

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 35147

223217

NORFOLK SOUTHERN RY. CO , PAN AM RY INC ET AL
JOINT CONTROL AND OPERATING/POOLING AGREEMENTS
-PAN AM SOUTHERN LLC

**COMMENTS OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION/IBT AND BROTHERHOOD OF RAILROAD SIGNALMEN
AND PETITION FOR REJECTION OF NOTICE OF INTENT TO FILE NOTICE OF
EXEMPTION IN FINANCE DOCKET NO. 35147 SUB-NO.1**

223218

The Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED") and Brotherhood of Railroad Signalmen ("BRS"), the unions that represent maintenance of way employees and signalmen employed on the rail lines that are the subject of the instant proceedings, submit these comments on the proposed control/operating/pooling transaction ("Primary Transaction") at issue in this Finance Docket, and the transactions that are expressly related to and dependent upon the proposed Primary Transaction. BRS and BMWED do not support or oppose the Primary Transaction and related transactions in concept. But BMWED and BRS submit that if STB approval is granted, it should be subject to certain conditions necessary for the protection of Maintenance of Way Employees and Signalmen, including application of the full *New York Dock* protections imposed in the Primary Transaction in all of the related, "embraced" transactions, and imposition of representations made by Applicants regarding Springfield Terminal employees and retention of the existing collective bargaining agreements as conditions of approval of the Primary Transaction and the related "embraced" transactions. BRS and BMWED further contend that the planned PAS acquisition of B&M lines cannot be accomplished under 49 U.S.C. §10901 and 49 C.F.R. §1150.31 as a non-carrier acquisition (F.D.

35147 Sub- No 1), but can only be accomplished under 49 U S C §11323, and they therefore petition the Board for rejection of the notice of intent to file a notice of exemption under 49 C F R §1150 31

BACKGROUND

By the Primary Transaction (Finance Docket No 35147), and the various related embraced sub-transactions, Norfolk Southern and PARI/Pan Am seek approval of their plan for Norfolk Southern and PARI/Pan Am to acquire control and ownership of PAS, for their planned operating and pooling agreements, and their agreement for Springfield Terminal to operate the lines of PAS, Norfolk Southern and PARI/Pan Am also seek authorization for PAS to acquire various lines and trackage rights of Springfield Terminal in related “embraced” transactions Application at 4 ¹ In the end, Norfolk Southern and PARI/Pan Am would control and own PAS which would acquire certain Pan Am lines and Pan Am trackage rights, and Pan Am subsidiary Springfield Terminal would operate the lines and trackage rights for PAS *Id* The Application says that Norfolk Southern and PARI/Pan Am will jointly own PAS, will have equal shares in PAS, and will have an equal role in the management of PAS Application at 2, -3, 6 PAS’s use of the trackage rights held by Springfield Terminal is described as essential to the Transaction, and while applicants hope to obtain agreements from the track owners, they ask the Board, as a part of its approval of the Primary Transaction, to expressly hold pursuant to 49 U S C. §11321, that PAS may use of those trackage rights regardless of any contracts or other rights that might otherwise prevent such use Application at 38 The Application further states that Springfield

¹ In these Comments and Petition, BMWED and BRS adopt the abbreviations utilized in the in the Application at pp vi-vii Given the complicated relationships among PARI and its various subsidiaries referred to as “Pan Am”, and the confusing and perhaps dubious distinctions among the Pan Am corporate entities, BMWED and BRS will refer to them collectively as PARI/Pan Am for ease of reference

Terminal will be responsible for railroad operations and related railroad work on the PAS lines and trackage rights under contract with PAS "for the foreseeable future", with Springfield Terminal using the same employees who currently perform railroad operations and related work on the acquired lines and trackage rights under their current collective bargaining agreements with Springfield Terminal Application at 8-9

The ownership and control of PAS will be pursuant to the parties' LLC agreement (Application Ex 2B). There will be a 6 member Management Committee and a Joint Operating Committee that will govern PAS The parties will be equally represented on the Management Committee unless there is a change of control of PARI, in which case Norfolk Southern will have a majority. Joint Operating Committee decisions must be unanimous, so no decisions can be made over the opposition of Norfolk Southern appointed JOC members PAS has the right to terminate the Railroad Operating Agreement under which Springfield Terminal will provide operations and related railroad work In the event of change of control of PARI there is an automatic shift to Norfolk Southern control of PAS and in the event of a change of control of Norfolk Southern, there is an automatic grant of certain trackage rights to Springfield Terminal, both automatic actions are deemed essential elements of the Primary Transaction (this Finance Docket) and necessary elements of the parties' various agreements Application at 22-23, 37

The PAS LLC Agreement (Application Ex 2B) provides that PAS will be a carrier and that Norfolk Southern and PARI/Pan Am will have equal membership interests in PAS LLC Agreement at 10,15, 22, A-3 The agreement further provides that the Management Committee will exercise all powers of the company, and will have six members, three designated by Norfolk Southern and three designated by PARI/Pan Am (but Norfolk Southern would have a 3-2 majority in the event of a change of control of PARI) LLC Agreement at 24-25. The

