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**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**

FINANCE DOCKET NO. 35147 (SUB-NO. 1)

**PAN AM SOUTHERN, LLC -
ACQUISITION AND OPERATION EXEMPTION-
LINES OF BOSTON AND MAINE CORPORATION**

FINANCE DOCKET NO. 35147 (SUB- NO. 2)

**NORFOLK SOUTHERN RAILWAY COMPANY-
TRACKAGE RIGHTS EXEMPTION-
PAN AM SOUTHERN, LLC- BETWEEN
MECHANICVILLE, NY AND AYER, MA**

FINANCE DOCKET NO. 35147 (SUB-NO. 3)

**SPRINGFIELD TERMINAL RAILWAY COMPANY-
TRACKAGE RIGHTS EXEMPTION-
PAN AM SOUTHERN, LLC - BETWEEN
CPF 312 NEAR WILLOWS, MA AND HARVARD STATION, MA**

Dated: August 14, 2008

**COMMENTS OF UNITED TRANSPORTATION UNION AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN IN
OPPOSITION TO THE TRANSACTION OR ALTERNATIVELY FOR
EMPLOYEE PROTECTIONS TAILORED TO THE TRANSACTION**

The United Transportation Union (“UTU”) and the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (“BLET”), are the bargaining representatives of all crafts comprising the operating employees (train and engine service employees) employed on the rail lines that are the subject of the Transaction embodied in Finance Docket Nos. 35147, 35147 (Sub-No. 1), 35147 (Sub-No. 2) and 35147 (Sub-No. 3). They submit these Comments in opposition to the Application and related filings of the Norfolk Southern Railway Company (Norfolk Southern”); Pan Am Railways, Inc. (“PARI”), non-carrier holding company; and two railroad subsidiaries of PARI, the Boston and Maine Corporation (B&M”), currently the non-operating owner of rail lines and trackage rights, and Springfield Terminal Railway Company (“Springfield Terminal”), a rail carrier providing freight rail service over its lines, B&M lines, and trackage rights and others (hereinafter collectively referred to as “Applicants”). The filings are totally intertwined and integrally related, so much so that the Board has referred to the agreements for which the Applicants seek the Board’s approval through the Application and related filings as the “Transaction.” See Decision No. 2. 73 Federal Register 36586 (June 27, 2008).

BLET and UTU submit that the Board should deny approval and authorization of the Transaction, because, as written, it is inappropriate and could deny the PARI employees represented by them of their employment and the protections imposed or that should be imposed upon the Transaction. If the Board should nevertheless grant approval and authorization of the Transaction, UTU/BLET submit alternatively that the Board impose, at a minimum, the labor protective

conditions set forth in *New York Dock Ry. – 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), upon the transaction as a whole for a period of no less than six (6) years, since all elements of the Transaction are intertwined and totally reliant upon each other and because there is no assurance the affected employees of Springfield Terminal will be employed and timely receive the protections of the *New York Dock* conditions over the full period of protection set forth therein.

In Decision No. 2, the Board found the filings integrated and constituting a singular transaction. And the Applicants, both in the Application and at page 4, footnote 2 of the Notice filed in Finance Docket No. 35147 (Sub-No. 1), admitted this in stating: As explained in the Primary Application, [Pan Am Southern’s] acquisition of the described trackage rights of Springfield Terminal is essential to the Transaction for which approval is sought....”

Factual Background

On June 23, 2008, the Board issued its Decision No.2 accepting for consideration the filings made by Norfolk Southern and PARI and two of its subsidiaries, Springfield Terminal and B&M seeking approval under 49 U.S.C. § 11322 and § 11323, and the three related notices for an exemption by Pan Am Southern LLC (“PAS”) to operate and control the lines of B&M and incidental trackage rights from Springfield Terminal pursuant to 49 C.F.R. §1150.35(d), an exemption from §11323 pursuant to 49 C.F.R. §1180.2(d)(7) and §1180.4(g) to permit Norfolk Southern to acquire and exercise overhead trackage rights on 151.33 miles of track that will be owned or operated by PAS between Mechanicville, NY and Ayer, MA; and an exemption from the prior approval requirements of 49 U.S.C. 11323, pursuant to 49 C.F.R. §§ 1180.2(d)(7) and 1180.4 (g), to permit Springfield Terminal to acquire and exercise overhead trackage rights over 6.4 miles

of track that will be owned by PAS between CPF 312 near Willows, MA and Harvard Station, MA.

If the Transaction is approved by the Board, PAS' operations would cover approximately 437 miles of track. These lines would consist of 238.3 miles of rail line to be owned by PAS and 198.4 miles of track as to which it will have trackage rights. The west to east main line would be called the Patriot Corridor and would be comprised of 139.7 miles of track to be owned by PAS extending from Mechanicville, NY to CPF-312, near Ayer, MA, as well as 15.8 miles of trackage rights over Massachusetts Bay Transportation Authority ("MBTA") track between Fitchburg, MA and Willows, MA.

In addition, the north-south portion of the PAS Lines would extend from White River Junction, VT to New Haven, CT, and would consist mainly of trackage owned by others. This section would consist of 72.8 miles of trackage rights over New England Central Railroad between White River Junction, VT and East Northfield, MA; 49.7 miles of track to be owned by PAS between East Northfield, MA and Springfield, MA; and 62.0 miles of trackage rights over the National Railroad Passenger Corporation (Amtrak) between Springfield, MA and New Haven, CT.

The Applicants say that they expect this agency to impose the *New York Dock* conditions on those parts of the Transaction subject to 49 U.S.C. 11323. See Application at 34-35. However, as to the exemptions in Finance Docket Nos. 35147 (Sub Nos. 2 and 3), Applicants state that those employees "adversely affected by the acquisition of the trackage rights that are the subject of this Notice of Exemption will be entitled to protection under the conditions imposed in *Norfolk and Western Railway Co.—Trackage Rights – Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway, Inc. – Lease and Operate – California Western Railroad*, 360 I.C.C. 653 (1980)." See Notice in F.D. 35147 (Sub No-2) at 7, and in (Sub-No. 3) at 6.

In regard to the Notice of Exemption in Finance Docket 35147 (Sub-No 1), however, Applicants apparently assume that PAS is a non-carrier that is exempt from labor protection requirements under 49 U.S.C. 10901. They justify this on the basis that “no 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.” *See, e.g.*, Application at 8. (emphasis supplied). Moreover, at different places in the filings, Applicants refer to the fact that under the Railroad Operating Agreement, Applicants’ Exhibit 2C, “PAS will engage Springfield Terminal to act as the initial operator of the PAS Lines....” *See* Application at 24 (emphasis supplied).

According to the Applicants, the avowed purpose of the Transaction is to rehabilitate and upgrade the infrastructure of the PAS Lines in order to provide better and faster service. To accomplish this, PARI and its two subsidiaries will provide a 73.684% undivided interest in the described line and trackage rights to PAS. In return, B&M receives a 50% interest in PAS and certain monies as a contractor for PAS, including revenues from PAS to Springfield Terminal for its rail operations and administrative support functions.

Norfolk Southern will have equal ownership and management interests on PAS. For this, Norfolk Southern will provide \$87.5 million dollars for, among other things, improving the infrastructure and thereby removing long term slow orders along the Patriot Corridor and adding capacity and clearances along that line. In all, Norfolk Southern will contribute a total of \$137.5 million in cash and notes, which includes \$47.5 million contributed to PAS to be used to exercise an option, which Norfolk Southern has purchased from B&M for \$5 million in order to acquire a

26.316% undivided interest in the PAS Lines and related assets for \$52 million. The option price paid by Norfolk Southern is non-refundable but will be credited against the purchase price when PAS exercises the aforesaid option at the closing of the Transaction Agreement.

PAS will be governed by a number of Committees with equal numbers of members designated by B&M and Norfolk Southern. Decisions of PAS' Joint Operating Committee must be by unanimous vote. There is no provision or guidance that these parties are aware of to break any ties in the decision making process. We do know that the PAS LLC Agreement provides a seven-year period in which there will be a preferred distribution to B&M, after which PAS' profits and losses will be split equally between B&M and Norfolk Southern. See Application Exhibit 2B at 22-23.

The day after the Board accepted the filings to approve the Transaction, the Vermont Railroad System (VRS) filed what the Board considered a petition to reconsider the Board's designation of the Transaction as "minor." VRS sought designation as a "significant" transaction and for a revision of the procedural schedule. BLET/UTU filed a petition to join the petition of VRS and to express their concern over the absence of any labor protection in Finance Docket No. 35147 (Sub-No.1).

Applicants filed a reply in opposition to the UTU/BLET petition on July 14, 2008. In an attempt to persuade the employees that they had nothing to fear from the Transaction, Applicants gave them the vague assurance that they would "perform[] the same work under the same agreements for the foreseeable future." They said in their opposition (pp 4-5):

In this case there clearly would 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." 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 will also give Norfolk Southern and Pan Am equal and joint control of PAS, thereby precluding either from operating PAS as its alter ego.

**Employee Concerns And Opposition Regarding
Effect Of The Transaction Upon Them**

In addition to the continued use of the vague and ambiguous language cited above by Applicants, the employees' concerns over the effects of the Transaction upon them have been fostered by real actions toward them over the past several decades by Pan Am Railways and its predecessor, Guilford Transportation.

The employees' concerns stem from actions of Guilford in late 1989 and in 1987 using Springfield Terminal, a wholly owned subsidiary, an auto transport company, and having its other subsidiaries, such as B&M, Delaware & Hudson Railway, and Maine Central, convey trackage rights to Springfield Terminal, which became the rail operations company. The employees on B&M and Maine Central were furloughed as Springfield Terminal took over all the rail operations.

As indicated by the verified statements of Michael D. Twombly and George T. Casey, some of the furloughed employees were hired by Springfield Terminal. Twombly V.S. at ¶4. A concise summary of the labor controversies growing out of those transactions may be found in *Railway Labor Executives Ass'n, v. United States*, 987 F.2d 806 (D.C. Cir. 1993). The Interstate Commerce

Commission (“ICC”) initially applied the employee protections prescribed in *Mendocino Coast Ry., Inc. – Lease and Operate–California Western R.R.*, 354 I.C.C. 732 (1978), as well as those in *Norfolk and Western Ry. – Trackage Rights – Burlington Northern, Inc.*, 354 I.C.C. 605, 611 (1978), both modified, *Mendocino Coast Ry, Inc. – Lease and Operate – California Western R.R.*, 360 I.C.C. 653 (1980), both *aff’d sub nom.*, *Railway Labor Executives Ass’n v. United States* 675 F.2d 1248 (D.C. Cir. 1982). On February 17, 1988, the ICC, hoping to quash the labor unrest taking place, imposed a hybrid set of protective conditions on the transactions, including the substantive provisions of the *Mendocino Coast* conditions and the more stringent procedural safeguards of the *New York Dock* conditions. *Delaware and Hudson Ry. Co. – Lease and Trackage Rights Exemption – Springfield Terminal Ry. Co.*, 4 I.C.C. 2d 322 (1988).

Notwithstanding the hybrid conditions, two major arbitration decisions respecting the application of those conditions, and litigation before the ICC and in the federal courts, it took over three years to obtain an arbitrated implementing agreement and many more to resolve the situation. Twombly V.S. at ¶12. The current situation causes the employees to envision the same circumstances arising here.

In fact, in July 2008, quite similar pre-Transaction circumstances took place. On July 7, 2008, UTU’s General Chairman, George Casey, wrote Springfield Terminal and requested a meeting to negotiate an implementing agreement under the *New York Dock* conditions to be imposed in this Transaction. Twombly V.S. at ¶13.

On July 11, 2008, Mr. Robert B. Culliford, Senior Vice President and General Counsel for PAR replied and rejected Mr. Casey’s request. See Twombly V.S. at ¶14 and Exh. 4. Mr. Culliford stated that no implementing agreement was required by the *New York Dock* conditions in that the

Transaction would not cause the dismissal or displacement of any employees or rearrangement of forces. He further suggested, without prejudice to the Carrier's position, a meeting be held on July 17, 2008 at 1 p.m., if there were any continuing concerns. *Id.*

The meeting did take place on July 17, 2008. At the outset, Mr. Culliford rejected the position and request of the UTU. He asserted the employees were protected and that Springfield Terminal did not need to respond to their questions and concerns. BLET's Vice President Twombly asked a few more questions, after which Mr. Culliford became agitated, swearing, pounding the table and hollering that the employees were a bunch of spoiled children. *Id.* at ¶16. Twombly then stated that the employees could not trust the Carrier to do the right thing when it could not even hold a professional meeting with their representatives. *Id.*

After things cooled down, Mr. Twombly asked Mr. Culliford to provide some idea as to why the documents that were filed referred to Springfield Terminal performing the operational and administrative functions "for the foreseeable future" and the Application stated PAS "will engage Springfield Terminal to act as the initial operator of the PAS Lines." *Id.* at ¶17. Though he was not clear on the issue, Mr. Culliford informed us that the language had something to do with the performance standards in the agreements and implied that if they were not met, Norfolk Southern could take over and operate the trains with the overhead trackage rights it would acquire if the Transaction were completed. *Id.* He kept telling Mr. Casey and Mr. Twombly to read the documents and that they would have nothing to worry about. When Mr. Culliford advised BLET's and UTU's representatives that Springfield Terminal would operate the lines on a contract basis, they became concerned and informed him that somehow, under similar status of a contract provider, Springfield Terminal lost the commuter rail contract and the unloading contract at the Ford Auto Unloading

Facility in Ayer, Ma, which eventually ended up with B&M. *Id.*

On July 29, 2008, Mr. Culliford sent a letter to Mr. Casey, copy to Twombly, which does not allay the employees' concerns as to employment security for Springfield Terminal employees under the Transaction. *Id.* at 18 and Exh. 6. Rather than emphasizing and leaving unencumbered the "assurances" contained in the last two sentences of the penultimate paragraph of his letter that "BLET and UTU's concern that ST will be removed as the operator of Pan Am Southern to avoid ST's labor contract is unfounded" and "to assure both the BLET and the UTU again that ST has no such plans and that such a removal has not been a part of any discussions with Norfolk Southern or others and is simply not ST's intent," Mr. Culliford states:

However, negotiation of an implementing agreement will not be required because ST is expected to continue operating Pan Am Southern Lines following this transaction under ST's existing collective bargaining agreements and without adverse labor impacts.

(*Id.*) (emphasis supplied).

While the assurances are welcome, the fact that Springfield Terminal is "expected" to continue to operate is far removed from saying it "will continue operating Pan Am Southern Lines following this Transaction under ST's existing collective bargaining agreements and without adverse labor impacts."

In addition to the bad experiences the employees had under the ICC imposed conditions and with Springfield Terminal's contract operations, they have a real concern as to whether Pan Am Railways, Inc., is in sufficiently sound financial condition and has adequate managerial competence to achieve the standards required of it, as well the necessary ability and trust to handle this

arrangement.

It is a matter of public record that the U.S. Department of Transportation issued a show cause order proposing to revoke the certificate of public convenience and necessity of Boston-Maine Airways Corp. ("BMAC"), one of Springfield Terminal's sister subsidiaries on Pan Am Systems.

