

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3509  
Telephone [202] 298-8660 Fax [202] 742-0683  
www.zsrlaw.com

RICHARD A. ALLEN

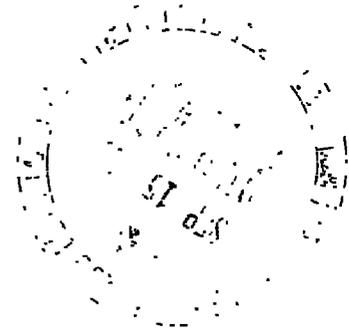
September 15, 2008

223603  
DIRECT DIAL (202) 973-7902  
raallen@zsrlaw.com

**BY HAND DELIVERY**

Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E St., S.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings  
SEP 15 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 each of Applicants' Reply In Opposition To Request For Oral Argument (NS/PA-6) together with three compact discs containing the foregoing filings.

Sincerely,

*Christina M. Wenzel*

Christina M. Wenzel

Encl.

cc: (w/encl.) All Parties of Record

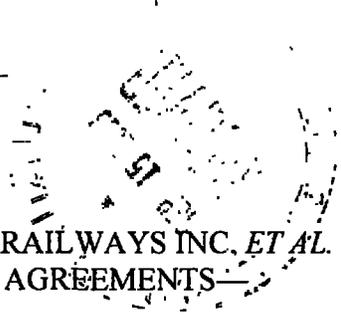
223603

NS/PA-6

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 IN OPPOSITION TO  
REQUEST FOR ORAL ARGUMENT**

ENTERED  
Office of Proceedings

SEP 15 2008

Part of  
Public Record

Robert B. Culliford  
Senior Vice President and General Counsel  
Pan Am Railways, Inc.  
400 Amherst St., Suite 405  
Nashua, NH 03063  
(603) 816-0042

Richard A. Allen  
Christina M. Wenzel  
Zuckert, Scoutt & Rasenberger. LLP  
888 Seventeenth Street, NW  
Suite 700  
Washington, DC 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  
(757) 629-2838

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

Dated: September 15, 2008

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 IN OPPOSITION TO  
REQUEST FOR ORAL ARGUMENT**

Norfolk Southern Railway Company ("Norfolk Southern"), Pan Am Railways, Inc. ("PARI"), Boston and Maine Corporation ("B&M") and Springfield Terminal Railway Company ("Springfield Terminal") (collectively, "Applicants") submit this reply in opposition to the Request for Oral Argument filed on September 11, 2008 by the Commonwealth of Massachusetts Executive Office of Transportation and Public Works ("EOTPW"), U.S. Clay Producers Traffic Association, Inc. (the "Clay Producers") and New England Southern Railway ("NESR") (collectively, "Movants"). Movants are three of 44 parties of record in this proceeding, and each of them filed comments and requests for conditions on or about August 11, 2008, to which Applicants replied on September 5, 2008 in Applicants' Response To Comments And Requests For Conditions And Rebuttal In Support Of Application, NS/PA-4 ("Applicants' Response"). Applicants' Response was accompanied by an Appendix (NS/PA-5) that contain letters from 85 shippers and other persons and entities who support the proposed transaction and wish to see it implemented.

Movants' request for oral argument should be denied. Movants filed their comments, and Applicants filed their response. Despite that, Movants failed, in their petition for oral

argument, to identify a single issue of fact, law or transportation policy that they contend oral argument in this proceeding would be necessary or helpful to the Board in resolving, much less demonstrated why it would be necessary or helpful.<sup>1</sup> Indeed, the Transaction for which Applicants seek approval presents no substantial issues of competition or transportation policy, is likely to provide significant public benefits and has received widespread support from shippers, railroads, public agencies and officials and other persons.