Management Committee may form subcommittees, and will form a Joint Operating Committee that will be responsible for day-to-day interaction with the general manager, monitoring of operations, dispute resolution, review of shop efficiencies and review of the performance of Springfield Terminal as contract operator. The Joint Operating Committee will be composed of the Chief Operations Officer, the Chief Marketing Officer and one appointed representative each of Norfolk Southern and Springfield Terminal; decisions of the Joint Operating Committee must be unanimous. LLC Agreement at 26. The LLC Agreement lists 22 "Major Decisions" of PAS, that are fundamental to the business and to PAS as an entity, that are reserved to the Management Committee, and that may not be made without the approval of at least one Norfolk Southern-appointed member. Among the fundamental decisions that are reserved to the Management Committee are: change in the basic agreements for this interrelated set of transactions, sale, lease, acquisition or divestiture of any assets of PAS, merger or spin-off the company or its assets, changes in investment policies, approval of the annual budget and business plan, compensation and bonuses, issuance of dividends, changes in management committee members, issuance of dividends, incurring debt, declaration of insolvency or bankruptcy, changes in profit allocations; initiating or settling litigation, material changes in accounting methods, and permission for others to have haulage trackage or other rights over the PAS lines. LLC Agreement at 27-29.

With respect to questions of governance of PAS, Major Decisions of PAS, and fundamental PAS policies and basic business determinations, BMWED and BRS served interrogatories on the Applicants concerning the equal ownership, equal membership and unanimous vote arrangements, and the possibilities of ties, and other deadlocks. In their responses, Applicants confirmed that there could be tie votes and other deadlocks, that there is no

mechanism in the agreements for tie-breakers or other ways of making a decision in the event of a tie or deadlock. *See Applicants' responses to BMWED/BRS interrogatories nos. 1 and 2, the responses are attached to these Comments and Petition*

The Applicants have submitted a Railroad Operating Agreement (Exhibit 2C) which governs the arrangement by which Springfield Terminal will be "retained" as a contract operator for the lines to be acquired by PAS, to perform rail service including all rail functions for those lines, the agreement then details the major railroad functions to be performed by Springfield Terminal. *Id* at 8-13. Such work is to be performed by Springfield Terminal using its employees under its collective bargaining agreements, as if the PAS assets were still part of the Springfield Terminal system. *Id* at 16-17. That agreement may be terminated by PAS upon a Pan Am change of control, PAS abandonment of the lines or its common carrier duties or a material breach of the agreement by Springfield Terminal. *Id* at 19 (Section 11(b)). In response to BRS/BMWED interrogatory no. 3, Applicants noted that PAS could terminate Springfield Terminal operations under Section 11(b) of the Operating Agreement, and that there are no other agreements, or understandings, procedures, restrictions or limitations on a PAS decision to change the contract operator (except possibly under some under the ICA)

In the Application and the Railroad Operating Agreement, the Applicants have repeatedly represented that they "anticipate no adverse effects on any existing railroad employees inasmuch as the lines will be operated for the foreseeable future by the same railroad, Springfield Terminal, and by the same employees that now provide rail transportation services (including maintenance) over the lines and who will continue to provide such services under the same collective bargaining agreements". Application at 8-9. *See also* Application at 34. Applicants further state that they expect that the Board will impose the employee protection conditions set forth in *New*

York Dock Ry-Control-Brooklyn Eastern District Terminal, 360 ICC 60(1979) “on those elements of the Transaction subject to 49 U.S.C. §11323” Application at 34-35

Along with the Application, Applicants have appended as a sub-numbered transaction, their notice of intent to file a notice of exemption for the PAS acquisition of the B&M lines and trackage rights under 49 C.F.R. §1150.31, stating that the notice is “related to, and dependent upon” approval of the “Primary Transaction”, i.e. the instant Finance Docket Notice of Exemption at 1 n 1. That filing again states that Springfield Terminal will “initially be the operator of the lines acquired” and that “[n]o adverse effects on any existing railroad employees are anticipated inasmuch as the lines will be operated for the foreseeable future by the same railroad, Springfield Terminal, and by the same employees that now provide rail transportation services (including maintenance) over the lines and who will continue to provide such services under the same collective bargaining agreements.” Notice of Exemption at 6

ARGUMENT

BMWED and BRS respectfully submit that if the Board approves the proposed “Primary Transaction”, the joint control/operating/pooling transaction, it should expressly require that Springfield Terminal be the operator of the lines performing railroad operations and related railroad work with its existing railroad workers under the existing Springfield Terminal collective bargaining agreements, or that any replacement operator performing railroad operations and related railroad work on the PAS lines and trackage rights lines do so using persons employed by Springfield Terminal under the Springfield Terminal collective bargaining agreements, until they are changed under the Railway Labor Act or the *New York Dock* conditions (as may be permissible). BRS and BMWED further submit that any approval of the Primary Transaction should explicitly state that all related, “embraced” transactions, and all

“elements” of those transactions, including but not limited to the PAS acquisition of the Pan Am lines, are necessarily subject to the employee protective conditions set forth in *New York Dock Ry-Control-Brooklyn Eastern District Terminal*, 360 ICC 60(1979) because such coverage is required given the inter-relatedness and necessary interdependence of the various transactions. Finally, BMW and BRS submit that the PAS acquisition cannot be effected under Section 10901 because it is an acquisition of rail lines of a carrier by two carriers through the vehicle of a controlled entity (PAS), or an effective acquisition of the Pan Am lines by Norfolk Southern, and thus a Section 11323 transaction. The Board should therefore reject the notice of intent to file a notice of exemption for the PAS acquisition under 49 C.F.R. §1150.31, BMW and BRS do not support or oppose an acquisition under Section 11323, or pursuant to an exemption from approval under that Section.