The Department's decision raises and answers the question of the financial condition of Pan Am Railways and Springfield Terminal. The decisions set forth within the order, along with the other factors we have mentioned, necessarily cause any outside observer to question the ability and willingness of these corporations to honor their commitments. *Twoombly V.S.* at ¶8 and Exh. 3. In summarizing its tentative finding (Exh. 3 at p. 2), the Department stated that the financial information submitted by BMAC's representatives, who also represented Springfield Terminal, had been falsified; that its financial condition actually was extremely poor with continuing losses; and that the falsified documents required the Department to "conclude" that the President and other key personnel either did not read the order, which, in and of itself, raises questions concerning their managerial competence, or that they knew the orders were inaccurate and did not inform the Department, which directly reflects on their compliance disposition.

At page 12 of the Department's opinion, it is revealed that BMAC attempted to establish that it was financially solvent by claiming that "its sister company, Springfield Terminal Railway Co. ('ST') had committed to extend BMAC a \$7.2 million line-of-credit." But the Department states that its later "review of the [actual] financial statements for ST, BMAC's sister company that committed to extend to the air carrier a line-of-credit, indicated that the company did not have the funds necessary to support BMAC's operations and capital expenditures, *let alone [ST's] own.*" See Exh. 3 at 14. (emphasis supplied).

In addition to these expressions of Springfield Terminal's financial condition, Springfield Terminal and B&M have a series of lawsuits brought against them which show that they and their parent, PARI, may owe large sums of money to third parties and are suffering from cash flow problems. Twombly V.S. at ¶7.

CSX Transportation ("CSXT") has a pending case against them for damages exceeding \$2.3 million in the U.S. District Court for the District of Massachusetts, which is entitled *CSX Transportation, Inc. v. Springfield Terminal Railway, et al.*, Case No. 1:08-cv-10220-NMG. Twombly V.S. at Exh. 1. CSXT alleges that the defendants owe it monies for use of CSXT's locomotives, car repairs made by CSXT on their rail cars, use of CSXT trackage, and CSXT's clean-up of an environmental spill by defendants on CSXT's tracks near Turnbull Road in Rotterdam, NY.

On March 4, 2008, the Greenbrier Companies filed an action against the same defendants in the same court for a sum of at least \$1,455,179.85 for outstanding car hire fees. *Id.* at ¶7 and Exh. 2. Similar cases appear to be pending against Springfield Terminal and B&M which were brought by GATX and Trinity Industries. *Id.* PARI and B&M are also involved in litigation over the North Point land development arrangement on former railroad property in the Boston area. *Id.* Springfield Terminal is also faced with environmental charges and potential fines sought by state environmental agencies, one of which was the subject of an April 3 press release by the Massachusetts Attorney General. *Id.* at ¶10 and Exh 4.

These background materials naturally lead a reasonable person to deduce that PARI and Springfield Terminal may attempt to circumvent or be unable to comply with the employee protections to be imposed in this Transaction and hold to the commitments in the Transaction's filings as to the continued employment of the Springfield Terminal's employees under the existing

collective bargaining agreements between the rail carriers and the employee representatives.

ARGUMENT

_____ BLET/UTU has serious concerns about PAR's (and its corporate family's (Springfield Terminal and B&M) abilities to live up to its promises to the employees involved in this Transaction. However, if the Board does decide to approve this Transaction, UTU/BLET respectfully asks for the imposition of employee protections tailored to this Transaction that would alleviate some of these concerns since Applicants are unwilling to reassure labor in any fashion about its real intentions despite numerous requests to do so through the mandated channels.

A. THE BOARD SHOULD IMPOSE *NEW YORK DOCK* ON ALL ASPECTS OF THE TRANSACTION, INCLUDING ALL EMBRACED TRANSACTIONS, BECAUSE THEY ARE AN INTEGRATED SERIES OF TRANSACTIONS UNDER § 11323, AS A CONDITION OF APPROVAL OF THE TRANSACTION

The Board should impose *New York Dock* on all aspects of this Transaction, including all embraced transactions, because they are an integrated series of transactions all falling under § 11323, as a condition of approval of the transaction. While Applicants' Application appears to concede this point, UTU and BLET have some serious concerns regarding this concession based on the Applicants' § 10901 filing, which is F.D. No. 35147 (Sub-No. 1).

In their Application, they state "[i]n any event, Applicants expect that, as required by § 11326(a), the Board will impose 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) on the elements of the transaction subject to 49 U.S.C. § 11323." While this statement is somewhat open ended, the intent appears to be that *New York Dock* will be applicable to all aspects of the transaction.

As noted, this intent was confirmed in Applicants' Reply to Petition of United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen for a Finding that the Proposed Transaction Is a Significant Transaction and for Revision of the Proposed Procedural Schedule. In their Petition, UTU and BLET stated that they "have some serious concerns about whether Applicants will attempt to use this [§10901] transaction to avoid labor protection altogether." In Applicants' Reply, apparently in an attempt to allay these concerns, they responded that the "UTU's and BLET's asserted concerns are unfounded." In addressing this matter further, Applicants were apparently attempting to reassure labor that *New York Dock* would be imposed on the entire Transaction in making the following statement:

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."

Also, Applicants subsequently wrote in a letter to UTU:

With regard to your assertion that ST "disavows any obligation to provide New York Dock . . . protection.", this is completely untrue and is in direct contradiction to both the statements made in the application for approval to form Pan Am Southern and statements made during our meeting. To reiterate, ST expects that New York Dock labor protective conditions will be imposed upon elements of this transaction including ST's operation of the Pan Am Southern lines.

Trombly V.S. Exhibit 6.

In other words, Applicants again appear to concede that *New York Dock* will apply to all

aspects of the Transaction, as it should, and they will not be using the § 10901 transaction to avoid their responsibilities thereunder. UTU and BLET urge the Board to take the Applicants at their word and impose *New York Dock* on all aspects of the Transaction, including all embraced transactions, in order to prohibit Applicants from back tracking on their apparent commitments herein later down the road.

B. EVEN ASSUMING THE BOARD DOES NOT IMPOSE *NEW YORK DOCK* BASED ON APPLICANTS' ASSERTIONS ALONE, IT SHOULD IMPOSE *NEW YORK DOCK* ON ALL ASPECTS OF THE TRANSACTION INCLUDING THE § 10901 TRANSACTION WHICH IS SUPERFLUOUS HERE BECAUSE IT IS CONTAINED IN THE GREATER § 11323 TRANSACTION ALREADY AS DESCRIBED IN THE APPLICATION.

Even assuming the Board does not impose *New York Dock* based on Applicants' assertions alone, it should impose *New York Dock* on all aspects of the transaction including the § 10901 transaction in (Sub-No.1) because this portion of the transaction is obviously rolled up inside the entire § 11323 transaction in this Application as demonstrated by Applicants' own filings. In the Application in the Section "Details Concerning the Transaction and Specific Requests for Relief," Applicants' described the § 11323 Transaction as follows:

- Applicants submit this Application pursuant to 49 U.S.C. §§ 11322 and 11323 and 49 C.F.R. Part 1180 seeking approval by the Board for:
 - 1. Norfolk Southern and B&M to acquire joint control and ownership of PAS, an entity to be formed, and its railroad lines, and
 - 2. approval of operating and pooling agreements by which Springfield Terminal will operate the lines of PAS and establish rates for PAS.

* * *

By the agreements for which approval and authorization are being sought by this Application and the related notices (collectively, the "Transaction"), Norfolk Southern and B&M will establish a new company, PAS, which they propose will own railroad lines and acquire certain trackage rights mainly in Massachusetts but also in New York, Vermont, New Hampshire, and Connecticut (the "PAS Lines") which are shown on the map on the following page, as well as in Exhibit A. B&M and other Pan Am subsidiaries will contribute the rail lines and assign the trackage rights to PAS. Norfolk Southern will contribute \$137.5 million in capital plus an option agreement.

PAS will be jointly owned by Norfolk Southern and B&M, which will share equally in supervising its management and capital expenditures. Pursuant to an operating agreement, railroad operations (including maintenance, dispatching and train operations) and administrative services will be provided for the foreseeable future by Springfield Terminal, as contractor to, and subject to supervision by, PAS.

* * *

Springfield Terminal will continue to operate the portion of its system that will not be contributed to PAS - the remaining Springfield Terminal system. As is shown on the map on the following page, Springfield Terminal will obtain trackage rights over PAS Lines in eastern Massachusetts to preserve an existing connection to CSXT.

Norfolk Southern will receive certain trackage and haulage rights from PAS. The haulage that PAS provides to Norfolk Southern will enable Norfolk Southern, for the first time, to directly reach interchanges with P&W, VTR and NECR.

Application at 4-7.

In other words, two carriers seek to put their assets together to form a carrier that will be operated by a third carrier. *See* 49 U.S.C. § 11323(a)(1). This Transaction totally encompasses the § 10901 transaction as described in the Notice of Exemption (Sub-No. 1), which is clearly superfluous in light of the § 11323 Application.

In comparison, in their § 10901 Notice of Exemption, Applicants describe this transaction as follows:

PAS will be a non-carrier formed by Norfolk Southern and the Pan Am Parties to acquire and operate rail lines currently owned by B&M.

* * *

In the Primary Application to which this Notice of Exemption is related, Norfolk Southern and the Pan Am Parties seek approval under 49 U.S.C. §§ 11323 and 11322 for the Transaction Agreement and related agreements. Pursuant to those agreements, PAS will be formed, Norfolk Southern will contribute cash, demand notes and an option agreement to PAS, which together are valued at \$140 million, and B&M will contribute certain railroad lines in Massachusetts, New York, Vermont, New Hampshire and Connecticut, totaling approximately 238 route miles, and Springfield Terminal will assign to PAS trackage rights Springfield Terminal currently holds over certain lines of Massachusetts Bay Transportation Authority ("MBTA"), New England Central Railroad ("NECR"), Canadian Pacific Railroad Company ("CP"), Amtrak, CSX Transportation, Inc. ("CSXT") and Metro North Commuter Railroad Company ("Metro North"), totaling approximately 198 route miles (collectively, the "PAS Lines"). The mile-posts of the subject property, including branch lines, are included in Ex. 1. The address of B&M is 1700 Iron Horse Park, Billerica, MA 01862.

In addition, pursuant to the Transaction Agreement and related agreements, (1) Norfolk Southern and B&M will jointly own and control PAS and will share equally in supervising its management and capital expenditures; (2) Springfield Terminal will be engaged initially to operate the lines and to establish rates and other charges for PAS and (3) Springfield Terminal will obtain trackage rights over PAS and MBTA lines in eastern Massachusetts to preserve

existing connections to CSXT and Providence and Worcester Railroad Company ("P&W"), and (4) Norfolk Southern will obtain certain trackage and haulage rights from PAS.

Notice at 3-4.

In essence, Applicants simply redescribe the Transaction that they seek of approval of in the Application when describing this transaction it proposes under § 10901. The reason being, the transactions are one in the same. As a result, UTU and BLET ask the Board to revoke the exemption sought under § 10901, which is merely superfluous as it is actually part of the Transaction in the § 11323 Application, or at the very least, find that this transaction is embraced by the § 11323 transaction and its *New York Dock* labor protective conditions.

B. The Law Regarding § 11323 Also Provides That The § 10901 Exemption Should Actually Be A Part of the § 11323 Transaction.

49 U.S.C. § 11323(a) provides as follows:

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.

(3) Acquisition of control of a rail carrier by any number of rail carriers.

(4) Acquisition of control of at least 2 rail carriers by a person that is not a rail carrier.

(5) Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.

(6) Acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(emphasis supplied).

In their Application, Applicants address the applicability of this section to the Transaction as follows:

Because the Transaction will result in Norfolk Southern and B&M jointly owning PAS and its lines, it requires Board approval under 49 U.S.C. § 11323(a)(6). *See, e.g.,* Finance Docket No. 33362, *Paducah & Louisville Ry – Control Exemption – Paducah & Illinois R. Co.* (served August 25, 1997). It may also require approval under 49 U.S.C. § 11323(a)(3), inasmuch as the Transaction will give both Norfolk Southern and B&M many of the indicia of “control” of PAS, whose lines are now wholly owned and controlled by PARI and its subsidiaries even though each of Norfolk Southern’s and B&M’s management representation and share of the profits will not exceed 50 percent. *See* Finance Docket 35063, *Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company* (served December 10, 2007). The agreement by which Springfield Terminal will operate the PAS Lines also requires approval under 49 U.S.C. § 11323(a)(2), and the agreement pertaining to the establishment of PAS’s rates and the allocation of joint transportation contract revenues requires approval under 49 U.S.C. § 11322.

Application at 11.

For the most part, UTU and BLET agree with Applicants that this transaction requires approval under § 11323(a)(2)(3), and (6). UTU and BLET also believe that this transaction requires

approval under § 11323(a)(1) since two carriers (B&M and NS) are consolidating their assets to form one corporation (PAS) for the ownership, management, and operation of the previously separately owned properties. The only point on which there is any disagreement between the parties on this issue is whether the Applicants really need the § 10901 transaction, which is clearly subsumed within the greater § 11323 transaction.

In the seminal case on the applicability of the Interstate Commerce Act's prior consolidation, merger, and acquisition of control provision, the Supreme Court interpreted § 5 as amended by the 1940 Act, 54 Stat. 899, 905, 49 U.S.C. § 5, as providing that the non-carrier parent (Union) of a carrier (Refiners) that proposed to purchase the property and franchises of another carrier (Marshall) "acquired control" of the property and franchises of the vendor and was therefore subject to the Commission's jurisdiction. *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944). In reaching its decision, the Court was explicit regarding the purpose of § 5:

It is not doubted that if Union, having control of Refiners, sought to acquire stock control of Marshall, Union would be required by s 5(2)(b) to apply for the Commission's authority to do so. But it is said that having control of Refiners, Union may, by procuring Refiners' compliance with the purchase provisions of the statute alone, extend its control indefinitely to other carriers merely by directing the purchase of their property and business by Refiners, without subjecting itself to the jurisdiction of the Commission as provided in s 5(3), so long as Union does not act directly as the purchaser of the property or of a controlling stock interest in such other carriers.

We think that neither the language nor the legislative history of the statute admits of so narrow a construction. Section 5(4) makes it unlawful, without the approval of the Commission as provided by s 5(2)(a), for a person which is not a carrier and which

has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Not only is this language broad enough in terms to embrace the acquisition of control by a non-carrier through the purchase, by a controlled carrier, of the property and business of another carrier, but the legislative history indicates that such was its purpose.

Id. at 36-37.

Shortly thereafter, the Supreme Court, in explaining *Marshall Transport*, stated as follows:

In other words, a non-carrier may not gain control over carriers free of Commission regulation merely by operating through subsidiaries.

The crux of each inquiry to determine whether there has been an 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, and not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote. In deciding this type of issue, of course, the finding of the Commission that a given transaction does not constitute a significant increase in the power of one company over another is not to be overruled so long as 'there is warrant in record for the judgment of the expert body * * *.' *Rochester Telephone Corp v. United States*, 307 U.S. 125, 146, 59 S.Ct. 754, 764, 83 L.Ed. 1147.

Allegheny Corporation v. Brunswick & Co., 353 U.S. 151, 773-74 (1957).