The Board's decisions reflect its recognition that oral hearings and arguments impose a significant burden on the Board and its staff in their efforts to process a busy docket. Generally the Board only grants a petition for oral hearings when there are "material matters

---

<sup>1</sup> On September 15, the Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railroad Signalmen ("BMWED") filed a response (the "BMWED Response") supporting the request for oral argument. BMWED claims that the Board should hold oral argument because of uncertainty arising from a motion filed in the U.S. District Court for the District of Massachusetts for the appointment of a receiver for Springfield Terminal Railway Company. BMWED claims that oral argument is the only means of gauging the impact of the appointment of such a receiver, a hypothetical situation that is very unlikely to occur. Oral argument would not be helpful in this regard. A receivership advanced pursuant to the Federal Rules of Civil Procedure is different from a bankruptcy advanced by the U.S. Bankruptcy Code, and, as a result, there would be no effect on the implementation of the transaction should a receiver be appointed for Springfield Terminal after receipt of an approval from the STB. First, should the U.S. District Court decide to appoint a receiver for Springfield Terminal, that receiver would not have the powers one normally associates with a bankruptcy trustee to affirm or reject executory contracts. Second, the receiver would not be able to reverse any concession or representation made in this proceeding prior to the receiver's appointment. Third, there is no reason to believe that appointment of a receiver for Springfield Terminal would affect Springfield Terminal's ability to operate its system or to act as a contract operator for PAS. A receiver essentially steps into the shoes of the current management. Additionally, there has been no procedural schedule for the U.S. District Court proceeding, which could be pending for far longer than the STB process. Of course, BMWED does not raise issues with regard to any adverse effect that might arise due to an appointment of a receiver during the pendency of this transaction before the Board, but if that were to occur, then the receiver could petition the Board for extra time in which to review and evaluate the transaction documents and the proceedings to date. This is not anticipated to happen, but if a receiver is appointed, Applicants will promptly notify the Board. In any event, oral argument would not be useful to resolve issues related to that eventuality.

in dispute that cannot be adequately considered and resolved based on written submissions.” which is not the case here.<sup>2</sup> The Board does not deviate from its practice of handling cases by means of its modified procedure (the written record) unless a party can show why that process is not sufficient.<sup>3</sup> Accordingly, oral hearings and arguments are the exceptions, which the Board reserves for proceedings presenting exceptionally difficult or novel issues of fact, law or transportation policy or for proceedings having extraordinarily widespread impact, such as Major Transactions involving two or more Class I Railroads. As the Board said in rejecting a request for oral argument in *I & M Rail Link, LLC—Acquisition and Operation Exemption - Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, STB Fin. Docket No. 33327. 2 S.T.B. 167, 172 (STB served on April 2, 1997): “We customarily address matters brought before us on a written record, wherein all members of the public may express their views. We hold public hearings only rarely, when a showing has been made that a written record is an inadequate vehicle by which to solicit views from the public.”

Accordingly, the Board has routinely denied requests for oral argument, including requests in proceedings involving significantly more difficult and controversial issues than

---

<sup>2</sup> See, e.g., *Victor Wheeler – Petition for Declaratory Order – Rail Line in Erie County, PA* STB Finance Docket No. 35082, slip op. at 5 (STB served August 27, 2008).

<sup>3</sup> See, e.g., *PCI Transportation, Inc. v Fort Worth & Western Railroad Co.*, STB Docket No. 42094 (Sub-No. 1). (STB served May 11, 2007) (denying a petition for oral argument because PCI failed to indicate “why the Board’s modified procedure is inadequate for it to present its case and defend against FWR’s counterclaim.”); *Delaware and Hudson Railway Co. – Discontinuance of Trackage Rights Exemption – in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genessee Counties, NY*, STB Docket No. AB-156 (Sub-No. 25X) (STB served November 10, 2004) (denying a request for oral argument because “it appear[ed] that all material issues of fact c[ould] be decided on the basis of written statements, and that the proceeding c[ould] be processed efficiently without oral testimony”).

