

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35147

**NORFOLK SOUTHERN RAILWAY COMPANY, PAN AMERICAN RAILWAYS, INC.,
ET. AL. – JOINT CONTROL AND OPERATING/POOLING AGREEMENTS – PAN AM
SOUTHERN LLC**

COMMENTS

The New York State Department of Transportation (NYSDOT) has reviewed the transaction, whereby Norfolk Southern Railway Co. (NS) and Pan American Railways, Inc (PAR) propose to create a new joint venture entity, Pan Am Southern LLC (PAS) and enter into certain operating agreements between the parties and their subsidiaries and offers the following comments

Classification of the Transaction as "Minor."

NYSDOT concurs with and supports the Board's finding (Decision served June 26, 2008 and affirmed July 21, 2008) that this transaction is a "minor" transaction under 49 USC §11323.

Environmental Comments

The environmental comments of NYSDOT, filed with the Board on July 11, 2008 are incorporated here by reference. In general, NYSDOT defers to the New York State Department of Environmental Conservation with regard to environmental matters.

The Batten Kill Railroad

The Parties have stated "Shortline and regional railroads in the region the Providence and Worcester Railroad Company ("P&W"), the New England Central Railroad Company ("NECR") and the Vermont Railroad, Inc ("VTR") – will not only interchange traffic with the new railroad, but will obtain new direct routing opportunities for interchange with Norfolk Southern through haulage service provided to Norfolk Southern by PAS" (Petition, p.3)

NYSDOT supports these arrangements as pro-competition, however, we note that the Batten Kill Railroad ("BKRR"), with a physical connection to the proposed PAS at Eagle Bridge, NY, is not mentioned anywhere in the application. The applicants should either extend the opportunity for interchange with both NS and PAS to the BKRR at Eagle Bridge, NY or should explicitly state that the establishment of such interchange is prohibited by a restriction on interchange of the

type that is the subject of Ex Parte No 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments*

Norfolk Southern Trackage Rights

The NS trackage rights for the movement of intermodal and automotive traffic included in this transaction may be exercised only in the event of a "Major Service Standard Failure," as defined in the agreement. The parties have requested Board approval of those trackage rights in a related proceeding (FD 35147_2) concurrently with the primary transaction.

NYSDOT recognizes that Board approval of NS trackage rights concurrently with the primary transaction is necessary to ensure the viability of the agreement between the parties. However, because NS may only exercise those trackage rights upon future events which may or may not happen, NYSDOT requests that approval of the trackage rights be conditioned upon future notice to the Board by NS of its intent to exercise these rights.

Application Exhibit 2E – Master Norfolk Southern Joint Use Agreement

Appendix B to Exhibit 2E defines a "Major Service Standard Failure." However, there appear to be inconsistencies within the Appendix. Specifically, Paragraph 2.(a) states,

"A 'Major Service Standard Failure' occurs when Qualifying Trains do not operate to the Service Standard Transit Times at least eighty five percent (85%) of the time, measured with a sixty (60) minute leeway, in any given rolling ninety (90) day period."

At the same time, Paragraph 2 (d) states,

"Upon service of the Trackage Rights Notification, Pan Am Southern and Norfolk Southern will continue to work to eliminate the causes of the deficiency giving rise to the Major Service Standard Failure, and to return haulage operations to the ninety percent (90%) on time requirement taking into account the thirty (30) minute tolerance factor described above."

The parties need to clarify the target on-time performance (85% or 90%) and leeway (60 min or 30 min) which would trigger Norfolk Southern's trackage rights.

Volume II, Transaction Agreement – Substitution of Public Funds

Section 2.2(a) of the Agreement states,

"If any of the Pan Am System Parties or the Company receives any public funding for infrastructure improvement to the Assets, or for the construction of the improvements (including modifications to the associated track) required for the Mechanicville Intermodal and Automotive Facility (the "Mechanicville improvements") before all of the NSR Contribution is paid, then the amount of the NSR Contribution shall be reduced by the same and the reduction shall be against the next demand note to be paid and, to the extent necessary, to the subsequent demand notes in the order in which they are to be paid."

NYSDOT is concerned with this offset provision in the agreement which would enable NS to reduce their contribution to the new corporation by the amount of public investment in the PAS facilities (including Mechanicville, Ayer or track infrastructure). Since the parties are committed to the transaction and the capital investments, this provision would seem to forestall any public benefit which would be derived from public investment.

NYSDOT Supports the Transaction.

Overall, NYSDOT sees this transaction as a significant benefit to the State of New York.

- The Capital District receives a much needed intermodal terminal, which will replace NS's capacity-constrained facility in downtown Albany. The new automotive terminal will be in healthy direct competition with CSX Transportation's Selkirk terminal;
- The proposed configuration of the Mechanicville facility will have benefits to the City of Mechanicville. Grade crossing blockages by stopped trains will be practically eliminated;
- The capital investments to upgrade the PAS track structure for 286 k railcars and the improvements proposed for Ayer, MA, including upgrades to the existing intermodal terminal and a new automotive terminal, will combine to take long distance trucks off New York's highways
- The additional NS overhead traffic on Canadian Pacific Railway's (CP) Freight Main Line will enhance the long term viability of their Delaware & Hudson (DH) subsidiary; ; and,
- The construction of the new intermodal facility in Mechanicville provides NS and PAS the opportunity to improve the level of service provided to New York shippers, while at the same time incorporating "green" technologies and working with the local communities as a good corporate neighbor.

NYSDOT has concluded that the impact of the transaction on Amtrak services in New York will be negligible. There is only a short segment of PAS and NS trackage rights operations over CP's Freight Main Line in common with Amtrak operations which will see a small increase in train traffic as a result of the transaction.

The New York State Department of Transportation therefore urges the Board to

1. Impose as a condition a notice requirement on the exercise of trackage rights by the Norfolk Southern;
2. Require the applicants to clarify the status of their connection to the BKRR at Eagle Bridge, and.

- 3 Require applicants to supplement their application to clarify the standard that will be applied to trigger the exercise of traffic rights by Norfolk Southern. We recommend clarification of the standard by supporting a higher level of service for the railroad's customers which would entail "the ninety percent (90%) on time requirement taking into account the thirty (30) minute tolerance factor" "in any given rolling ninety (90) day period"

Respectfully submitted,

New York State Department of Transportation

by



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Dated, August 11, 2008

State of New York)

County of Albany)

Raymond Hessinger, being duly sworn, deposes and says:

I am employed by the New York State Department of Transportation as its Acting Director NYSDOT Freight Bureau, and that I have examined the forgoing Comments and find them to be correct and true to the best of my knowledge and belief



Raymond Hessinger

Sworn to before me this 11th day
of August 2008.



Charlotte Beahm
Notary Public

CHARLOTTE BEAHM
Notary Public
State of New York
County of Albany
Commission Expires 12/31/11

CERTIFICATE OF SERVICE

In accordance with the Board's decision in the above referenced matter served July 24, 2008, this will certify that the New York State Department of Transportation has this day served copies of the foregoing Comments upon all parties of record by US mail, postage pre-paid.

Respectfully submitted,



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Dated: August 11, 2008