In essence, the Supreme Court requires one to view the nature of the overall transaction in

determining whether the § 11323(a) (previously Section 5) provision is applicable to a transaction. With respect to this Transaction, the nature is clear; obviously two separate carriers are combining their assets (cash and tracks) to form one railroad corporation. See 49 U.S.C. § 11323(a)(1). The use of the § 10901 transaction has no purpose here when one looks at the real nature of this transaction. See, e.g., *Fox Valley & Western Limited v. I.C.C.*, 15 F.3d 641 (7th Cir. 1994).

In fact, when one looks at the essence of this transaction, it basically matches the facts in the Board's recent decision in Finance Docket No. 35063, *Michigan Central Railway, LLC- Acquisition and Operation - Lines of Norfolk Southern Railway Corporation* (served December 10, 2007). In this case, Michigan Central, a newly formed company, sought an exemption under § 10901 to acquire 299 miles of track from NSR, to acquire through assignment some 85.5 miles of existing track or easement rights and lease rights, and to acquire yards and stations that were related to this track. NSR would have contributed these rail lines, trackage rights and related assets to MSR in exchange for a 33% interest in MCR, a majority share of MCR's profits, retention of certain management rights over MCR, retention of certain trackage and haulage rights over MCR, and certain restrictions on MCR's ability to interchange traffic with other carriers. Watco Transportation Services, Inc. ("Watco") would have contributed \$18 million in cash and locomotives over time to MCR in exchange for a 67% membership interest in MCR. MCR stated that it would have invested more than \$20 million in these lines over the first 3 years, provided responsive service to local shippers, and developed a new traffic base. MCR also represented that there would have been no adverse effect on overhead traffic and that no shipper would have suffered a reduction in competition as a result of the proposed transaction.

In a related proceeding, Watco and its corporate parent, Watco Companies, Inc., filed a notice

of exemption to continue in control of MCR upon MCR's becoming a rail carrier through its proposed acquisition and operation of these rail lines.

In finding this transaction did not fall under the acgis of § 10901, the Board reasoned as follows:

Unlike the more typical short lines sales that have come before us in the past for authorization, the proposed transaction here involves NSR's contribution of hundreds of miles of rail lines to a noncarrier entity coupled with NSR's retention of extensive control over those lines, including significant ownership interest in the new entity. Based on the facts of this case, we find that MCR would not be sufficiently independent of NSR to be deemed a separate "person" for purposes of section 10901(a)(4). Therefore, the proposed transaction would not come within the scope of section 10901.

We find that NSR's influence over MCR far exceeds what would be expected of a minority investor. As noted, NSR would have a nominal 33% ownership interest in MCR, and it would have the right to designate two of the five persons on MCR's Management committee and one of the three persons on the Capital Project Committee. These facts, standing alone, would not lead us to find a control relationship between MCR and NSR. In this case, however, NSR's actual influence over MCR would go far beyond its committee voting rights because NSR would retain the right to veto almost all of MCR's significant financial and operations decisions. These include: major assets sales or encumbrances; actions that would dilute NSR's share of ownership or profits; investment of funds; annual budgets and business plans; operating or capital expenditures exceeding budgets by 10%; payment of dividends; borrowing in excess of \$1 million; declaring bankruptcy; material modifications of employee benefit plans; and litigation where the amount at issue exceeds \$1 million. These provisions would give NSR the ability

to prevent MCR from taking the kind of initiative and action ordinarily associated with ownership, and NSR's veto power would be perpetual.

As a result of these findings, the Board held as follows:

While we understand that rail carriers may seek to protect their assets and investments when they enter into agreements, NSR has retained too much control over MCR to allow us to find that this transaction is subject to section 10901. In examining the indicia of control it is apparent that Watco's relationship to MCR is more akin to that of a minority investor than a majority owner. NSR would be likely to prevail over Watco in making major decisions for MCR because of its ability to veto all major decisions and its size in relation to Watco. These factors coupled with the many limitations on MCR's operations and the right of NSR to more than 50% of MCR's profits take this transaction significantly beyond those that we have authorized in the past under section 10901. In sum, under the totality of the circumstances presented here, the record shows that NSR would continue to have the power to exert such a significant degree of control over MCR, and the lines it would contribute, to preclude the proposed transaction from coming within the scope of section 10901.

In other words, since the transaction did not come within the scope of § 10901, the parties to this proceeding by implication would have had to seek approval under § 11323, much the same as was done here with one exception. Despite the clear holding in *Michigan Central* that § 10901 was inapplicable in these types of transactions, Applicants (one of which was a party in *Michigan Central*) still sought to sneak a § 10901 filing in below the radar in this proceeding. UTU and BLET have serious concerns about the purpose of this transaction, *i.e.*, using the § 10901 transaction to avoid *New York Dock*. Obviously, since the § 10901 filing is unwarranted as shown above, it should be revoked or alternatively, BLET and UTU ask the Board to embrace this transaction in the § 11323

transaction, along with its *New York Dock* labor protective conditions.

B. THE BOARD SHOULD REQUIRE APPLICANTS TO GIVE PRIORITY OF HIRE TO ALL SPRINGFIELD TERMINAL EMPLOYEES AND MAINTAIN THE COLLECTIVE BARGAINING AGREEMENTS ON SPRINGFIELD TERMINAL IF THERE IS A CHANGE IN OPERATORS ON PAS, OR ALTERNATIVELY TO ENGAGE IN THE IMPLEMENTING AGREEMENT PROCEDURE IN ACCORDANCE WITH ARTICLE I, SECTION 4 OF *NEW YORK DOCK* BEFORE THIS TRANSACTION MAY BE IMPLEMENTED, SINCE SPRINGFIELD TERMINAL REFUSES TO COMPLY WITH THESE IMPLEMENTING AGREEMENT PROCEDURES.

UTU and BLET respectfully ask the Board to require Applicants to give priority of hire to all Springfield Terminal employees and maintain the CBA on Springfield Terminal subject to change under *New York Dock* or the Railway Labor Act if there is a change in the operators on PAS, or alternatively to engage in the implementing agreement procedure in accordance with Article I, Section 4 before this transaction may be implemented since Springfield Terminal refuses to comply with these procedures. On July 17, 2008, UTU and BLET met with Springfield Terminal and its corporate family and asked them to begin negotiations under Article I, Section 4 to reach an implementing agreement under *New York Dock*. Springfield Terminal flatly refused to negotiate or even discuss an implementing agreement under the aegis of these labor protective conditions on the pretense that no agreement has to be reached if Applicants believe no employees will be adversely affected by the transaction. See Twombly V.S. Exh. 6.

In Section 1180.6(a)(2)(v) of the Application regarding the Transaction's effect on carriers' employees, Applicants state as follows:

Applicants expect that the Transaction will result in
no adverse effect on any of the Applicant's

employees. Employees of Springfield Terminal are currently providing all of the rail services over the PAS Lines. The Transaction Agreement and the Railroad Operating Agreement provide that following consummation of the Transaction, Springfield Terminal will become the contract operator of the PAS Lines, and Springfield Terminal will 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." Exhibit E, Section 9(f)(ii)(A). In short, the same employees will 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 will impose 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) on the elements of the Transaction subject to 49 U.S.C. § 11323.

Application at 34-35.

UTU simply asked Springfield Terminal to meet in accordance with *New York Dock* to negotiate an implementing agreement. UTU only wanted to memorialize the above-mentioned assurances in agreement form as is its right to do under Article I, Section 4 of *New York Dock*. UTU also had some concerns about who would perform the work in the new yard and switching facilities proposed to be implemented under this Transaction. However, Springfield Terminal flatly refused to even begin these discussions.

This rejection of implementing agreement discussions by the Springfield Terminal is improper, as the negotiation of an implementing agreement is not a unilateral decision for the carriers to make. *See, e.g., Railway Labor Executives' Ass'n v. Southeastern Pennsylvania Transportation*

Authority, 534 F. Supp 832 (Sp. Ct. R.R.R.A. (1982). In this case which is applicable here by analogy, the Regional Rail Reorganization Act of 1973 Special Court reasoned as follows when deciding whether an implementing agreement in a nearly identical context to the one at hand must be negotiated:

SEPTA argues that “(i)f there are no employees being transferred, obviously negotiations are unnecessary.” SEPTA Brief at 24. SEPTA concludes that since it decided that on Conrail employees were “to be transferred” to its Fox Chase-Newtown operations (and that no such transfer is intended for the commuter operations out of Reading Terminal), s 508(a) is inapplicable.

This argument—which relies on the premise “if there are no employees being transferred”—begs the question of who is to decide how many Conrail employees are “to be transferred.” RLEA’s whole case is that Congress has set up a procedure to do this, and RLEA can point convincingly to s 508(c)(1), which provides that the negotiating process “shall ... determine the number of employees to be transferred to Amtrak Commuter or a commuter authority.” If, as SEPTA claims, it can decide in advance of negotiations that it wants no Conrail employees, then it is hard to see why s 508(c)(1) was included.

Id. at 841-42.

Like in *RLEA*, the courts have similarly held that if an entity enters into a transaction subject to approval by the Surface Transportation Board, it must abide by these implementing agreement and arbitration requirements imposed on a transaction whether or not the entity believes them to be necessary. *See Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co.*, 314 F.2d 424, 433-34 (8th Cir. 1963); *New Orleans & N.E. R. Co. v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963) (“It would be meaningless for the order to provide that appellees may refer the dispute to arbitration if such provision were to be construed as also meaning that such election could be defeated by the refusal of the appellant to acquiesce.”)

Moreover, the language in Article I, Section 4 clearly makes the implementing agreement process mandatory since “[e]ach transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of agreement or decision under this Section 4.” (emphasis supplied). As this language provides, even if the transaction only “may” affect employees, the parties “shall” engage in these discussions and possibly arbitration if need be. In other words, this process is mandatory and provides no wiggle room for a carrier to avoid these procedures simply by saying no employees will be affected.

Ordinarily, UTU and BLET would not ask the Board to rule on such a matter involving *New York Dock*. However, since Springfield Terminal has made this unprecedented unilateral refusal to discuss an implementing agreement, UTU and BLET seek the Board’s imposition of the condition that any new operator on PAS will give priority of hire to all Springfield Terminal employees and will maintain Springfield Terminal collective bargaining agreements in place until changed pursuant to *New York Dock* or the Railway Labor Act if there is a change in operators on PAS. UTU and BLET seek this condition in order to ensure that Applicants live up to their word in saying Springfield Terminal will be the operator on PAS and no employees will be adversely affected. Alternatively, UTU and BLET respectfully ask the Board to order the Springfield Terminal to engage in the implementing agreement procedures with the employee representatives before that Transaction can be implemented.

CONCLUSION

UTU and BLET respectfully oppose and seek rejection of this Transaction in its present form.

Alternatively, UTU and BLET ask the Board to revoke the § 10901 transaction in Sub. No. 1, or simply include it in the § 11323 Transaction and impose *New York Dock* on all aspects of the Transaction. UTU and BLET also ask the Board to require any new operator on PAS give priority of hire to all Springfield Terminal employees and to maintain the Springfield Terminal collective bargaining agreements in place subject to change pursuant to *New York Dock* or the Railway Labor Act if there is a change in operators on PAS, or alternatively, to require Springfield Terminal to engage in the implementing agreement procedures with UTU and BLET before it can begin this Transaction.

Respectfully submitted

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CERTIFICATE OF SERVICE

_____ This is to certify that a copy of the foregoing United Transportation Union's and Brotherhood of Locomotive Engineers and Trainmen's Comments have been served via first-class, postage pre-paid mail upon the following:

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VERIFIED STATEMENT OF GEORGE T. CASEY

I, George T. Casey, depose and state as follows:

1. I am and have been the General Chairman for United Transportation Union's ("UTU") General Committee with jurisdiction on Springfield Terminal Railway Company since January 1, 2005. I was Vice General Chairperson on this Committee with jurisdiction over Springfield Terminal from 1985 to January 1, 2005. My office is located in Framingham, MA.

2. Pan Am Railways owns the Boston and Maine Railroad ("B&M") and the Maine Central Railroad. Springfield Terminal is a wholly owned subsidiary of B&M. In addition, the Maine Central and the B&M own, on a 51-49 percentage basis, the Portland Terminal Company, which is an operating switching company in Portland, Maine.

3. UTU is the collective bargaining representative for the craft of trainmen, laborers and police on the Springfield Terminal, currently the operating railroad of the Pan Am Railways system, and on B&M, which owns Springfield Terminal and also other rail lines and trackage rights.

4. On its face, the transaction in Finance Docket No. 34157 and related filings would appear to be beneficial by providing some measure of cash flow to Springfield Terminal, upgrading trackage and signal systems, creating faster and better delivery to shippers on the involved lines, increasing jobs for Springfield Terminal railroad employees and automotive industry workers, and hopefully helping the economy of the region and augmenting needed revenues for affected communities. Moreover, the existing employees of Springfield Terminal would have somewhat more secure jobs and an upbeat feeling as to their future livelihood. If this were true and that all current Springfield Terminal employees would continue to be employed and would receive the *New York Dock* employee protections for at least a period not less than the maximum period specified

therein, UTU, I would think, would have difficulty in opposing the transaction.

5. However, UTU has three concerns, which cause it to believe that the transaction, as presently constituted, will in all likelihood fail, or that it requires the imposition of a further condition or conditions to protect the employees of Springfield Terminal and also assure that the monies provided Pan Am Southern Railways ("PAS") by Norfolk Southern will be used for their intended purpose.

6. The first concern stems from litigation filed against Springfield Terminal and B&M indicating they and their parent, Pan Am, may owe large sums of money to third parties and have cash flow problems. For example, CSX Transportation, Inc. ("CSXT"), filed an action against B&M and Springfield Terminal in the U. S. District Court for the District of Massachusetts on February 11, 2008, for a sum exceeding \$75,000.00. In its complaint, CSXT claims the defendants owe it money for their use of CSXT's locomotives; car repairs made by it on defendants' rail cars; use of CSXT's trackage by defendants from the Amtrak connection to the Cedar Hill yard; and CSXT's clean-up of an environmental spill on CSXT's tracks near Turnbull Road in Rotterdam, NY. A copy of CSXT's complaint in the case entitled *CSX Transportation, Inc. v. Springfield Terminal Railway, et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:08-cv-10220-NMG, is attached to Michael D. Twombly Verified Statement ("Twombly V.S.") as Exhibit 1. Also, on March 4, 2008, the Greenbrier Companies brought an action in the U.S. District Court for the District of Massachusetts against B&M and Springfield Terminal for a sum of at least \$1,455,179.85 for all outstanding car hire fees owed it by the defendants as of February 29, 2008. A copy of that complaint, docketed as Case No. 1:08-cv-10362-NMG, is attached to Twombly's V.S. as Exhibit 2. It is my understanding similar suits for monies owed on car leases are pending against Springfield

Terminal and B&M, which were brought by GATX and Trinity Industries. Further, Pan Am and B&M are involved in litigation with their partners in a land development arrangement in Boston, MA, which was called North Point and apparently has been dissolved with only a few buildings being completed.