those in this case, in most of which, moreover, the requester (unlike Movants here) identified the issues it claimed warranted oral argument and gave reasons to support its request. In *United States Department of Energy—Rail Construction and Operation—Caliente Rail Line in Lincoln, Nye and Esmeralda Counties, NV*, STB Fin. Docket No. 35106 (STB served June 27, 2008), the Board denied the request of the State of Nevada for oral argument in the proceeding involving the construction of the proposed and highly controversial 300 mile rail line to serve the proposed Yucca Mountain nuclear waste storage facility. Similarly, in a proceeding the Board has deemed to be “significant,” the Board denied the request of the Mayo City of Rochester for oral argument in *Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota and Eastern Railroad Corp., et al.*, STB Fin. Docket No. 35081 (STB served June 12, 2008), notwithstanding the Clinic’s contention that “the proposed acquisition raises significant issues about the safety and security threats posed by the rail transportation of hazardous materials.” *See, e.g., Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company*, STB Fin. Docket No. 34509 (STB served May 3, 2005) (denying a hearing because the petitioners had not raised issues that were novel, and because holding an hearing would not be likely to “yield additional relevant information.”); *see also, Keokuk Junction Railway Company – Feeder Line Acquisition – Line Of Toledo, Peoria and Western Railway Corporation between La Harpe and Hollis, Il.*, STB Fin. Docket No. 34335 (STB served February 7, 2005); *Norfolk Southern Corp. and Norfolk Southern Railway Co. – Control and Consolidation Exemption – Algiers, Winslow And Western Railway Co.*, STB Fin. Docket No. 34839 (STB served May 15, 2006); and *Tongue River Railroad Co. – Rail Construction and Operation – Ashland to Decker, Montana*, STB Fin. Docket No. 30186 (Sub-No. 2) (STB served November 8, 1996).

None of the issues raised by Movants in their comments (or by the parties Movants say support their request) presents difficult or novel issues of fact, law or policy that the Board cannot readily resolve on the basis of the written record. As noted in Applicants' Response, EOTPW's comments do not dispute the substantial public benefits of the Transaction as described in the Application, and in fact, acknowledge "that the enhanced rail infrastructure operations and service contemplated by the proposed Transaction will – if properly implemented – benefit the Commonwealth." EOTPW Comments at 3. EOTPW's main objection is to one element of the relief sought by Applicants, namely, their request for a "declaratory order pursuant to 49 U.S.C. § 11321(a) that PAS and any contract operator of PAS Lines will have authority to conduct operations over the trackage rights lines as fully and to the same extent as Springfield Terminal could, notwithstanding any clauses in any such trackage rights agreements limiting or prohibiting Springfield Terminal's unilateral assignment of its operating rights to another person." Application at 38; see also Application at 45. As explained in Applicants' Response (at 17-25), such relief is clearly necessary for PAS to be able to carry out the Transaction, because it will need to operate over 198 miles of tracks owned by five other railroads pursuant to trackage rights now held by Springfield Terminal. Of those five railroads, only the Massachusetts Bay Transit Authority ("MBTA"), per EOTPW, objects to the requested relief. Applicants' Response shows that the requested relief is supported by law and precedent and that EOTPW's desire for "bargaining leverage" to obtain unrelated concessions from Applicants does not warrant denial of the relief. Whatever the Board decides, however, this is not a difficult or particularly novel issue that oral argument is needed to elucidate.

Similarly, the conditions requested by the other two Movants – the Clay Producers

and NESR – present no difficult or novel issues. Each asks the Board to require or ensure the payment of sums by PARI or its subsidiaries allegedly due to Movants for various pre-Transaction activities. Applicants contend that these conditions are clearly unrelated to any effect the Transaction may have and are therefore unwarranted under well settled precedent. See Applicants’ Response at 25-26, 36-37 and 63. Again, however the Board rules, this is not a difficult or novel issue warranting oral argument.

