVICE

I certify that I have this 14th day of July, 2008 served a copy of the foregoing Applicants' Reply To Petition Of United Transportation Union's and Brother of Locomotive Engineers Petition in STB Finance Docket No. 35147, by first class mail, postage prepaid, on the following parties of record at addresses listed below:

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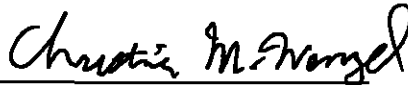
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