7. In addition to the concerns of the employees we represent over the financial condition of Pan Am Railways and Springfield Terminal, we question their ability or willingness to honor their commitments. On February 1, 2008, the U.S. Department of Transportation issued a show cause order proposing to revoke the certificate of public convenience and necessity of Boston-Maine Airways Corp., and to dismiss its applications for foreign scheduled operations on the basis it failed to remain fit, willing, and able to provide air transportation as a U.S. certificated air carrier. A copy of this order is attached to Twombly's V.S. as Exhibit 3. At the time, Boston-Maine Airways was a part of Pan Am Systems, Inc., as was its sister corporation, Springfield Terminal. At page 2 of its order, the Department summarized its tentative findings. They were that the financial information submitted by it and its representatives, who were also representatives of Springfield Terminal, had been falsified, its actual financial condition was extremely poor with continuing losses, and that the subsequently admittedly falsified documents, which it filed, required the Department to "conclude that the President and other key personnel either did not read the orders, which, in and of itself, raises questions concerning their managerial competence, or that they knew the orders were inaccurate and did not inform the Department, which directly reflects on their compliance disposition." A perusal of the Department's opinion reveals at page 12 that Boston-Maine Airways attempted to shore up its financial solvency by claiming "its sister company, Springfield Terminal Railway Co. ('ST') had committed to extend BMAC a \$7.2 million line-of-credit." At a later date, the Department found,

as the order states at page 14, that its "review of the financial statements for ST, BMAC's sister company that committed to extend to the air carrier a line-of-credit, indicated that the company did not have the funds necessary to support BMAC's operations and capital expenditures, let alone [ST's] own." To the best of my knowledge, Boston-Maine Airways no longer has a license to operate planes and air service.

8. It also needs to be noted that the tracks on Springfield Terminal's lines have not been maintained to 40 mile per hour standards for years and accordingly the trains operating on them are subject to speed restrictions. For the most part, on lines owned by Pan Am Railways, trains operate at either 10 miles or 25 miles per hour; and on lines owned by MBTA (commuter lines) or lines upgraded for Amtrak service (Atkinson, NH to Portland, ME), trains may be operated at speeds up to 40 miles per hour, but most are restricted to 30 miles per hour because Pan Am Railways does not have sufficient telemetry devices (an FRA requirement) to permit speeds in excess of 30 miles per hour on the 40 miles per hour lines.

9. In addition, there are other problems currently facing Springfield Terminal which cause its rail operations to be problematic, such as pending environmental charges and potential fines that state environmental agencies are seeking. An example appears in Exhibit 4 to Twombly's V.S., an April 3, 2008 press release from the Office of the Attorney General of Massachusetts.

10. There are two additional occurrences that have taken place, one at the inception of the current railroad structure of Pan Am Railways and the other during July 2008. These events shape our belief that Pan Am Railways and Springfield Terminal may shirk compliance with the employee protections to be imposed in this proceeding and the representations in the application and the filings herein about the continued employment of the Springfield Terminal employees under the

existing collective bargaining agreements between the rail carrier and the employee representatives.

11. The first occurrence took place when Pan Am Railways (then Guilford Transportation, Inc.) attempted to shed its work force on Maine Central and B&M, transfer the work to Springfield Terminal and circumvent compliance with the employee protective conditions imposed by the Interstate Commerce Commission. Those efforts eventually failed in large measure due to rulings by the Commission and the federal courts. Notwithstanding all of that litigation, it took over three years to achieve the implementing agreements under the Mendocino Coast Conditions imposed by the agency in ICC Finance Docket No. 30965, as subsequently modified by the Commission to include certain requirements from the *New York Dock* Conditions.

12. The occurrence that took place in July 2008 is also mystifying. Mike Twombly, the Vice President for the BLET, with Pan Am Railways as his assignment, and I have worked together and cooperated in trying to resolve various labor problems arising on Springfield Terminal, including application of employee protection in this situation. On July 7, 2008, I wrote Springfield Terminal and requested a meeting to negotiate an implementing agreement under the *New York Dock* Conditions to be imposed upon this transaction.

13. On July 11, 2008, Robert B. Culliford, Senior Vice President and General Counsel for Pan Am Railways, sent a letter to me rejecting my request, which correspondence is attached to Twombly V.S. as Exhibit 5. In his letter, Mr. Culliford stated that no implementing agreement was required by the *New York Dock* Conditions, since the transaction would not have the effect of causing the dismissal or displacement of any employees or rearrangement of forces. He further suggested that if there were any continuing concerns, and without prejudice to the carrier's position, a meeting would be held at Springfield Terminal's North Billerica, Massachusetts offices on July

17, 2008, at 1 p.m.

14. I invited Mr. Twombly to attend the meeting, which was held on July 17, 2008. Besides Mr. Twombly, Mr. Culliford and me, Pan Am Vice-President-Labor Relations Cynthia Scaranno and Pan Am Director of Labor Relations Anthony Lomanto were present. Kevin Moore, United Transportation Union's Vice General Chairperson, appeared midway during the meeting. UTU's attorney, Dan Elliott, participated in the meeting by telephone.

15. During the course of the conversation, Mr. Culliford categorically rejected my request and position. He stated that management did not want to negotiate or define any verbiage or provide the meaning of any language in the documents filed with the Board. He said the employees were protected and had nothing to worry about, and Springfield Terminal, therefore, did not have to respond to our questions and concerns. After Mr. Twombly asked him a few more questions about the employees' concerns, Mr. Culliford became extremely upset and hostile, using profane language, directing himself in a physical way toward Mr. Twombly, pointing and tapping the table, while informing the group that the employees were a bunch of spoiled children that needed reassurance. After this outburst was finished, Mr. Twombly stated his opinion in this question: "How can the employees trust the Carrier to do the right thing, when it cannot even hold a professional meeting with us in regard to these issues?"

16. After the dust had settled, I asked Mr. Culliford if he could otherwise give us some idea of the meaning of several ambiguous terms or why they were used. I referred to the use of the phrase "operations for the foreseeable future" used on page 8 of the Application and other places in the filings and about the reason for stating on page 24 of the Application that PAS "will engage Springfield Terminal to act as the initial operator of the PAS Lines...." (Emphasis supplied). Mr

Culliford was not clear on this issue, but advised that it had something to do with the performance standards included in the agreements between the railroads, implying that if the operating standards were not met, Norfolk Southern could step up and operate trains with the requested overhead trackage rights it would acquire if the transaction were completed. Mr. Culliford kept telling us to read the documents; we had nothing to worry about. He advised us that Springfield Terminal was going to be used on a contract basis to operate the lines in question. I told him that we had seen the outcome from the loss of the commuter rail contract and even how Springfield Terminal somehow lost the auto unloading contract in Ayer, MA, at the Ford Auto Unloading Facility, and how it somehow flowed to North East Logistical Services, and how it somehow ended up under contract with Boston & Maine Railroad. Mr. Culliford had no comment, and the meeting ended.

17. I received a July 29, 2008 letter from Mr. Culliford to me restating the Carrier's position that "negotiation of an implementing agreement will not be required because ST is expected to continue operating Pan Am Southern lines following this transaction under ST's existing collective bargaining agreements and without adverse labor impacts." Attached to Twombly V.S. as Exhibit 6.

VERIFICATION AND SIGNATURE

I, George T. Casey, verify under penalty of perjury that the statements herein are true and correct to the best of my knowledge, information and belief.

Executed this 31st day of August 2008

George T. Casey
George T. Casey

VERIFIED STATEMENT OF MICHAEL D. TWOMBLY

I, MICHAEL D. TWOMBLY, depose and state as follows:

- 1. I am and have been since May 21, 2008, a Vice President of the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters ("BLET"). I was General Chairman for BLET and its predecessor on Pan Am Railways, which was formerly known as Guilford Transportation, Inc., since 1991, and continued to work as a locomotive engineer on Springfield Terminal ("ST") until I filled my new office. One of my current assignments is Pan Am Railways. My office is located at 70 High Street, Andover, MA.**
- 2. Pan Am Railways owns the Boston and Maine Railroad ("B&M") and the Maine Central Railroad. Springfield Terminal is a wholly owned subsidiary of B&M. In addition, the Maine Central and the B&M own, on a 51-49 percentage basis, the Portland Terminal Company, which is an operating switching company in Portland, Maine.**
- 3. BLET is the collective bargaining representative for the craft of locomotive engineers on the Springfield Terminal, currently the operating railroad of the Pan Am Railways system, and on B&M, which owns Springfield Terminal and also other rail lines and trackage rights.**
- 4. I was hired as a locomotive fireman on B&M and have been an employee of Pan Am Railways and its predecessors since 1971. B&M lines and trackage rights were, along with three other sister railroads, leased to Springfield Terminal in late 1986 and into 1987. I was subsequently furloughed by B&M and hired by Springfield Terminal in my capacity as a locomotive engineer in 1987. I am still on furlough from B&M and hold seniority on it and Springfield Terminal from which I now have a leave of absence as a union officer.**
- 5. On its face, the transaction in Finance Docket No. 34157 and related filings would appear to be beneficial by providing some measure of cash flow to Springfield Terminal, upgrading trackage and signal systems, creating faster and better delivery to shippers on the involved lines,**

increasing jobs for Springfield Terminal railroad employees and automotive industry workers, and hopefully helping the economy of the region and augmenting needed revenues for affected communities. Moreover, the existing employees of Springfield Terminal would have somewhat more secure jobs and an upbeat feeling as to their future livelihood. If this were true and that all current Springfield Terminal employees would continue to be employed and would receive the *New York Dock* employee protections for at least a period not less than the maximum period specified therein, BLET, I would think, would have difficulty in opposing the transaction.

6. However, BLET has three concerns, which cause it to believe that the transaction, as presently constituted, will in all likelihood fail, or that it requires the imposition of a further condition or conditions to protect the employees of Springfield Terminal and also assure that the monies provided Pan Am Southern Railways ("PAS") by Norfolk Southern will be used for their intended purpose.

7. The first concern stems from litigation filed against Springfield Terminal and B&M indicating they and their parent, Pan Am, may owe large sums of money to third parties and have cash flow problems. For example, CSX Transportation, Inc. ("CSXT"), filed an action against B&M and Springfield Terminal in the U. S. District Court for the District of Massachusetts on February 11, 2008, for a sum exceeding \$75,000.00. In its complaint, CSXT claims the defendants owe it money for their use of CSXT's locomotives; car repairs made by it on defendants' rail cars; use of CSXT's trackage by defendants from the Amtrak connection to the Cedar Hill yard; and CSXT's clean-up of an environmental spill on CSXT's tracks near Turnbull Road in Rotterdam, NY. A copy of CSXT's complaint in the case entitled *CSX Transportation, Inc. v. Springfield Terminal Railway, et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:08-cv-10220-NMG, is attached hereto as Exhibit 1. Also, on March 4, 2008, the Greenbrier Companies brought an action in the U.S. District Court for the District of Massachusetts against B&M and Springfield Terminal for a sum of at least \$1,455,179.85 for all outstanding car hire fees owed it by the defendants as of February 29, 2008. A copy of that complaint, docketed

as Case No. 1:08-cv-10362-NMG, is attached hereto as Exhibit 2. It is my understanding similar suits for monies owed on car leases are pending against Springfield Terminal and B&M, which were brought by GATX and Trinity Industries. Further, Pan Am and B&M are involved in litigation with their partners in a land development arrangement in Boston, MA, which was called North Point and apparently has been dissolved with only a few buildings being completed.

8. In addition to the concerns of the employees we represent over the financial condition of Pan Am Railways and Springfield Terminal, we question their ability or willingness to honor their commitments. On February 1, 2008, the U.S. Department of Transportation issued a show cause order proposing to revoke the certificate of public convenience and necessity of Boston-Maine Airways Corp., and to dismiss its applications for foreign scheduled operations on the basis it failed to remain fit, willing and able to provide air transportation as a U.S. certificated air carrier. A copy of this order is attached hereto as Exhibit 3. At the time, Boston-Maine Airways was a part of Pan Am Systems, Inc., as was its sister corporation, Springfield Terminal. At page 2 of its order, the Department summarized its tentative findings. They were that the financial information submitted by it and its representatives, who were also representatives of Springfield Terminal, had been falsified, its actual financial condition was extremely poor with continuing losses, and that the subsequently admittedly falsified documents, which it filed, required the Department to "conclude that the President and other key personnel either did not read the orders, which, in and of itself, raises questions concerning their managerial competence, or that they knew the orders were inaccurate and did not inform the Department, which directly reflects on their compliance disposition." A perusal of the Department's opinion reveals at page 12 that Boston-Maine Airways attempted to shore up its financial solvency by claiming "its sister company, Springfield Terminal Railway Co. ('ST') had committed to extend BMAC a \$7.2 million line-of-credit." At a later date, the Department found, as the order states at page 14, that its "review of the financial statements for ST, BMAC's sister company that committed to extend to the air carrier a line-of-credit, indicated that the company did not have the funds necessary to support BMAC's operations and capital expenditures, let alone [ST's] own." To the best of my knowledge, Boston-Maine Airways no longer has a license to operate planes and air service.

9. It also needs to be noted that the tracks on Springfield Terminal's lines have not been maintained to 40 mile per hour standards for years and accordingly the trains operating on them are subject to speed restrictions. For the most part, on lines owned by Pan Am Railways, trains operate at either 10 miles or 25 miles per hour; and on lines owned by MBTA (commuter lines) or lines upgraded for Amtrak service (Atkinson, NH to Portland, ME), trains may be operated at speeds up to 40 miles per hour, but most are restricted to 30 miles per hour because Pan Am Railways does not have sufficient telemetry devices (an FRA requirement) to permit speeds in excess of 30 miles per hour on the 40 miles per hour lines.

10. In addition, there are other problems currently facing Springfield Terminal which cause its rail operations to be problematic, such as pending environmental charges and potential fines that state environmental agencies are seeking. An example appears in Exhibit 4 hereto, an April 3, 2008 press release from the Office of the Attorney General of Massachusetts.

11. There are two additional occurrences that have taken place, one at the inception of the current railroad structure of Pan Am Railways and the other during July 2008. These events shape our belief that Pan Am Railways and Springfield Terminal may shirk compliance with the employee protections to be imposed in this proceeding and the representations in the application and the filings herein about the continued employment of the Springfield Terminal employees under the existing collective bargaining agreements between the rail carrier and the employee representatives.

12. The first occurrence, of course, took place when Pan Am Railways (then Guilford Transportation, Inc.) attempted to shed its work force on Maine Central and B&M, transfer the work to Springfield Terminal and circumvent compliance with the employee protective conditions imposed by the Interstate Commerce Commission. Those efforts eventually failed in large measure due to rulings by the Commission and the federal courts. Notwithstanding all of that litigation, it took over three years to achieve the implementing agreements under the

Mendocino Coast Conditions imposed by the agency in ICC Finance Docket No. 30965, as subsequently modified by the Commission to include certain requirements from the *New York Dock* Conditions.

13 The occurrence that took place in July 2008 is also mystifying. George Casey, the General Chairperson for the United Transportation Union on Pan Am Railways, and I have worked together and cooperated in trying to resolve various labor problems arising on Springfield Terminal, including application of employee protection in this situation. On July 7, 2008, Mr. Casey wrote Springfield Terminal and requested a meeting to negotiate an implementing agreement under the *New York Dock* Conditions to be imposed upon this transaction.

14. On July 11, 2008, Robert B. Culliford, Senior Vice President and General Counsel for Pan Am Railways sent a letter to Mr. Casey rejecting his request, which correspondence is attached as Exhibit 5. In his letter, Mr. Culliford stated that no implementing agreement was required by the *New York Dock* Conditions, since the transaction would not have the effect of causing the dismissal or displacement of any employees or rearrangement of forces. He further suggested that if there were any continuing concerns, and without prejudice to the carrier's position, a meeting would be held at Springfield Terminal's North Billerica, Massachusetts offices on July 17, 2008, at 1 p.m.