I. THE BOARD SHOULD CONDITION ANY APPROVAL OF THE PRIMARY TRANSACTION AND RELATED TRANSACTIONS ON A REQUIREMENT THAT SPRINGFIELD TERMINAL BE THE CONTRACT OPERATOR USING ITS EMPLOYEES UNDER EXISTING COLLECTIVE BARGAINING AGREEMENTS, OR THAT ANY REPLACEMENT OPERATOR PROVIDE SUCH RAILROAD SERVICES USING SPRINGFIELD TERMINAL EMPLOYEES UNDER THE SPRINGFIELD TERMINAL COLLECTIVE BARGAINING AGREEMENTS

In several places in the Application and supporting documents, the Applicants have represented that they “anticipate no adverse effects on any existing railroad employees inasmuch as the lines will be operated for the foreseeable future by the same railroad, Springfield Terminal, and by the same employees that now provide rail transportation services (including maintenance) over the lines and who will continue to provide such services under the same collective bargaining agreements”. However, Applicants have not indicated what the “foreseeable future” means, and have elsewhere referred to Springfield Terminal as the initial operator of the lines for PAS. The Railroad Operating Agreement provides for termination of Springfield Terminal as

operator for a number of reasons, including material breach of that agreement, and in response to the BMWED/BRS interrogatories, the Applicants acknowledge that there are no other agreement limitations or restrictions on PAS's ability to terminate Springfield Terminal as contract operator

Applicants have repeatedly addressed employee issues and potential adverse impacts on employees both generally, and in connection with specific requirements that they address those issues, by offering the assurance that the plan is for current employees to continue working under their existing collective bargaining agreements. But Applicants have elsewhere recited the proviso that the plan to use Springfield Terminal is for the foreseeable future, and PAS can terminate Springfield Terminal for material breach of the Operating Agreement. Thus, the Applicants have made representations to the Board about their plans as they relate to employees on the lines to be acquired and as to employee impacts, but these representations could be undermined by subsequent reliance on Applicants' other statements concerning the ability of PAS to replace Springfield Terminal as the Operator.

BMWED and BRS submit that if Applicants are going to rely on the operating contract with Springfield Terminal, and its collective bargaining agreements, in seeking approval of the Primary Transaction and related transactions, and in complying with STB requirements for statements as to employee impact, then the Board should impose a condition on any approval orders binding Applicants to their representations regarding employee rights and interests. BMWED and BRS recognize that the various agreements on which the Application is predicated note that PAS may terminate Springfield Terminal as the contract operator, and that use of Springfield Terminal is stated to be for the foreseeable future. But the Applicants have explicitly relied on the Springfield Terminal Operating Agreement and the Springfield Terminal CBAs to satisfy requirements for statements as to employee impacts, and to obtain support for their plans

See e g Application at 8-9, and especially at 34-35 (Specific Information Required by the Regulations, Section 1180 6(a)(2)(v) *See also* Notice of Intent in F D 31547 Sub-No 1, at 6 (General Statement -Labor Impacts) Having made these representations in seeking approval of the interrelated Primary Transaction and PAS acquisition transaction, Applicants should be bound to those representations if S I B approval is granted

Applicants may object that they did not intend such a commitment because they do not want to be bound indefinitely to using Springfield Terminal as the contract operator in the event of some massive, corporate- wide performance failure or in the event of a change of control of PARI/Pan Am But employee rights and interests should not be compromised by a desire to account for such possible occurrences. A major fight between PAS and Springfield Terminal is not going to involve the employees, and a change in control of PARI/Pan AM will only involve the Applicants And the employees should not be subject to uncertainty and loss of rights, particularly when assurances have been given about those rights, because of some problem among the Applicants In particular, employees should not be subject to a decision of PAS (or Norfolk Southern) to bring in a so-called non-carrier operator without Springfield Terminal level, or national standard type, rates of pay, rules and working conditions, as a replacement for Springfield Terminal

To the extent that Applicants have an interest in preserving the ability of PAS to change the contract operator, the condition advocated by BRS and BMWED addresses that interest because it does not restrict that right since they have proposed alternatively that any replacement contract operator would be obligated to use persons employed by Springfield Terminal for work on and related to the PAS lines under the Springfield Terminal collective bargaining agreements until they are changed under the Railway Labor Act or the *New York Dock* conditions (as may be

permissible) The condition proposed by BMWED and BRS is consistent with the representations made by Applicants, while respecting the right of PAS to replace Springfield Terminal as contract operator, but it insures that if Springfield Terminal is replaced, the decision to do so will be subject to the same employee rights and employer obligations relied on by Applicants in seeking approval of the Primary Transaction and related transactions. And the condition sought by BMWED and BRS insures that a decision to change the contract operator will not be based on perceived labor cost advantage.²

BMWED and BRS further submit that the Board has the authority to impose a condition predicated on representations made by applicants seeking Board approval, and that there is ample Board precedent for binding applicants to their representations in seeking Board approval. *See e.g. Canadian National Railway Company, Grand Trunk Corporation And Grand Trunk Western Railroad Incorporated—Control—Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company and Cedar River Railroad Company*, Finance Docket No. 33556, Decision No. 37, May 31, 1999—generally binding the applicants to their representations made in the Board proceedings (*id.* at 57), *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operation Leases/agreements—Conrail Inc. and Consolidated Rail Corporation*, Finance Docket No. 33388, Decision No. 89, July 20, 1998—generally binding the