The issues raised by the other parties alleged by Movants to support Movants’ request are equally unexceptional, as perhaps reflected by the failure of those parties to formally join the request. The claim of the Montreal, Maine and Atlantic Railway, Ltd. (“MMA”) that the Applicants will act to foreclose other routings by which MMA move’s traffic to Norfolk Southern is a familiar one in Board and ICC proceedings, where it has been consistently rejected, and is particularly implausible in this case. *See Applicants’ Response at 47-51.* The claim of the Milford Bennington Railroad Company, Inc. (“MBR”) that PARI will deliberately degrade the assets of its remaining lines after the Transaction is unsupported, implausible, and, as noted in Applicants’ Response at 52, “contrary to the opinion expressed by other railroads in the region, such as CP, P&W, PVRR, NESR, MRR, CCRR and NHNR, as well as the opinions of the transportation agencies of the affected states, including NHDOI.” The comments of the Town of Ayer, MA raise only environmental issues, which Applicants expect will be addressed in the Environmental Assessment prepared by the Section of Environmental Analysis. The Town of Deerfield likewise raises only environmental issues, which, moreover, pertain only to pre-existing conditions and not to any affects of the Transaction.<sup>4</sup>

---

<sup>4</sup> The circumstances and issues presented by the Transaction in this case contrast sharply with

Movants' claim that the comments filed in this proceeding warrant oral argument also overlooks the very substantial and widespread support the Transaction has received. As detailed more fully in Applicants' Response and the Appendix (NS/PA-5), the Transaction is strongly supported by 66 shippers, including UPS, Ford Motor Company, Chevron Phillips Chemical Company, JB Hunt Transportation Services and many other major shippers, and no shippers oppose the Transaction. It is also supported by the transportation agencies of New York, New Hampshire, Connecticut and Vermont and by the State of Maine, and by other public officials, including Massachusetts Congressmen John Olver and James McGovern. It is also supported by most railroads directly affected by the Transaction, including Canadian Pacific Railway, Providence and Worcester Railroad, New England Central Railroad and Amtrak. This widespread support further reflects that the Transaction presents no substantial issues warranting oral argument.

---

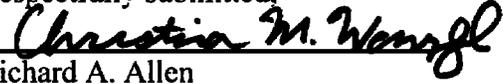
those in the three cases cited by Movants in footnote 7 of their request in which the Board held or scheduled a hearing or argument. *Central Oregon & Pacific, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR.* STB Docket No. AB 515 (Sub-No. 2) (STB served July 29, 2008) is an abandonment application as to which there was a substantial amount of conflicting information, necessitating multiple inspections of the line and several rounds of filings. Among other avenues of information gathering, the Board scheduled a public hearing in Oregon to afford local persons and entities an opportunity to express their views. *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway - Construction, Acquisition and Operation Exemption - In Wilmington and Woburn, MA.* STB Fin. Docket No. 34797 (STB served March 29, 2007) involved a construction application which also had substantial opposition, and it also presented difficult and novel issues of Board jurisdiction on specific processes that applicants proposed to perform on its property, which the Board concluded oral argument would help it resolve. The Board granted a petition for hearing in *Buckingham Branch Railroad Company - Lease - CSX Transportation, Inc.*, STB Fin. Docket No. 34495 (STB served October 5, 2004) after receiving a petition that detailed five specific areas in which the Board was faced with difficult and novel issues in deciding whether to approve the transaction. *See, Request of the Brotherhood of Maintenance of Way Employes for Oral Argument, BMWF-10*, submitted in *Buckingham Branch Railroad Company - Lease - CSX Transportation, Inc.*, STB Fin. Docket No. 34495, on Sept. 29, 2004. No such issues were presented in this proceeding.

**CONCLUSION**

Movants' request for an oral argument should be denied.

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

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

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

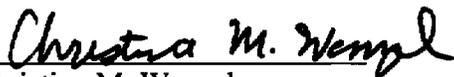
James A. Hixon  
William A. Galanko  
John V. Edwards  
David L. Coleman  
Helen M. Hart  
**NORFOLK SOUTHERN  
CORPORATION**  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
(757) 629-2838

*Attorneys for Norfolk Southern  
Railway Company*

September 15, 2008

## CERTIFICATE OF SERVICE

I certify that I have this 15<sup>th</sup> day of September, 2008 served a copy of the foregoing Applicants' Reply In Opposition To Request For Oral Argument (NS/PA-6), in STB Finance Docket No. 35147, by first class mail, postage prepaid, upon all the parties of record.

  
Christina M. Wenzel