15. Mr. Casey invited me to attend the meeting, which was held on July 17, 2008. Besides Mr. Casey, Mr. Culliford and me, Pan Am Vice-President-Human Resources Cynthia Scaranno, and Pan Am Director of Labor Relations Anthony Lomanto were present. Kevin Moore, BLET's Vice General Chairman, appeared midway during the meeting. UTU's attorney, Dan Elliott, participated in the meeting by telephone.

16. During the course of the conversation, Mr. Culliford categorically rejected Mr. Casey's request and position. He stated that management did not want to negotiate or define any verbiage or provide the meaning of any language in the documents filed with the Board. He said the

employees were protected and had nothing to worry about, and Springfield Terminal, therefore, did not have to respond to our questions and concerns. After I asked him a few more questions about the employees' concerns, Mr. Culliford became extremely upset and hostile, using profane language, directing himself in a physical way toward my person, pointing and tapping the table, while informing the group that the employees were a bunch of spoiled children that needed reassurance. After this outburst was finished, I stated my opinion in this question: "How can the employees trust the Carrier to do the right thing, when it cannot even hold a professional meeting with us in regard to these issues?"

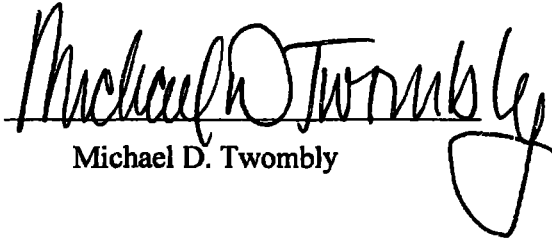
17. After the dust had settled, I asked Mr. Culliford if he could otherwise give us some idea of the meaning of several ambiguous terms or why they were used. I referred to the use of the phrase "operations for the foreseeable future" used on page 8 of the Application and other places in the filings and about the reason for stating on page 24 of the Application that PAS "will engage Springfield Terminal to act as the initial operator of the PAS Lines..." (Emphasis supplied). Mr. Culliford was not clear on this issue, but advised that it had something to do with the performance standards included in the agreements between the railroads, implying that if the operating standards were not met, Norfolk Southern could step up and operate trains with the requested overhead trackage rights it would acquire if the transaction were completed. Mr. Culliford kept telling us to read the documents; we had nothing to worry about. He advised us that Springfield Terminal was going to be used on a contract basis to operate the lines in question. I told him that we had seen the outcome from the loss of the commuter rail contract and even how Springfield Terminal somehow lost the auto unloading contract in Ayer, MA, at the Ford Auto Unloading Facility, and how it somehow flowed to North East Logistical Services, and how it somehow ended up under contract with Boston & Maine Railroad. Mr. Culliford had no comment, and the meeting ended.

18. I have received a copy of the July 29, 2008 letter from Mr. Culliford to Mr. Casey restating Carrier's position that "negotiation of an implementing agreement will not be required because ST is expected to continue operating Pan Am Southern lines following this transaction under ST's existing collective bargaining agreements and without adverse labor impacts." Exhibit 6.

VERIFICATION AND SIGNATURE

I, MICHAEL D. TWOMBLY, verify under penalty of perjury that the statements herein are true and correct to the best of my knowledge, information and belief.

Executed this 5 day of August 2008



Michael D. Twombly

Exhibit No. 1

JS 44 (Rev. 12-07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

CSX Transportation, Inc.

(b) County of Residence of First Listed Plaintiff State of Florida
(EXCEPT IN U.S. PLAINTIFF CASES)(c) Attorney's (Firm Name, Address, and Telephone Number) (617) 773-5500
Michael B. Flynn and Richard A. Davidson, Jr.
400 Crown Colony Drive, Quincy, MA 02169

DEFENDANTS

Springfield Terminal Railway Company and
Boston and Maine CorporationCounty of Residence of First Listed Defendant Middlesex
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ 1 Incorporated or Principal Place of Business in This State ☐ 1 ☐ 1
- Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business in Another State ☐ 3 ☐ 3
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	PERSONAL INJURY ☐ 362 Personal Injury - Med. Malpractice ☐ 365 Personal Injury - Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs. ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 750 Other Labor Litigation ☐ 791 Emp'l Ret. Inc. Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 463 Habeas Corpus - Alien Detention ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395f) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(a)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(a)) REAL ESTATE TAX ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat. TV ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Motions to Vacate Sentence ☐ 530 Habeas Corpus: General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity)

28 U.S.C. sec. 1332(a)

Brief description of cause

Defendants owe plaintiff monies for services and materials provided.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23DEMAND \$ 2,375,507.80CHECK YES only if demanded in complaint
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

February 11, 2008

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG JUDGE

Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) CSX Transportation, Inc. v. Springfield Terminal Railway Company, et al
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- ☐ I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
- ☐ II. 195, 198, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. *Also complete AO 120 or AO 121 for patent, trademark or copyright cases.
- ☒ III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- ☐ IV. 220, 422, 423, 430, 460, 462, 463, 465, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
- ☐ V. 150, 152, 153.
3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.
Not applicable.
4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
YES ☐ NO ☒
5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
YES ☐ NO ☒
If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
YES ☐ NO ☒
6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
YES ☐ NO ☒
7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
YES ☐ NO ☒
- A. If yes, in which division do all of the non-governmental parties reside?
Eastern Division ☐ Central Division ☐ Western Division ☐
- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
Eastern Division ☒ Central Division ☐ Western Division ☐
8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
YES ☐ NO ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Richard A. Davidson, Jr Flynn & Associates, P.C.ADDRESS 400 Crown Colony Drive, Suite 200, Quincy, MA 02169TELEPHONE NO. (617) 773-5500

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

CSX TRANSPORTATION, INC.,
Plaintiff,

v.

SPRINGFIELD TERMINAL RAILWAY
COMPANY and BOSTON AND MAINE
CORPORATION,
Defendants.

C.A. No.:

COMPLAINT AND JURY DEMAND

1. Plaintiff CSX Transportation, Inc. ("CSXT"), is a Virginia corporation with a principal place of business located at 500 Water Street, Jacksonville, FL.
2. Defendant Springfield Terminal Railway Company ("STRC") is a Vermont corporation with a principal place of business located at Iron Horse Park, Billerica, MA.
3. Defendant Boston and Maine Corporation ("B&M") is a Delaware corporation with a principal place of business located at Iron Horse Park, Billerica, MA.

JURISDICTION AND VENUE

4. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 3 above as if expressly set forth herein.
5. This Court has diversity jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1332(a), in that:
 - (a) plaintiff and the defendants reside in different states; and
 - (b) the amount in controversy, exclusive of interest and costs, exceeds \$75,000.00.
6. Venue for this action is predicated upon 28 U.S.C. §1391(a) and (c), and Local Rule 40.1.

COUNT I
(HORSEPOWER HOURS – BREACH OF CONTRACT)

7. CSXT hereby repeats and realleges its allegations set forth in ¶ 1 through 6 above as if expressly set forth herein.
8. The parties are freight railroads which interchange freight railcars in interstate commerce.
9. On or about June 1, 2000, the parties entered into a *Master Equipment Run-Through Agreement* ("Master Agreement"), a copy of which is attached hereto as Exhibit "A."
10. The defendants are referred to in *Master Agreement* jointly as "GTS."
11. Pursuant to the *Master Agreement*, the parties each used each other's Equipment (locomotives and telemetry devices) on their railroad lines in order to handle merchandise traffic moving between Selkirk, NY and South Portland, ME.
12. CSXT granted to STRC and/or B&M the right to operate CSXT's Equipment over and upon the railroad lines of GTS between Barber Station, MA and Rigby Yard located in South Portland, ME.
13. STRC and/or B&M granted CSXT the right to the right to operate their Equipment over and upon the railroad lines of CSXT between Barber Station, MA and Selkirk, NY.
14. Equipment was considered Exchanged at the time that the Equipment was interchanged by the Delivery Party to the Receiving Party.
15. The Using Party of the Equipment incurred horsepower hour liability for use of the Owning Party's Equipment.
16. Horsepower liability commenced against a Using Party at the time the Equipment was Exchanged and ceased when the Equipment was returned in Exchange to the Owning Party.

17. Horsepower hours liability was calculated by multiplying the rated horsepower of such locomotive by the Net Time (total time that the locomotive was in the custody and control of the Using Party less any time that the locomotive was out-of-service) rounded to the nearest hour that the locomotive was in the Custody and Control of the Using Party.
18. Liability for the head-end and rear-end telemetry devices hours was accounted for in the same manner as locomotives, but were valued at the rate of 36 horsepower hours per hour and the parties were liable for the use of head-end and rear-end telemetry devices pursuant to the Association of American Railroad's *Code of Rules for EOT Telemetry Devices*.
19. Since November 2005, the STRC and/or B&M have become a deficit users of CSXT's Equipment for which CSXT has repeatedly invoiced the STRC and/or B&M in accordance with the *Master Agreement*.
20. The STRC and/or B&M have failed to pay their horsepower hour usage of CSXT's Equipment.
21. CSXT sent written demands to the STRC and/or B&M demanding payment for the STRC's and/or B&M's horsepower usage of CSXT's Equipment.
22. The STRC and/or B&M had 180 days from the date of the written demand to equalize the horsepower hours and/or pay CSXT for their horsepower usage.
23. The STCR and/or B&M failed to equalize the horsepower hours within the 180 day demands.
24. Payment is due to CSXT from the STRC and/or B&M for their horsepower hour use.

25. CSXT prepared all horsepower hour bills to the STRC and/or B&M in accordance with the standard billing practices and pursuant to the *Master Agreement*.
26. The STRC and/or B&M have failed to make payment on the horsepower hour invoices submitted by CSXT, pursuant to the *Master Agreement*, and/or otherwise have ignored CSXT's demands.
27. The STRC and/or B&M never took exception to the monthly invoices or the bills CSXT submitted in demand for their horsepower hour usage.
28. CSXT is entitled to the actual value of the horsepower hour usage of its Equipment by the STRC and/or B&M.
29. CSXT is entitled to the fair value of the STRC's and/or B&M's horsepower hour usage of CSXT's Equipment.
30. The STRC and/or B&M owe payment to CSXT for their horsepower usage commencing in November 2005 through the present.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount to be proven at trial together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

COUNT II
(HORSEPOWER HOURS – QUANTUM MERUIT)

31. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 30 above as if expressly set forth herein.
32. CSXT provided to the STRC and/or B&M locomotives, head-end and rear-end telemetry devices which the STRC and/or B&M used in their movement of freight cars between November 2005 and the present.

33. CSXT is entitled to the fair value of the STRC's and/or B&M's use of CSXT's Equipment between November 2005 and the present.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount for the fair value of the horsepower hours used by the STRC and/or B&M to be proven at trial together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

COUNT III
(RAILCAR REPAIRS – BREACH OF CONTRACT)

34. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 33 above as if expressly set forth herein.
35. The parties are freight railroads which interchange freight railcars in interstate commerce.
36. The parties are signatories to and subscribers of rules of the Association of American Railroads.
37. As signatories and subscribers of the Association of American Railroads, the parties agreed to abide by rules governing the condition of, repairs to, and settlements for freight cars repairs performed on each other's railcars.
38. The rules governing the parties repair to freight railcars and the settlement for freight car repairs are found in the *Field Manual of the A.A.R. Interchange Rules* and *Office Manual of the A.A.R. Interchange Rules*
39. The Association of American Railroads' rules make railcar owners responsible for and therefore chargeable with the repairs and maintenance to their railcars necessitated by ordinary wear and tear in fair service, safety requirements, and by the standards issued by the Association of American Railroads.

40. The Association of American Railroads' rule provide an equitable basis for charging railcar owners for repairs and damage.
41. Since September 2004, CSXT has performed repairs and maintenance to STRC's and/or B&M's railcars in accordance with the Association of American Railroads' rules and standards while their railcars where handled by CSXT.
42. Since September 2004, CSXT has sent to the STRC and/or B&M monthly invoices for the repairs and maintenance to their railcars in accordance with the rules and procedures promulgated by the Association of American Railroads.
43. The STRC and/or B&M failed to remit payment to CSXT for the railcar repairs and maintenance.
44. The STRC and/or B&M failed to take exception to the monthly invoices CSXT submitted for the repairs and maintenance of their railcars.
45. The STRC and/or B&M owe to CSXT the payment of the amounts as set forth in the monthly invoices for the repair and maintenance of their railcars.
46. The STRC and/or B&M are not owed or due any credit or off-set for the repairs and maintenance performed by CSXT on their railcars.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount to be proven at trial together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

COUNT IV
(RAILCAR REPAIRS – QUANTUM MERUIT)

47. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 46 above as if expressly set forth herein.

48. CSXT provided repair, maintenance, parts and equipment to and for railcars owned by the STRC and/or B&M between September 2004 and the present.
49. CSXT is entitled to the fair value of the services and parts and equipment which it provided in the repair and maintenance of the STRC and/or B&M's railcars from September 2004 through the present.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount for the fair value for the services and parts and equipment which it provided in the repair and maintenance of the STRC and/or B&M's railcars to be proven at trial together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

COUNT V
(TRackage RIGHTS – CEDAR HILL YARD ACCESS)

50. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 49 above as if expressly set forth herein.
51. CSXT has granted or allowed the STRC and/or B&M certain trackage rights in North Haven, CT from the AMTRAK connection to the Cedar Hill yard subject to certain payments.
52. The STRC and/or B&M have failed to remit payment to CSXT since 2003 for their trackage rights in North Haven, CT from the AMTRAK connection to the Cedar Hill yard.
53. CSXT has invoiced the STRC and/or B&M for their use of the trackage rights, but the STRC and/or B&M have failed to remit payment to CSXT.
54. The STRC and/or B&M failed to take exception to the invoices CSXT submitted for said trackage rights.

55. The STRC and/or B&M owe to CSXT the payment of the trackage rights for the service years 2003, 2004, 2005, 2006, and 2007.
56. The STRC and/or B&M are not owed or due any credit or off-set for their use of the trackage rights.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount to be proven at trial together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

COUNT VI
(ENVIRONMENTAL CLEAN-UP)

57. CSXT hereby repeats and re-alleges its allegations set forth in ¶ 1 through 56 above as if expressly set forth herein.
58. On or about June 11, 2005, there was an environmental spill of 1,500 lbs. of white powder on the STRC's and/or B&M tracks at or near Turnbull Road in Rotterdam, NY.
59. CSXT was called to clean-up the white powder due a mistaken belief by local authorities that the trackage belonged to CSXT.
60. CSXT had the white powder removed and cleaned-up by outside contractors and thereafter invoiced the STRC and/or B&M.
61. CSXT invoiced the STRC and/or B&M for the clean-up of the white powder.
62. The STRC and/or B&M failed to take exception to the invoices CSXT submitted for the environmental clean-up of the white powder.
63. The STRC and/or B&M would have been required by local authorities to clean-up the white powder spill had CSXT not undertaken the clean-up.
64. The STRC and/or B&M owe to CSXT payment for the invoices submitted for the environmental clean-up.