² In this regard, BMWED and BRS note that it was not that long ago that an effort was made by the predecessors to PARI/Pan Am to engage in a series of operator replacement transactions in ICC Finance Dockets, where the transactions were designed solely for the purpose of replacing existing rates of pay, rules and working conditions with lower rates of pay, and rules and working conditions substantially less favorable to railroad employees, and the ICC allowed years to pass without responding to what was really happening. *Delaware and Hudson Ry. Co.—Springfield Terminal Ry.*, 4 ICC 2d 322(1988). So the employee concerns raised here are not speculative or fanciful.

applicants to their representations made in the Board proceedings (*id* at 176), and binding the applicants to various specific representations made with respect to particular circumstances, interests, and parties (*id* at 88, 101, 105, 112, and 123); *Burlington Northern Inc and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No 32549. Decision No 30, August 16, 1995-binding the applicants to a specific representation concerning a particular party (*id* at 94)

II. ANY APPROVAL OF THE PRIMARY TRANSACTION SHOULD EXPLICITLY STATE THAT ALL RELATED, “EMBRACED” TRANSACTIONS, AND ALL “ELEMENTS” OF THOSE TRANSACTIONS, INCLUDING BUT NOT LIMITED TO THE PAS ACQUISITION OF THE PAN AM LINES, ARE SUBJECT TO THE NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

In their statements regarding employee protection conditions, Applicants have said that they expect that the *New York Dock* conditions will be imposed “on the elements of the Transaction subject to 49 U S C §11323 Application at 35 But, it is readily apparent that the “Transaction” consists of a series of transactions; and they have been described to the Board as an interrelated, mutually dependent group of transactions that truly are parts of one big Transaction Indeed, the joint control and operating/pooling arrangements in this Finance Docket are described as the “Primary Transaction”, and the other transactions are described as related and embraced transactions, and the other transactions are not assigned separate docket numbers, but are sub-numbers of the Primary Transaction

Moreover, the Application describes various elements of these transactions as necessary parts of the overall Transaction, and/or as predicates for the entire Transaction The trackage rights transactions and the PAS acquisition are necessary parts of the Primary Transaction The Application states that “PAS’ use of the trackage rights now held by Springfield Terminal and to

be assigned by it to PAS is essential to the Transaction", and that while Applicants hope to negotiate consent for such use from the track owners, Applicants seek an explicit Order under Section 11321 permitting such use regardless of any other rights of the track owners Application at 38 Similarly, the Notice of Intent to File a Notice of Exemption also states that the transfer of trackage rights "is essential to the Transaction for which approval is sought" and that Section 11321 override authority is requested to insure the transfer of such rights Notice at 4, n 2 And there would be no point at all to the Primary Transaction if there was not going to be a PAS acquisition Norfolk Southern is acquiring an interest in a new company to which it is contributing over \$137 million, where the assets of that company will be the lines it will acquire from PARI/Pan Am. The Notice of Intent to File a Notice of Exemption for the acquisition states that it is dependent on approval of the Primary Transaction, and that a Notice of Exemption will be filed only if the Primary Transaction is approved And the various agreements that were entered by the Applicants, including the Springfield Terminal Operating Agreement are all essential to the series of transactions The suggestion that there are separate parts of this Transaction that are not subject to Section 11323 simply denies the reality of the arrangements among the Applicants Based on the facts of record, the Primary Transaction and the subsidiary transactions are all connected, mutually dependent parts of one big Transaction, and the employee protections imposed in Finance Docket 35147 should therefore be applied to all of the sub-numbered transactions

Not only is such a result supported by the factual record, it is consistent with a long-standing body of Commission precedent which held that when two or more transactions are components of an inseparable arrangement, the protections imposed in one of the transactions are applicable to employees who adversely affected by the other related transaction In *Texas &*

Pacific Ry , 247 I C C. 285 (1941), which involved transactions under the Sections 1 (18) and 5 (2) of the Interstate Commerce Act (predecessor to current Sections 10901 and 11323), the Commission held that the protections attached to a Section 5 (2) transaction applied to employees involved in a Section 1 (18) transaction who were affected by the Section 5 (2) transaction because the various transactions were inextricably intertwined. The Commission stated

Inasmuch as the proposed dismissal of employees [in connection with the Section 1 (18) transaction] in this case arises out of an inseparable plan of operation, which in part can be made effective only upon our authorization under Section 5 (2) of the act , we must comply with the provisions of paragraph (2) (f) of that section [regarding arrangements for the protection of employees affected by the transaction].

Similarly in *Oklahoma Ry Co, Trustees - - Abandonment of Operation, Etc* , 257 I C C 177 (1944), the Commission was confronted with both a discontinuance of operations under Section 1 (18) and purchases subject to Section 5 (2). *Id* The Commission concluded that the transactions were part of an inseparable plan for the unification of railroad facilities and applied employee protective conditions for the benefit of all employees, including those nominally involved in the Section 1 (18) transactions. *Id* at 194. In *Gulf, Mobile & Ohio Railroad Co* , 282 I C C 311 (1951), the Commission held that protections imposed in an acquisition of trackage rights and joint use of terminal facilities under Section 5 (2) were applicable to employees affected by a related abandonment of certain trackage rights under Section 1 (18), noting that in *Texas & Pacific*

We held that where loss in employment results from the abandonment of a line under Section 1(18) as part of an inseparable plan of operation also involving a transaction under Section 5 (2) of the Act, then the employee protection requirements of Section 5 (2) (f) apply to all employees adversely affected by the change in operation