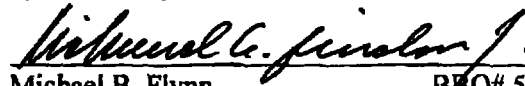
65. CSXT is entitled to the fair value of the services and material which it provided in the clean-up of the 1,500 lbs. of white powder on the STRC's and/or B&M trackage on June 11, 2005.

WHEREFORE, CSXT demands judgment against the STRC and/or B&M in a monetary amount to be proven at trial, or in the alternative for the fair value of the services rendered, together with interest, costs, attorney's fees and such other relief as this Court deems just and proper under the circumstances.

JURY DEMAND

CSXT demands a trial by jury as to all issues.

Respectfully submitted,
CSX TRANSPORTATION, INC.,
by its attorneys,



Michael B. Flynn BBO# 559023
Richard A. Davidson, Jr. BBO# 552988
FLYNN & ASSOCIATES, P.C.
400 Crown Colony Drive, Suite 200
Quincy, MA 02169
(617) 773-5500

Dated: February 10, 2008

Exhibit No. 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) The Greenbrier Companies, Inc., et al v. Springfield Terminal Railway Company, et al
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- ☐ I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
- ☐ II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, 740, 780, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. *Also complete AO 120 or AO 121 for patent, trademark or copyright cases
- ☒ III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
- ☐ IV. 220, 422, 423, 430, 460, 462, 463, 465, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 881-885, 870, 871, 875, 900.
- ☐ V. 150, 152, 153.
3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.
06CV10207
4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
YES ☐ NO ☒
5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
YES ☐ NO ☒
If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
YES ☐ NO ☐
6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
YES ☐ NO ☒
7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
YES ☐ NO ☒
- A. If yes, in which division do all of the non-governmental parties reside?
Eastern Division ☐ Central Division ☐ Western Division ☐
- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
Eastern Division ☒ Central Division ☐ Western Division ☐
8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
YES ☐ NO ☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Lisa Brodeur-McGan, Esq.ADDRESS Brodeur-McGan, P.C., 1331 Main Street, 2nd Floor, Springfield, MA 01103TELEPHONE NO. 413-735-1775

(CategoryForm-08.wpd -2/8/06)

Exhibit 2

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

The Greenbrier Companies, Inc., and Greenbrier Management Services, LLC

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Lisa Brodeur-McGan, Esq., Brodeur-McGan, P.C., 1331 Main Street, 2nd Floor, Springfield, MA 01103 (413) 735-1775

DEFENDANTS

Springfield Terminal Railway Company, and Boston and Maine Corporation

County of Residence of First Listed Defendant Middlesex
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business in This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business in Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

☐ 110 Insurance	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 424 Copyrights	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 330 Federal Employers' Liability	☐ 370 Other Fraud	☐ 630 Liquor Laws	☐ 425 Patent	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 340 Marine	☐ 371 Truth in Lending	☐ 640 R.R. & Truck	☐ 426 Trademark	☐ 460 Deportation
☐ 151 Medicare Act	☐ 345 Marine Product Liability	☐ 380 Other Personal Property Damage	☐ 650 Airline Regs.	☐ 427 Copyrights	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 350 Motor Vehicle	☐ 385 Property Damage Product Liability	☐ 660 Occupational Safety/Health	☐ 428 Copyrights	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 355 Motor Vehicle Product Liability		☐ 690 Other	☐ 429 Patent	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 430 Trademark	☐ 510 Selective Service
☐ 190 Other Contract			☐ 720 Labor/Mgmt. Relations	☐ 431 Trademark	☐ 520 Securities/Commodities/Exchange
☐ 195 Contract Product Liability			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 432 Trademark	☐ 575 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 740 Railway Labor Act	☐ 433 Trademark	☐ 590 Other Statutory Actions
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 434 Trademark	☐ 591 Agricultural Acts
☐ 220 Foreclosure	☐ 442 Employment	☐ 530 General	☐ 791 Empl. Ret. Inc. Security Act	☐ 435 Trademark	☐ 592 Economic Stabilization Act
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/Accommodations	☐ 535 Death Penalty		☐ 436 Trademark	☐ 593 Environmental Matters
☐ 240 Torts to Land	☐ 444 Welfare	☐ 540 Mandamus & Other		☐ 437 Trademark	☐ 594 Energy Allocation Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 550 Civil Rights		☐ 438 Trademark	☐ 595 Freedom of Information Act
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 555 Prison Condition		☐ 439 Trademark	☐ 900 Appeal of Fee Determination Under Equal Access to Justice
	☐ 440 Other Civil Rights			☐ 440 Trademark	☐ 950 Constitutionality of Some Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

49 USC 11704 and 28 USC 1332

Brief description of cause:

Defendants breached settlement agreement and car hire contract through failure to pay.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ >1.4M

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Gorton

DOCKET NUMBER 06CV10207

DATE

03/04/2008

SIGNATURE OF ATTORNEY OF RECORD

Kashy

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. _____

THE GREENBRIER COMPANIES,
INC., and GREENBRIER
MANAGEMENT SERVICES, LLC
Plaintiffs,

v.

SPRINGFIELD TERMINAL
RAILWAY COMPANY, and BOSTON AND
MAINE CORPORATION,
Defendants.

COMPLAINT AND DEMAND FOR A JURY TRIAL

I. Nature of the Action

1. Plaintiffs, The Greenbrier Companies, Inc., and Greenbrier Management Services, LLC, bring this action pursuant to 49 U.S.C. § 11704 against Defendants, Springfield Terminal Railway Company, and Boston and Maine Corporation for failure to pay car hire fees.

II. Jurisdiction

2. Jurisdiction is found pursuant to 49 U.S.C. § 11704(c)(1), which allow Plaintiffs, *inter alia*, to pursue a civil action to enforce liability. Alternatively, the Court has jurisdiction under 28 U.S.C. § 1332, in that the matter in controversy exceeds the sum of or value of \$75,000, exclusive of interest or costs, and is between citizens of different states.
3. This Court additionally has jurisdiction over the issues raised by the settlement agreement entered into in this court.

III. Venue

4. Venue is proper pursuant to 28 U.S.C. § 1391, as all Defendants reside, and a substantial part of the events or omissions giving rise to the claim asserted herein occurred, within the Massachusetts judicial district.

IV. Parties

5. The Plaintiff, The Greenbrier Companies, Inc., is an Oregon corporation with its principal place of business located at One Centerpointe Drive, Suite 200, Lake Oswego, Oregon.
6. The Plaintiff, Greenbrier Management Services, LLC, is a Delaware corporation with its principal place of business located at One Centerpointe Drive, Suite 200, Lake Oswego, Oregon. (The Greenbrier Companies, Inc., and Greenbrier Management Services, LLC, are collectively referred to hereafter as "Greenbrier" or "Plaintiffs.")
7. The Defendant, Springfield Terminal Railway Company, is a Vermont corporation licensed to do business in the Commonwealth of Massachusetts with its principal place of business located at Iron Horse Park, North Billerica, Massachusetts.
8. The Defendant, Boston and Maine Corporation, is a Delaware corporation licensed to do business in the Commonwealth of Massachusetts with its principal place of business located at Iron Horse Park, North Billerica, Massachusetts. (Springfield Terminal Railway Company, and Boston and Maine Corporation are collectively referred to hereafter as "Springfield Terminal" or "Defendants.")

V. Statement of Facts

9. Plaintiffs are rail carriers that own rail freight cars that move through the United States.
10. Defendants are rail carriers that comprise the Guilford Rail System located at Iron Horse Park, North Billerica, Massachusetts.

11. At all times relevant to the present action, Defendants and Plaintiffs were parties to Circular No. OT-10, Car Service and Car Hire Agreement ("Agreement").
12. The Agreement is a contract whereby all parties promise and agree to abide by and enforce the Car Service and Car Hire Rules promulgated by the Association of American Railroads.
13. Under the Agreement, Defendants are required to keep an accounting of their use of Plaintiffs' rail cars ("Car Service").
14. In accordance with Defendants' Car Service, an amount is owed to Plaintiffs ("Car Hire").
15. Defendants are required, pursuant to the Agreement, to send to Plaintiffs a monthly accounting both of Car Service and Car Hire owed.
16. Defendants are also required, pursuant to the Agreement, to remit payment to Plaintiffs on a monthly basis of all outstanding Car Hire owed.
17. Defendants failed to remit payments to Plaintiffs under the Agreement.
18. On or about February 2, 2006, Plaintiffs filed suit for the outstanding Car Hire owed. See Docket No. 06-CV-10207-NMG.
19. By January 31, 2007, Defendants owed Plaintiffs \$838,559.69,¹ exclusive of interest, costs and attorneys fees, in unpaid Car Hire.
20. In or about February 2007, Defendants agreed to pay Plaintiffs all outstanding Car Hire, including all present and past due amounts plus 6% interest per annum; this oral agreement was reduced to writing, signed by the parties, and resulted in a settlement

¹ As noted in the Settlement Agreement, the \$838,559.69 reflects a payment of \$100,000 made in November 2006 during settlement negotiations.

agreement between the parties ("February 2007 Settlement Agreement") and an Agreement for Judgment, filed with this Court on March 19, 2007.

21. Defendants agreed, pursuant to the February 2007 Settlement Agreement and Agreed Judgment, to pay Plaintiffs a total of \$854,343.84 by September 21, 2007.
22. Defendants agreed, pursuant to the February 2007 Settlement Agreement and Agreed Judgment, to remit payment of \$100,000 per month beginning January 21, 2007, with a final payment of \$54,343.84 to be paid September 21, 2007.
23. In return for Defendants' promise to pay these amounts over time, Plaintiffs agreed to waive attorney's fees up to and including January 2007.
24. Defendants made a payment of \$200,000 on February 23, 2007, a payment of \$25,000 on June 14, 2007, and a payment of \$25,000 on August 17, 2007.
25. Defendants failed to make payments in accordance with the February 2007 Settlement Agreement and Agreed Judgment.
26. The February 2007 Settlement Agreement constituted a contract entered into by the parties and was breached by Defendants.
27. Defendants have continued to use the Car Hire System and have failed to pay most of the new monies owed to Plaintiffs.
28. Defendants' monthly debt fluctuates but is about \$50,000.00 to \$80,000.00 monthly.
29. Defendants now owe Plaintiffs a total amount of \$1,455,179.85, representing all outstanding Car Hire owed as of February 29, 2008.

COUNT I

BREACH OF CONTRACT
49 U.S.C. § 11704

30. Plaintiffs repeat and re-allege each and every allegation contained in Paragraphs 1 through 30 above and incorporate same by reference.
31. Defendants violated 49 U.S.C. § 11704 by breaching the agreement to pay Car Hire to Plaintiffs for use of their rail freight cars from January 1, 2007 to present.
32. Plaintiffs and the companies they manage, for which they are bringing suit, cannot without order of this Court, stop providing services to Defendants because of issues of interstate commerce.
33. Defendants continue to use the Defendants Car Hire system and fail to pay for such benefit.
34. Defendants' failure to pay Plaintiffs for the Car Hire is a violation of 49 U.S.C. § 11704.
35. As a direct and proximate result of Defendants' violation and breach of contractual terms, Plaintiffs have suffered and continue to suffer damages.

COUNT II

BREACH OF FEBRUARY 2007 SETTLEMENT AGREEMENT

36. Plaintiffs repeat and re-allege each and every allegation contained in Paragraphs 1-36 above and incorporate same by reference.
37. Defendants have failed to meet their terms of the February 2007 Settlement Agreement that was entered into and arising out of Plaintiffs' aforementioned federal court complaint, Docket No. 06-10207.
38. Plaintiffs have been damaged by such failure.
39. Defendants have unfairly benefited from the February 2007 Settlement Agreement.

40. The February 2007 Settlement Agreement contemplated that the parties would have all the post judgment rights and remedies of a judgment creditor.
41. Plaintiffs have been damaged by Defendants' breach of the January 2007 Settlement Agreement.

WHEREFORE, Plaintiffs, The Greenbrier Companies, Inc., and Greenbrier Management Services, LLC, demand the aforementioned compensatory damages and any other relief in an amount this Court deems just and proper, against Defendants, Springfield Terminal Railway Company, and Boston and Maine Corporation.

PLAINTIFFS DEMAND A JURY TRIAL ON ALL TRIABLE ISSUES.

Respectfully submitted,

Plaintiffs, The Greenbrier Companies, Inc. and
Greenbrier Management Services, LLC,
By their attorneys,

Date: March 4, 2008

/s/ Lisa Brodeur-McGan
Lisa Brodeur-McGan, Esq. (BBO# 556755)
Kathryn von Schoeler, Esq. (BBO# 664423)
Brodeur-McGan, P.C.
1331 Main Street, 2nd Floor
Springfield, Massachusetts 01103
(413) 735-1775; Fax (413) 735-1772

Exhibit No. 3



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 1st day of February, 2008

In the matter of the continuing fitness of

BOSTON-MAINE AIRWAYS CORP.

under 49 U.S.C. § 41110(e)

Docket DOT-OST-2000-7668

Application of

BOSTON-MAINE AIRWAYS CORP.

for a certificate of public convenience and necessity
under 49 U.S.C. § 41102 to engage in foreign
scheduled air transportation of persons, property,
and mail

Docket DOT-OST-2003-14985

Application of

BOSTON-MAINE AIRWAYS CORP.

for an exemption from 49 U.S.C. § 41102 to engage
in foreign scheduled air transportation of persons,
property, and mail between U.S. Points and the
Caribbean

Docket DOT-OST-2004-19919

Motion of

AIR LINE PILOTS ASSOCIATION

to revoke the certificate of public convenience and
necessity under 49 U.S.C. § 41102 issued to
Boston-Maine Airways Corp.

**Dockets DOT-OST-2000-7668
DOT-OST-2003-14985**

SHOW CAUSE ORDER

By this order, we propose to revoke the certificate of public convenience and necessity issued to Boston-Maine Airways Corp. ("BMAC"), and dismiss its applications for foreign scheduled

certificate and exemption authority for its failure to continue to remain fit, willing, and able to provide air transportation as a U.S. certificated air carrier. Our review of the record in this case indicates that BMAC does not possess (1) the financial wherewithal to continue or expand its operations without posing an undue risk to consumers and their funds, (2) the managerial competence necessary to oversee its current and proposed operations, and (3) a proper regard for the laws and regulations governing its services to ensure that its aircraft and personnel conform to applicable safety standards and to ensure that acceptable consumer relations practices will be followed.

The Department's tentative findings are based on the following circumstances:

- On August 27, 2002, BMAC filed an application for certificate authority to conduct scheduled passenger operations using 141-seat B-727 aircraft. The Department was later informed that the financial information submitted by BMAC in support of its request had been falsified, and that the air carrier did not actually possess the financial resources necessary to meet the Department's financial fitness requirements for the requested authority.
- Over the past five years, BMAC's actual financial condition has been extremely poor, and the air carrier has continued to sustain losses. The severity of BMAC's financial situation has inhibited the air carrier's ability to maintain an adequate number of necessary personnel, has likely had a negative impact on consumer refunds, and has caused the air carrier to significantly scale back its operations.
- BMAC's President claims that the company was not aware that its Senior Vice President and General Counsel, who submitted falsified documents to the Department, had engaged in such behavior. Whether or not that assertion is true, the company, through its President and other key personnel, were in a position where they should have been aware of this activity. Consequently, the company's management should be held accountable for these serious falsifications. Given that the Department issued three public orders summarizing our financial fitness requirements and the air carrier's alleged financial position, which was based on the falsified material, we may only conclude that the President and other key personnel either did not read the orders, which, in and of itself, raises questions concerning their managerial competence, or that they knew that the orders were inaccurate and did not inform the Department, which directly reflects on their compliance disposition.

The circumstances listed above indicate that BMAC (1) was not fit at the time that it received certificate authority to operate its B-727 aircraft and therefore, it is not eligible to hold such authority; (2) is not financially fit and does not possess the managerial competence to conduct any air transportation operations; and (3) has failed to comply with the regulations governing its operations. Thus, the Department proposes to revoke the air carrier's certificate authority in accordance with 49 U.S.C. § 41110(e).

Statutory Standard

Section 41110(e) of Title 49 of the United States Code (the Transportation Code) provides that the requirement that air carriers be "fit" to perform air transportation services is a continuing one and that an air carrier's authority shall be amended, modified, suspended, or revoked if it fails to

remain fit, willing, and able to provide the air transportation authorized by its certificate, which includes failure to comply with the regulations governing its operations.

Background

Based in Portsmouth, New Hampshire, BMAC was organized as a corporation under the laws of the State of New Hampshire in March 1999. The company is a wholly-owned subsidiary of Pan Am Systems, Inc. ("PASI"), which is owned by two U.S. citizens, Mr. Timothy Mellon (94.2 percent) and Mr. David Fink (5.2 percent), who is also President of the air carrier.¹

By Order 2000-10-1, issued October 2, 2000, the U.S. Department of Transportation ("the Department" or "DOT") found BMAC fit, willing, and able to conduct interstate scheduled passenger air transportation using small aircraft.² Ultimately, by Order 2004-8-21, issued August 18, 2004, the Department amended BMAC's authority to permit it to operate three large aircraft in interstate scheduled operations.³ BMAC conducts interstate scheduled and charter operations using a fleet of seven 19-seat Jetstream 3100 aircraft and three 141-seat B-727-200 aircraft. Operating under the trade name "Pan Am Clipper Connection," BMAC uses its Jetstream 3100 aircraft in scheduled passenger operations, serving Portsmouth, New Hampshire (PSM); Bedford, Massachusetts (BED); and Trenton, New Jersey (TTN). BMAC uses its B-727 aircraft to conduct private charter flights.

Applications and Pleadings

Application to Operate One Large Aircraft

On August 27, 2002, BMAC filed an application in Docket DOT-OST-2000-7668 requesting that the Department amend its interstate scheduled certificate to permit the air carrier to operate large aircraft.⁴ In its application, BMAC provided updated fitness data as well as information pertaining to its proposed operations and its current financial position. To demonstrate its financial ability to support large aircraft operations, BMAC provided a copy of the air carrier's unaudited June 30, 2002, balance sheet.⁵ Also, the air carrier stated that its parent company, Pan American Airlines, Inc. ("PAA"), had extended it a \$750,000 line-of-credit. On September 9, 2002 (Supplement 1), BMAC provided a copy of PAA's June 30, 2002, balance sheet, evidencing the company's ability to extend BMAC the-line-of credit.⁶

¹ BMAC was previously owned by Pan American Airlines, Inc. ("PAA"), and Guilford Transportation Industries ("Guilford"), both of which were owned by Mr. Mellon and Mr. Fink. PAA also owned the now defunct air carrier Pan American Airways Corp. ("Pan Am"). Guilford is the aircraft lessor for some of BMAC's aircraft.

² Small aircraft is defined as any aircraft with an original design capacity of no more than 60 passenger seats or an 18,000 pound payload.

³ See Order 2004-8-21, confirming oral action of July 16, 2004, granting such authority. The Department earlier had found BMAC fit to operate one large aircraft (Order 2003-2-24, issued February 28, 2003), but that authority was never made effective.

⁴ Large aircraft is defined as any aircraft having an original design capacity of more than 60 passenger seats or an 18,000 pound payload.

⁵ See Exhibit BMA-104 to BMAC Application for Amended Certificate, filed August 27, 2002.

⁶ See Exhibit BMA-S/1-1 to Supplement 1 filed September 2, 2002.

On September 19, 2002, the Department informed BMAC that based on our review of PAA's balance sheet, it did not appear that the company had the financial ability to extend BMAC a \$750,000 line-of-credit.

Also on September 19, 2002, the Air Line Pilots Association ("ALPA") filed an answer opposing BMAC's application. ALPA stated that other companies that share common ownership with BMAC and its sister air carrier, Pan American Airways Corp. ("Pan Am"), previously had been found to have engaged in violations of the Railway Labor Act ("RLA").⁷ ALPA alleged that BMAC was requesting large aircraft authority so that most or all of the operations being performed by Pan Am could be shifted to BMAC.⁸

BMAC replied to ALPA's answer on September 24, 2002, stating that ALPA's answer was motivated by a complaint arising out of a "perceived potential labor dispute between ALPA and Pan Am,"⁹ and argued that ALPA's complaint was filed in the wrong forum and against the wrong party.¹⁰

Shortly thereafter, on September 26, 2002 (Supplement 2), BMAC provided a September 15, 2002, balance sheet for PAA.¹¹ BMAC argued that although PAA had negative working capital, the company had \$1.2 million in cash.¹² Additionally, BMAC noted that it intended to sell approximately \$4.6 million worth of assets, which would give the company more than \$2 million in working capital.¹³

By letter dated October 17, 2002, the Department informed BMAC that receipts from potential sales could not be used in making a fitness determination. Thus, on October 21, 2002 (Supplement 3), BMAC provided its unaudited balance sheet at September 30, 2002,¹⁴ as well as a statement from Fleet Bank dated October 21, 2002, to demonstrate the company's financial fitness.¹⁵

On November 4, 2002 (Supplement 4), and December 4, 2002 (Supplement 5), BMAC provided updated information about the air carrier's management to show that it had personnel qualified to oversee its proposed operations.

Based on our review of the record, by Order 2002-12-20, issued December 27, 2002, the Department tentatively found BMAC fit to engage in interstate scheduled air transportation using one large aircraft.¹⁶ In that order, the Department informed the air carrier that it would need to

⁷ ALPA Motion, filed September 19, 2002, at 2.

⁸ *Id.*

⁹ BMAC Reply, filed September 24, 2002, at 1

¹⁰ BMAC Reply, filed September 24, 2002, at 1, 2.

¹¹ See Exhibit BMA-S/2-1 to Supplement 2, filed September 26, 2002.

¹² *Id.*

¹³ BMAC Supplement 2, filed September 26, 2002, at 2.

¹⁴ See Exhibit BMA-S/3-5 to Supplement 3, filed October 21, 2002.

¹⁵ See Exhibit BMA-S/3-4 to Supplement 3, filed October 21, 2002.

¹⁶ In that order, the Department expressed concern that BMAC's key technical personnel had little experience overseeing large aircraft operations of the type proposed. However, because the FAA had

have \$1.36 million to meet the Department's financial fitness test.¹⁷ With respect to ALPA's concerns, we noted that ALPA might have a future claim against Pan Am if its owners were to shift its operations to BMAC in such a manner that would violate the RLA; however, we concluded at that time that BMAC did not lack a satisfactory compliance disposition. We also stated that ALPA could request that we review the continuing fitness of the parties involved if the owners of BMAC and Pan Am later were found to have engaged in the behavior anticipated by ALPA and the courts determined that the carriers thereby violated the RLA.¹⁸

On January 13, 2003, ALPA objected to the Department's tentative findings, stating that the Department's determination that BMAC would have sufficient working capital to meet our financial fitness criteria for its proposed large aircraft operations was in error. ALPA argued that the Department considered only the projected operating costs of the proposed large aircraft operations, failing to consider the ongoing operating costs of BMAC's existing small aircraft operations. ALPA further argued that if the Department considered the level of funding required for all of BMAC's operations, the air carrier would lack sufficient financial resources to meet the Department's minimum requirements.¹⁹

BMAC replied to ALPA's objection on January 15, 2003, arguing that there is no Department precedent for ALPA's contention that the financial results of the existing operations of an applicant for expanded authority should be considered in assessing the future financial fitness of that applicant for expanded authority.²⁰

After carefully considering the entire record, including ALPA's arguments, the Department determined that BMAC was fit to conduct its proposed operations and issued Order 2003-2-24 on February 28, 2003, making final our tentative findings and conclusions that BMAC was fit, willing, and able to engage in interstate transportation of persons, property, and mail using one large aircraft. In that order, the Department stated that when an applicant already has established operations, we include in our funding requirement the level of funds needed to cover any current working capital deficit (*i.e.*, the difference between the applicant's current assets and current

advised the Department that BMAC's team as a whole was qualified for the single B-727 aircraft operations proposed, the Department concluded that BMAC's team as a whole possessed sufficient experience. Nonetheless, the Department noted that if BMAC proposed to expand its fleet to more than one large aircraft, concerns over the strength of the management team might arise.

¹⁷ In evaluating an applicant's financial fitness, the Department generally asks that the company have available to it sufficient resources to cover all pre-operating costs plus a working capital reserve equal to the operating costs that would be incurred in three months of "normal" certificated operations. Because projected expenses during the first several months of actual air transportation operations frequently do not include all costs of operations that will be incurred during a normal period of operations, it is our practice to base our three-month test on one quarter of the first year's operating cost forecast. In calculating available resources, projected revenues may not be used.

For its large aircraft operations, BMAC projected first year operating expenses of \$4.76 million, one quarter of which is \$1.19 million. Further, the air carrier had \$170,000 in pre-operating expenses remaining to be paid. Thus, the air carrier required \$1.36 million to meet the Department's financial fitness criteria.

¹⁸ See Order 2002-12-20, issued December 27, 2002, at 9.

¹⁹ ALPA Objection, filed January 13, 2003, at 3.

²⁰ BMAC Reply, filed January 15, 2003, at 2.

liabilities).²¹ This policy effectively protects the public while implementing the intent of the Airline Deregulation Act to enhance competition through a liberal entry policy. Further, the Department stated that review of the financial information on file at that time fully supported the Department's tentative conclusion in Order 2002-12-20. The Department noted, however, that BMAC's authority to operate large aircraft would not become effective until the air carrier provided evidence from the Federal Aviation Administration ("FAA") authorizing large aircraft operations.

Application for Foreign Authority and to Operate Additional Large Aircraft

Subsequently, on April 18, 2003 (Supplement 6), before its large aircraft authority was made effective, BMAC amended its August 27, 2002, application, requesting that the Department grant the air carrier the authority to operate two additional large aircraft in interstate scheduled passenger service. On that same date, BMAC filed an application in Docket DOT-OST-2003-14985 for certificate authority to conduct foreign scheduled passenger air transportation using four additional large aircraft, thus bringing its fleet under its proposal to seven total large aircraft. BMAC submitted a revised operating plan, as well as updated operating expense forecasts. In support of its requests, BMAC provided an unaudited balance sheet at March 31, 2003,²² and a statement from Mellon Bank dated April 16, 2003,²³ to show the company's ability to support the expanded operations.

On April 25, 2003, ALPA filed an objection to BMAC's amended application, arguing that when combined, BMAC's April 18, 2003, filings in Dockets DOT-OST-2000-7668 and DOT-OST-2003-14985 show a proposed fleet increase to seven large aircraft from its then current authorized single large aircraft operations. ALPA noted that the Department was not prepared to find BMAC fit to operate more than one large aircraft, and contended that except for a large infusion of cash, BMAC's previously submitted fitness information remained unchanged, thus, suggesting that BMAC is not fit to operate more than one large aircraft.²⁴

On May 6, 2003, BMAC submitted a reply to ALPA's response, asserting that ALPA was seeking relief for a labor complaint in the wrong forum. BMAC urged the Department to reject ALPA's claims and grant the air carrier authority to operate additional large aircraft.

On July 7, 2003, the Department requested additional information from BMAC about its proposed operations. Specifically, the Department requested that the air carrier provide consolidated financial projections for its proposed interstate and foreign scheduled passenger operations and resubmit financial statements demonstrating its ability to support the combined operations.

BMAC responded to the Department's request on July 17, 2003 (Supplement 7), submitting a statement from Fleet Bank dated July 1, 2003,²⁵ and a statement from Mellon bank dated July 1, 2003.²⁶ The air carrier also provided updated information regarding its management.

²¹ Current liabilities are financial obligations payable within the next 12 months.

²² See Exhibit BMA-S/6-5 to Supplement 6, filed April 18, 2003.

²³ See Exhibit BMA-S/6-6 to Supplement 6, filed April 18, 2003.

²⁴ ALPA Objection, filed April 25, 2003, at 5.

²⁵ See Exhibit BMA-5/7-8 to Supplement 7, filed July 17, 2003.

²⁶ *Id.*

On July 29, 2003, the Department requested further information pertaining to certain management personnel's resumes and BMAC's joint reservation system with Pan Am. BMAC filed a response to this information request on August 8, 2003 (Supplement 8), providing updated personnel information and addressing the reservation system functionality. On October 3, 2003 (Supplement 9), BMAC submitted further information about its management personnel.

On October 23, 2003, the Department advised BMAC that since the FAA had not yet authorized BMAC to operate any large aircraft, the Department would defer action on BMAC's request to operate additional large aircraft until it could provide evidence that the FAA had granted the air carrier large aircraft authority.

On May 20, 2004 (Supplement 10), BMAC supplemented its application with additional information, stating that it expected to receive authorization from the FAA to operate large aircraft on or about June 25, 2004. The air carrier also provided updated fitness information, including management personnel changes, BMAC's balance sheet at March 31, 2004,²⁷ a Mellon Bank statement dated April 1, 2004,²⁸ a Fleet Bank statement dated March 31, 2004,²⁹ a list of pre-operating expenses,³⁰ and a liability insurance certificate.

On June 17, 2004 (Supplement 11), BMAC informed the Department that it was in the final stages of its FAA certification process and that it anticipated the FAA would issue it amended Operations Specifications on June 28, 2004, authorizing large aircraft operations. The air carrier also filed updated first-year projections and a revised calculation of the Department's financial fitness test based on those revised first-year projections. In this regard, BMAC requested that the Department make its large aircraft authority for interstate and foreign scheduled passenger operations effective.

On June 22, 2004, the Department informed BMAC that its March 31, 2004, balance sheet did not balance and requested that the air carrier submit a revised balance sheet, together with a statement that there had not been any events in the preceding months that would have caused significant changes to the company's March 31, 2004, balance sheet. The Department also requested that BMAC provide third-party verification of funds the air carrier had on deposit and an updated income statement.

BMAC responded to the Department's request on June 24, 2004 (Supplement 12). The company provided a corrected balance sheet at March 31, 2004,³¹ an income statement for the period January 1, 2004 to May 31, 2004,³² a statement from Fleet Bank dated May 28, 2004,³³ and a statement from Mellon Bank dated June 1, 2004,³⁴ as third-party verification of funds. Our review of this information was satisfactory and, after consulting with the FAA, on July 16, 2004,

²⁷ See Exhibit BMA-S/10-3 to Supplement 10, filed May 20, 2004.

²⁸ See Exhibit BMA-S/10-6 to Supplement 10, filed May 20, 2004.