Id at 337. See also *Louisiana & Arkansas Railway Co* , - - *Abandonment*, 290 I C C 434 (1954), and *Seaboard Air Line Railroad Co* , *Trackage Rights, Atlantic Coast Line Railroad*

Co, 312 I C C 797 (1962). More recently, in *Delaware and Hudson Ry Co —Springfield Terminal Ry*, 4 ICC 2d 322(1988), the ICC concluded that a series of purported individual intra-corporate lease transactions were really parts of a larger effective merger or control transaction, and that the multiple transactions had to be seen as parts of one big plan for employee protection purposes 4. ICC 2d at 327-330 Because the leases had already been implemented, the ICC did not revoke the exemptions from regulation that it had granted and instead imposed the sort of employee protections that would be applied in a merger or control transaction on all of the leases, essentially treating the series of individual transactions as parts of one big transaction *Id* at 325, 334

Thus, where, as here, two or more transactions are interrelated, and mutually dependent, and part of an inseparable plan, there is no distinction among the individual parts of the plan with respect to employee protections If the Board approves the Primary Transaction, the *New York Dock* conditions imposed in that transaction should be applied to all of the related transactions, including in particular, the PAS acquisition sub-transaction

III. THE PAS ACQUISITION CANNOT BE EFFECTED UNDER SECTION 10901 BECAUSE IT IS AN EFFECTIVE ACQUISITION OF PAN AM LINES BY NORFOLK SOUTHERN, AND THUS A SECTION 11323 TRANSACTION

While BMWED and BRS are not opposed to the PAS acquisition of the lines and trackage rights currently owned by B&M, they are opposed to such an acquisition being accomplished under Section 10901 and an exemption from approval under that Section of the Act While Section 10901 has been held to govern so-called non-carrier acquisitions of rail lines, the instant case does not involve a non-carrier acquisition, but the creation of a new corporate entity by two existing carriers for the new entity they created to acquire rail lines of a carrier, when acquisition of the lines by either or both of the existing carriers would be a Section 11323

transaction. Furthermore, the Notice of Intent to File a Notice of Exemption states that it is dependent upon approval of the Primary Transaction under Section 11323, and will only occur if such approval is granted. The Notice of Intent itself references the necessity for an Order under Section 11321 in the Primary Transaction ensuring that PAS may use the trackage rights currently held by Springfield Terminal, regardless of any other legal rights or impediments. Notice at 4. BRS and BMWED submit that PAS cannot accomplish an acquisition of trackage rights with Section 11321 override authority by notice of exemption under Section 10901. Even if the trackage rights transfer was viewed as somehow separate from the acquisitions of lines owned by B&M, they would have to be treated as one transaction since there would be no point to transfer of the trackage rights without acquisition of the B&M lines, a right to use trackage rights is useless if one does not own the lines to which the trackage rights lines connect.³ The PAS acquisition transaction, as presented, is an acquisition of lines of a carrier by two carriers through the vehicle of a joint venture created for that purpose, it is therefore a Section 11323 transaction and may not be done by Notice of Exemption under Section 10901 and 49 U.S.C. §115035.

But even if the acquisition itself could qualify on the surface as a non-carrier acquisition by the use of the new corporate entity, examination of the facts of record concerning the creation and governance of PAS show that an acquisition by PAS would then have to be treated as effectively a Norfolk Southern acquisition of rail lines through a controlled entity. Applicants have attempted to blur this fact by describing an arrangement where Norfolk Southern and

³ Nor could the trackage right transfer be deemed incidental to the lines acquisition as has been done in some cases, when here the trackage rights transfer has been described as essential to the Transaction, and Section 11321 override authority is expressly sought for the trackage rights transfer.

PARI/Pan Am have equal shares of PAS and equal votes on the management committee. But this ignores the fact that the lines being acquired by PAS are presently owned by a PARI/Pan Am subsidiary, Norfolk Southern is contributing over \$137 million and PARI/Pan Am is contributing the lines it already owns. But, after consummation, PARI/Pan Am would no longer be able to control the lines it presently owns. Moreover, Norfolk Southern will have effective veto power over any consequential decision to be made by PAS because all important decisions, everything a railroad does, are subject to Norfolk Southern veto. There is an extensive list of "Major Decisions", each of which require Management Committee approval where the Committee is evenly split between Norfolk Southern and PARI/Pan Am representatives. And votes of the Joint Operating Committee on other significant issues and day to day operations require unanimous votes with at least one Norfolk Southern representative voting for the action or decision. LLC Agreement at 27-29. Furthermore, Applicants have admitted that there is no tiebreaker or deadlock resolution procedure. Applicants' answers to BMWED/BRS interrogatories (attachment hereto). If Norfolk Southern says "no" to an action or decision, PAS may not take that action or make that decision. BRS and BMWED submit that by the Primary Transaction, Norfolk Southern will effectively be acquiring control of PAS, and through the vehicle of PAS, Norfolk Southern will then be acquiring the lines to be conveyed to PAS which means the PAS acquisition transaction can only be accomplished under Section 11323.

Section 10102(3), originally in former ICA Section 5, defines "control" as including "actual control, legal control and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust or a holding or investment company, or (B) any other means". In *United States v. Marshall Transport*, 322 U.S. 31 (1944), the Supreme Court rejected a narrow reading of the term "control" and said that former Section 5(2) and former

Section 5(4) “embraced every type of control in fact”, and that “the existence of control must be determined by a regard for the actualities’ of intercorporate relationships”, and that it covered control “however such result is attained, whether directly or indirectly, by use of common directors, officers or stockholders ..or in any manner whatsoever §5(4) Control or management is defined to include ‘the power to exercise control or management §5(4)” *Id* at 38, ellipsis in original In *Allegheny Corp v Breswick*, 353 U S 151, 163 (1957), the Court said that the determination of control depends on “the realities of the situation” and that it had “rejected artificial tests for ‘control’ and left its determination in a particular case as a practica[l] concept to the agency charged with enforcement” And in *Gilbertville Trucking, supra* , the Court found a control relationship based on family and employer-employee relationships, the Court noted that “We have construed this language to encompass every type of control in fact and have left to the agency charged with enforcement the determination from the facts whether ‘control’ exists, subject to normal standards of review”. 371 U.S. at 125.

Given this broad definition of control, BMWED and BRS respectfully submit that if the PAS acquisition is not deemed a Section 11323 carrier line acquisition by Norfolk Southern and PARI/Pan Am, the factual record regarding the creation of PAS and its governance supports the BRS/BMWED argument that Norfolk Southern will be acquiring control of PAS and that the PAS acquisition of the B&M lines is therefore an effective acquisition of those lines by Norfolk Southern that can only be accomplished under Section 11323 ⁴

⁴ BMWED and BRS further submit that if the PAS acquisition is not treated as a carrier (Norfolk Southern-PARI/Pan Am) line acquisition, and the Primary Transaction is not deemed to involve Norfolk Southern control of PAS and Norfolk Southern line acquisition because of the equal split of ownership and tie/deadlock possibilities, then there is no control transaction at all (and no Section 11321 override of other laws, and of existing trackage rights arrangements) because then control of the lines would remain with PARI/Pan Am which already owns the lines Norfolk Southern and PARI/Pan Am can not create a legal limbo as to control by their 50%-50%

For all of these reasons, BMWED and BRS submit that the PAS acquisition may not be affected under Section 10901 and 49 C F R §1150 31, so the notice of intent to file a notice of exemption under those provisions should be rejected. If the PAS acquisition is to be undertaken, it must be done under Section 11323 and therefore subject to the *New York Dock* employee protective conditions. BRS and BMWED take no position on a proposed PAS acquisition under Section 11323, but they submit that a PAS acquisition may only be effected under authority of that provision of the Act.

CONCLUSION

For the foregoing reasons, if the Board approves the Primary Transaction and related transactions, such approval(s) should be subject to the conditions sought by BMWED and BRS. Additionally, the Board should reject the notice of intent to file a notice of exemption for accomplishment of the PAS acquisition under a Section 109091 exemption since that acquisition can only be accomplished under Section 11323.

Respectfully submitted,
/s/ 
Richard S. Edelman
O'Donnell, Schwartz & Anderson
1300 L Street, N W
Suite 1200
Washington, D C 20005
(202) 898-1707
(202)-682-9276
REdelman@odsawalaw.com

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arrangement such that 51% Norfolk Southern ownership would be a change of control, 51% PARI/Pan Am ownership would not be a transaction, but a 50%-50% arrangement, with a transfer of line ownership after a \$137 million buy-in by Norfolk Southern is a non-carrier acquisition.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Comments of the Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railroad Signalmen And Petition for Rejection of Notice of Intent to File Notice of Exemption in Finance Docket No 35147 Sub-No 1, by first-class mail, postage prepaid, to the offices of the following

Richard A Allen
Zuckert, Scout & Rasenberger LLP
888 Seventeenth Street NW
Suite 700
Washington, DC 20006

Attorney General of the United States
c/o Assistant Attorney General,
Anti-trust Division, Room 3109
Department of Justice
Washington, DC 20530

John V Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Secretary of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Robert B Cullisford
Senior Vice President and General Counsel
Pan Am Railways, Inc
14 Aviation Avenue
Portsmouth, NH 03801

Edward D Greenberg
Galland, Kharasch, Greenberg, Fellman
& Swirsky, P.C.
Canal Square
1054 Thirty-First Street, N W
Washington, DC 20007

Louis E Gitomer
The Adams Building
600 Baltimore Avenue, Suite 301
Towson, MD 21204

Daniel R Elliot, III
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107

Harold A Ross
23195 Stoneybrook Drive
North Olmsted, OH 44070

Dave Fellon
Progressive Rail Inc
21778 Highview Avenue
Lakeville, MN 55044

Roger J Schiera
New York State Department of
Transportation
50 Wolf Road
Albany, NY 12232
Harry P Carroll
City of Springfield, Massachusetts
36 Court Street, Room 210
Springfield, MA 01103

Chalmers Hardenbergh
Atlantic Northeast Rails & Ports
162 Main Street
Yarmouth, ME 04096

Toni L Kemmerle
Maine Department of Transportation
16 State House Station
Augusta, ME 04333

Thomas D Hall
Committee to Improve Rail Service in
Maine
176 Merrill Road
Pownal, ME 04069

Stephen G LaBonte
New Hampshire Department of
Transportation
33 Capitol Street
Concord, NH 03301

Peter C Vail, Jr
Carolina Easter-Vail, Inc
4134 State Rte 22
P O Box 483
Salem, NY 12865

Jeffrey B Mullan
Commonwealth of Massachusetts
Executive Office of Transportation
and Public Works
Ten Park Plaza
Boston, MA 02116

Michael S. Wolly
Zwerdling, Paul, Kahn, & Wolly
1025 Connecticut, N W
Suite 712
Washington, DC 20036

Eugene J Colonese
Connecticut Department of
Transportation
2800 Berlin Turnpike
P O Box 317546
Newington, CT 06131

Vincent P Szeligo
Wick, Streiff, Meyer O'Boyle & Szeligo
1450 Two Chatham Center
Pittsburgh, PA 15219

Kevin C Maughan
Greenbrier Leasing Company LLC
One Centerpointe Drive, Suite 200
Lake Oswego, OR 97035

James E Howard
One Thompson Square
Suite 201
Charlestown, MA 02129

Eric M Hocky
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market Street, Suite 1910
Philadelphia, PA 19103

Keith G. O'Brien
Baker & Miller PLLC
2401 Pennsylvania Ave , N W
Suite 300
Washington, DC 20037

Edward J. Rodriguez
Housatonic Railroad Company
8 Davis Road West
P O Box 687
Old Lyme, CT 06371

Myles L Tobin
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606
William L. Faber
Batten Kill Road
1 Elbow Street
Greenwich, NY 12834

Peter R Leishman
Milford-Bennington Railroad Co , Inc
62 Elm Street
Milford, NH 03055

Timothy Brennan
Pioneer Valley Planning Commission
26 Central Street, Suite 34
West Springfield, MA 01089

William C Sippel
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606

Captain Dirck Hecking
Consultant Group of Hecking
& Remington, LLP
6215 Coffman Road
Indianapolis, IN 46268

Ronald A. Lane
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606

Donnalee Lozeau
City of Nashua
229 Main Street
P O Box 2019
Nashua, NH 03061

John K Dunlevy
Vermont Agency of Transportation
One National Life Drive
Montpelier, VT 05633

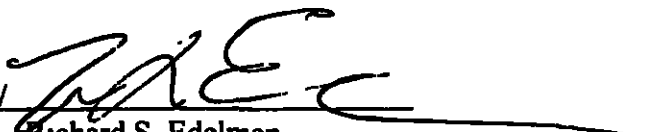
Paul A Cunningham
Harkins Cunningham LLP
1700 K Street, N W., Suite 400
Washington, DC 20006

Alison H Crocker
New York State Department of
Environmental Conservation
Office of the General Counsel
625 Broadway, 14 Floor
Albany, NY 12233

Shaun A Suhoski
Town of Ayer Massachusetts
1 Main Street
Ayer, MA 01432

Bernard R Kubiak
Town of Deerfield
8 Conway Street
South Deerfield, MD 01373

August 11, 2008

/s/ 
Richard S Edelman

Before The
Surface Transportation Board

Finance Docket No. 35147

PAN AM SOUTHERN LLC—
ACQUISITION AND OPERATION EXEMPTION—
LINES OF BOSTON AND MAINE CORPORATION

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM
RAILWAYS, INC., BOSTON AND MAINE CORPORATION, AND SPRINGFIELD
TERMINAL RAILWAY COMPANY TO INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS PROPOUNDED BY THE BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT AND BROTHERHOOD OF
RAILROAD SIGNALMEN**

Norfolk Southern Railway Company ("Norfolk Southern"), Pan Am Railways, Inc ("PARI"), Boston and Maine Corporation ("B&M") and Springfield Terminal Railway Company ("Springfield Terminal"),¹ collectively "Applicants," submit this response to discovery requests submitted by the Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railroad Signalmen ("BMWED/BRS"), dated July 24, 2008

GENERAL OBJECTION

Applicants object to the production of, and is not producing, documents that would disclose information protected by the attorney-client privilege and the attorney work-product doctrine

¹ B&M and Springfield Terminal are part of a corporate family of rail carriers operating under the trade name Pan Am Railways ("Pan Am").

DEFINITIONS

Any capitalized term used in any of the responses herein that is not otherwise defined (such as "Pan Am Change in Control," "Pan Am Member" and "NS Member") shall have the meaning given to that term in the Transaction Agreement or the agreement referenced in said response

INTERROGATORIES

Interrogatory No. 1:

With respect to the representations in the Application that NSR and Boston & Maine Corp and other Pan Am subsidiaries will have equal ownership and management interests in PAS (e.g. Application pp 2, 6)

a Please explain how PAS decisions will be made if NSR and B&M/Pan Am representatives disagree as to decisions and actions by PAS

b Is there a mechanism for a "tie breaker" or other method of reaching a decision when the NSR and B&M/Pan Am representatives disagree?

Response:

In accordance with Section 5.2(a) of the Limited Liability Company Agreement of Pan Am Southern LLC, attached as Exhibit 2B to the Application (the "LLC Agreement"), the business, property and affairs of the Company are to be managed by a Management Committee that will be composed, prior to a Pan Am Change in Control, of six members, three of which will be appointed by each of the Pan Am Member and the NS Member (As described in Section 5.2(b), after a Pan Am Change in Control, the Management Committee will be composed of five persons, three of which will be appointed by the NS Member, and two of which will be appointed by the Pan Am Member). Quorum requirements and other Management Committee requirements are set forth in Section 5.4 of the LLC Agreement. Certain other decision-making requirements are set forth in Section 5.6 of the LLC Agreement.

Because, prior to a Pan Am Change in Control, there will be an even number of persons present on the Management Committee, it is possible, under the terms of that agreement, for an equal number of persons to vote for a proposal as would vote against it. There is no mechanism for a "tie breaker" or other method of reaching a decision when the Management Committee reaches such a point, other than what might be imposed by state law.

Interrogatory No. 2:

With respect to the representations in the Application that decisions of the PAS Management Committee and Joint Operating Committee must be by unanimous vote (e.g. Application p. 22)

a Please explain how management and operating decisions will be made and PAS actions authorized if the committee members are not unanimous in their voting

b Are there any rules or procedures established for situations when PAS must take action or make a decision and the Management Committee and/or Joint Operating Committee members are not in agreement as to what is to be done or decided?

Response:

In accordance with Section 5.2(a) of the LLC Agreement, the business, property and affairs of the Company are to be managed by a Management Committee that will be composed, prior to a Pan Am Change in Control, of six members, three of which will be appointed by each of the Pan Am Member and the NS Member (As described in Section 5.2(b), after a Pan Am Change in Control, the Management Committee will be composed of five persons, three of which will be appointed by the NS Member, and two of which will be appointed by the Pan Am Member). Quorum requirements and other Management Committee requirements are set forth in Section 5.4 of the LLC Agreement. Certain other decision-making requirements are set forth in Section 5.6 of the LLC Agreement.

Because, prior to a Pan Am Change in Control, there will be an even number of persons present on the Management Committee, it is possible, under the terms of the LLC Agreement, for an equal number of persons to vote for a proposal as would vote against it. There is no mechanism for a "tie breaker" or other method of reaching a decision when the Management Committee reaches such a point, other than what might be imposed by state law.

A Joint Operating Committee ("JOC") will exist pursuant to Section 5.3(c) of the LLC Agreement. Prior to a Pan Am Change in Control, the JOC will be composed of six members, three of which will be appointed by each of the Pan Am Member and the NS Member. Prior to a Pan Am Change in Control, the JOC will make decisions by the unanimous vote of its members. As described in Section 5.3(c), after a Pan Am Change in Control, the JOC will be composed of seven persons, three of which will be appointed by the Pan Am Member, and four of which will be appointed by the NS Member. After a Pan Am Change in Control, the JOC will make decisions on a majority vote basis.

Because, prior to a Pan Am Change in Control, the JOC is to make decisions based on a unanimous vote of its members, it is possible, under the terms of the LLC Agreement, for a less-than unanimous vote of the members for a proposal. There is no mechanism for a "tie breaker" or other method of reaching a decision when the JOC reaches such a point, other than what might be imposed by state law.

Interrogatory No. 3.

With respect to representations in the Application that the PAS line will be "operated for the foreseeable future by" Springfield Terminal, and that "PAS will engage Springfield Terminal to act as the initial operator of the PAS Lines" (e.g. Application pp. 8, 24, 34)

a Please state whether there are any agreements or understandings by, between and/or among NSR, PARI, PAS, Springfield Terminal and/or any other Pan Am subsidiary as to when or under what circumstances or situations PAS may change the operator of the PAS lines from Springfield Terminal to any other entity

b Please state whether there are any limitations or restrictions on the decision of PAS to change the operator of its lines from Springfield Terminal to any other entity

c Please state whether there are any procedures or processes that PAS must utilize, or any notices that must be given by PAS, if it seeks to change the operator of its lines from Springfield Terminal to any other entity

Response:

The Railroad Operating Agreement, attached to the Application as Exhibit 2C, will govern the relationship between Springfield Terminal and PAS, which generally provides that Springfield Terminal will act as the designated Railroad Operator for the Line. The agreement will commence on the Effective Date, and continue until terminated in accordance with Section 11(b) of that agreement. The LLC Agreement defines the Railroad Operating Agreement as one of the "JV Transaction Agreements." Pursuant to Section 5.6 of the LLC Agreement, a vote to repeal, modify or amend a JV Transaction Agreement requires the approval of a majority of the Management Committee, including the approval of at least one of the Committee Representatives appointed by the NS Member. There are no other agreements or understandings between or among the parties as to when or under what circumstances or situations PAS may change the operator of the PAS lines from Springfield Terminal to any other entity. There are no other limitations or restrictions on the decision of PAS to change the operator of its lines from Springfield Terminal to any other entity and no other procedures or processes that PAS must utilize, or any notices that must be given by PAS, if it seeks to change the operator of its lines from Springfield Terminal to any other entity other than may be imposed by the Interstate Commerce Act.

Request for Production of Documents No. 1.

Please identify any document reviewed by NSR, PARI and PAS in answering the BMWED/BRS interrogatories and please produce, or arrange for counsel for BMWED and BRS to inspect, any such documents if they have not already been reproduced in the Application or exhibits to the Application

Response:

None



Robert B Culliford
Senior Vice President and General Counsel
Pan Am Railways, Inc
14 Aviation Avenue
Portsmouth, NH 03801
(603) 766-2002

Respectfully submitted,



Richard A Allen
Christina M Wenzel
David M Endersbee
**ZUCKERT, SCOUTT &
 RASENBERGER, LLP**
888 Seventeenth Street, NW
Suite 700
Washington, D C 20006
(202) 298-8660

James A. Hixon
William A Galanko
John V Edwards
David L Coleman
Helen M Hart
**NORFOLK SOUTHERN
CORPORATION**
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

*Attorney for Pan Am Railways, Inc , Boston and
Maine Corporation and Springfield Terminal
Railway Company*

*Attorneys for Norfolk Southern
Railway Company*

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