²⁹ *Id.*

³⁰ See Exhibit BMA-S/10-5 to Supplement 10, filed May 20, 2004.

³¹ See Exhibit BMA-S/12-1 to Supplement 12, filed June 24, 2004.

³² See Exhibit BMA-S/12-3 to Supplement 12, filed June 24, 2004.

³³ See Exhibit BMA-S/12-2 to Supplement 12, filed June 24, 2004.

³⁴ *Id.*

the Department orally granted BMAC effective authority to operate three large aircraft in interstate scheduled air transportation.

By Order 2004-8-21, issued August 18, 2004, the Department confirmed its oral action and amended and reissued BMAC's interstate certificate to reflect its effective date and the use of three large aircraft in interstate operations. In that order, the Department also indicated that BMAC's request to operate four additional large aircraft would be addressed in the context of its request for foreign scheduled authority.

Labor Dispute

On September 9 and 10, 2004, an evidentiary hearing was held in connection with a labor case filed by ALPA in the District Court of New Hampshire to consider a motion filed by ALPA for a preliminary injunction under the RLA to restrain Guilford, Pan Am, and BMAC, collectively referred to as the defendants, from violating the statutory rights of Pan Am pilots and their union, ALPA. Air Line Pilots Ass'n, Int'l v. Guildford Transportation Industries, Inc., D.N.H. No. 04-331-JD. ALPA alleged that the defendants formed BMAC to divert work from Pan Am, a unionized corporation, to BMAC, a non-unionized corporation, with the intent of eventually dissolving Pan Am. ALPA argued that the defendants intended to take such action to enable Pan Am to circumvent its labor agreements with its pilots.

ALPA's motion was granted and, on October 13, 2004, the court issued an injunction, ordering the defendants to:

1. Restore to the status quo rates of pay, rules, and working conditions of the Pan Am flight crewmembers as they existed on July 15, 2004, including but not limited, all those embodied in the collective bargaining agreement between Pan Am and ALPA, until all required bargaining, mediation, and dispute resolution procures of the Railway Labor Act are exhausted.
2. Refrain from using BMAC or any other affiliated operations, to operate B-727s or other large jet aircraft in service traditionally performed by Pan Am and that Pan Am is capable of performing.
3. Refrain from transferring to BMAC any aircraft from the Pan Am certificate to the BMAC certificate.

In light of the above order, the Department found it appropriate to defer action on BMAC's application for foreign authority and additional aircraft operations pending the outcome of the litigation.³⁵

Application for Exemption Authority

On December 15, 2004, the air carrier filed an application in Docket DOT-OST-2004-19919 for an exemption from section 41102 to provide foreign scheduled air transportation to St. Kitts and Nevis while its application for foreign scheduled certificate authority remained pending before the Department. BMAC maintained that the requested authority was consistent with the injunction order, arguing that (1) the service proposed was not traditionally performed by Pan

³⁵ Shortly after issuance of the injunction order, Pan Am informed the Department that it intended to cease all operations, which it did, effective November 1, 2004.

Am; (2) Pan Am was not capable of performing the service because effective November 1, 2004, that air carrier had ceased all operations; and (3) the aircraft to be used in the proposed service were not transferred to BMAC from Pan Am.³⁶

Motion for Revocation

On December 29, 2004, ALPA filed a motion with the Department to revoke BMAC's existing certificate authority, alleging that the air carrier lacked the compliance disposition required to remain fit. ALPA claimed that BMAC's owners, as well as some of its key personnel, hereinafter referred to as the "Mellon Group," had not displayed a proper regard for the law. To support its argument, ALPA pointed out that, in the past, the Mellon Group had "been found to have violated a number of federal laws, including the RLA." ALPA further contended that companies owned and managed by the Mellon Group have (1) "repeatedly transferred work from unionized to non-unionized groups to avoid the collective bargaining obligations under the RLA," (2) "repeatedly discharged pilots because they were unwilling to fly in violation of FAA [Federal Aviation Administration] safety rules," (3) "repeatedly refused to comply with final and binding decisions of system boards of adjustment as required under the RLA," and (4) "willfully violated environmental laws."³⁷

On January 7, 2005, BMAC filed an answer to ALPA's motion, maintaining that the air carrier continued to be fit, willing, and able to conduct air transportation operations, and refuting ALPA's claims that the air carrier lacked a satisfactory compliance disposition. BMAC contended that ALPA's motion was "merely another attempt to use the Department's licensing procedures to delay the air carrier's efforts to operate large aircraft in interstate and foreign scheduled operations." The air carrier noted that ALPA did not allege or cite any evidence that BMAC itself had displayed an unsatisfactory compliance disposition in any other aspect of its operations or corporate activity. BMAC contended that ALPA's assertions were based entirely on the alleged conduct of other parties affiliated with BMAC, including its now defunct sister air carrier Pan Am. The air carrier maintained that such activities were unrelated and should have no bearing on the air carrier's certificate authority. Further, BMAC noted that ALPA had repeatedly opposed the air carrier's attempts to obtain additional authority from the Department.

BMAC did not dispute the fact that it shares common ownership and senior executive officers with other companies. However, the air carrier emphatically claimed that the Mellon Group had never exercised control over BMAC in a manner that would cause the air carrier to violate federal aviation laws and regulations or federal labor laws.³⁸ Regarding the cases ALPA cited in support of its arguments, BMAC stated that such "examples of alleged misconduct are either unfounded, premature, have been resolved by corrective action, are irrelevant, or are grossly exaggerated."³⁹

³⁶ Application of BMAC for Grant of Exemption, dated December 15, 2004, at 6-7.

³⁷ ALPA Motion, filed December 29, 2004, at 3.

³⁸ BMAC Answer, filed January 7, 2005, at 5.

³⁹ *Id.* at 6.

On January 13, 2005, ALPA filed a reply and an accompanying motion for leave to file an otherwise unauthorized document. On January 18, 2005, BMAC filed a response which was accompanied by a motion for leave to file.

Submission of Falsified Documents

On June 1, 2005, ALPA provided further evidence of its alleged claim against BMAC's key personnel. Among other things, ALPA stated that in December 2004, Mr. John Nadolny, Senior Vice President and General Counsel for BMAC and its sister air carrier, Pan Am, submitted a performance bond (surety bond) to ALPA in connection with a labor-related case that was purportedly issued by Great American Insurance Company ("Great American") and signed by Mr. Nadolny on behalf of Pan Am.⁴⁰ According to ALPA, an insurance investigator employed by American Financial Group, the parent of Great American, informed ALPA that Great American did not in fact issue the bond and "that the signature on the bond that purports to be that of an attorney-in-fact acting on behalf of Great American is not genuine."⁴¹

On June 3, 2005, BMAC filed an answer in the docket acknowledging that Great American did not issue the bond. Additionally, on June 9, 2005, BMAC filed a statement pointing out that Mr. Nadolny "acknowledges that he was directly involved in, and takes responsibility for, the irregularities affecting the procurement of the Performance Bond delivered to ALPA's counsel in connection with the negotiated settlement agreement between ALPA and Pan Am."⁴² BMAC informed the Department that Mr. Nadolny had resigned from his positions as Senior Vice President and General Counsel for BMAC, Pan Am, and certain other affiliated companies, and provided the record with Mr. Nadolny's letter of resignation from both Pan Am and BMAC, effective June 3, 2005.

On June 13, 2005, ALPA filed a comment and a motion for leave to file. ALPA questioned whether Mr. Nadolny retained any positions with any corporation affiliated with, or related to, BMAC, and whether Mr. Nadolny acted without the knowledge of other Pan Am management personnel.

On June 15, 2005, BMAC filed an answer to ALPA's comment, along with a motion for leave to file. BMAC reiterated that Mr. Nadolny was no longer employed in any capacity by BMAC, Pan Am, Guilford Transportation Industries, or any other corporation affiliated with any of those companies. BMAC further noted that Mr. Nadolny stated that he acted alone, and that he was acting neither at the direction of his superiors, nor with the knowledge or approval of his superiors.⁴³ BMAC further represented that Pan Am's senior management group had received no information about the surety bond problem until they saw ALPA's June 1, 2005, pleading.

Since the majority of the pleadings filed by BMAC between January 7 and June 30, 2005, were signed by Mr. Nadolny, the Department questioned the veracity of BMAC's representations

⁴⁰ In its supplement, ALPA states that it had entered into an agreement with Pan Am to settle a lawsuit that ALPA had brought against the carrier pursuant to the Worker Adjustment and Restraining Notification Act. ALPA states that under the terms of the settlement agreement, Pan Am was required to make payments to ALPA and to some pilots, and to deliver a surety bond to ALPA that would ensure that the payments would be made. ALPA Supplement, filed June 1, 2005, at 1-2.

⁴¹ ALPA Motion, filed December 29, 2004, at 3.

⁴² BMAC Answer, filed June 9, 2005, at 2.

⁴³ *Id.*

made in its requests for authority to operate three large aircraft and to engage in foreign scheduled passenger air transportation using four additional large aircraft. Therefore, by letter dated July 20, 2005, the Department informed the air carrier that we were unwilling to accept the factual statements made in this case without additional assurance from current senior company officials that the facts stated in those pleadings were true and accurate. We also directed BMAC to provide further information and clarification regarding the issues raised by ALPA to enable us to establish a complete and accurate record.

By letter dated July 26, 2005, BMAC indicated that Mr. Nadolny had also submitted inaccurate fitness information to the Department. In particular, BMAC stated that the Mellon bank statement dated April 1, 2005, and its balance sheet dated March 31, 2005, were inaccurate. The air carrier further stated that it recognized the possibility that other financial information filed with the Department may have been altered and that it would institute its own internal investigation.

Inspector General Investigation

In light of these circumstances, on August 2, 2005, Mr. Karan K. Bhatia, DOT Assistant Secretary for Aviation and International Affairs, requested that the DOT Office of the Inspector General ("Inspector General") initiate an investigation into the circumstances involving the information filed by BMAC in proceedings before the Department. In light of these circumstances, the Department deferred action on all open dockets regarding BMAC's authority until completion of the investigation.⁴⁴

Although the Inspector General had not yet completed its investigation, on October 12, 2005, BMAC requested that the Department resume its review of the air carrier's applications for foreign scheduled and foreign exemption authority and authorize it to operate four additional large aircraft. BMAC argued that the delay in processing its pending applications was causing the air carrier to "endure severe economic damage and operating losses."⁴⁵

⁴⁴ On August 24, 2005, Captain Dirck Hecking, a former employee of Pan Am, filed a motion in docket DOT-OST-2000-7668 to revoke BMAC's certificate authority. This motion was the first of several documents filed in the docket by Captain Hecking. On August 29, 2005, BMAC filed an answer to Captain Hecking's motion requesting that the Department consider his motion at the same time that we address ALPA's motion for revocation. Since the Department had deferred action on ALPA's motion, we found it appropriate to also defer action on Captain Hecking's submissions. In light of the action taken in this order, we hereby dismiss Mr. Hecking's motion as moot.

On August 29, 2005, BMAC also filed a request in the docket for additional time to comply with Condition No. 4 of Order 2004-8-21, issued August 18, 2004. That condition directed BMAC to submit to the Department a first-year progress report within 45 days following the end of its first year of operations using large aircraft. BMAC requested a one-year extension to submit its first-year progress report, or six months following the completion of the Department's investigation, whichever was later. BMAC stated that "highly unusual and disruptive events" had "impeded BMAC's introduction and utilization of B-727-200 aircraft into its fleet since the issuance of Order 2004-8-21." Because the Department had deferred action on all fitness-related matters pertaining to BMAC pending the outcome of the investigation, we found it appropriate, in this instance, to defer submission by BMAC of the progress report. Thus, by letter dated September 14, 2005, the Department informed BMAC that upon completion of the investigation, BMAC would have 30 days to file its first-year progress report.

⁴⁵ BMAC Submission, filed October 12, 2005, at 7.

On November 14, 2005, the air carrier requested that the Department, at a minimum, grant it authority to add two additional large aircraft, which would bring its fleet to five large aircraft in interstate service. BMAC maintained that its poor financial condition was a direct result of its inability to operate additional large aircraft.

In response to BMAC's request, the Department, by letter dated December 5, 2005, informed the air carrier that not only was the Inspector General's investigation still pending, but also the record of this case lacked much of the information necessary for us to determine its fitness to conduct its proposed expanded operations. In that letter, the Department provided BMAC with the opportunity to refresh the record and assured the air carrier that our review of the air carrier's fitness would continue.

Subsequently, on December 30, 2005, BMAC submitted updated fitness information. The company provided, among other things, updated information about new management personnel and projected revenues and expenses for the year ending December 31, 2006, including those associated with the operation of additional large aircraft. BMAC also provided several financial statements, including (1) an audited balance sheet as of December 31, 2002, and an income statement for the year ended December 31, 2002; (2) an audited balance sheet as of December 31, 2003, and an income statement for the year ended December 31, 2003; (3) an audited balance sheet as of December 31, 2004, and income statement for the year ended December 31, 2004; and (4) unaudited balance sheets at June 30, 2004, and at October 31, 2005.⁴⁶

With respect to BMAC's financial ability to operate additional large aircraft, the company stated that its sister company, Springfield Terminal Railway Co. ("ST") had committed to extend BMAC a \$7.2 million line-of-credit.⁴⁷ To demonstrate ST's ability to extend BMAC the line-of-credit, the air carrier provided copies of ST's October 31, 2005, balance sheet and statement of cash flows for the period January 1 through October 31, 2005.⁴⁸

BMAC also discussed the results of its internal investigation of the Nadolny matter. The air carrier stated that it had further identified several inaccurate submissions made to the Department under Mr. Nadolny's supervision pertaining to the air carrier's requests to operate large aircraft and to conduct foreign scheduled operations.⁴⁹ For example, in support of its application to operate one large aircraft, BMAC provided a balance sheet at September 30, 2002, showing current assets totaling \$960,090 (\$109,700 of which was cash) and current liabilities totaling of \$318,000, which indicated that BMAC had working capital of \$642,070.⁵⁰ According to the air carrier, this balance sheet was not accurate. BMAC also informed us that the \$750,000 cash

⁴⁶ BMAC's Response to DOT's Request for Updated Fitness Information, filed December 30, 2005, Exhibits BMA-6, BMA-7, BMA-8, BMA-9, and BMA-10.

⁴⁷ BMAC's Response to DOT's Request for Updated Fitness Information, filed December 30, 2005, at 5.

⁴⁸ ST's financial information was filed confidentially under 14 CFR 302.12.

⁴⁹ See Appendix A for a description of BMAC's inaccurate filings. Also see BMAC's Response to DOT's Request for Updated Fitness Information, filed December 30, 2005, Attachment BMA-20.

⁵⁰ See Exhibit BMA-S/3-5 to Supplement 3, filed October 21, 2002.

infusion it stated it received from its parent company, PAA, and which it used to meet the Department's financial fitness test for operations using one large aircraft, did not in fact occur.⁵¹

In another example, BMAC stated that the April 16, 2003, Mellon Bank statement provided in Supplement 6 was inaccurate.⁵² In fact, the air carrier indicated that it did not even have an account with Mellon Bank until April 18, 2003, two days after the date of the alleged statement of account. BMAC stated that the document presented to the Department was actually the account statement for Boston & Maine Corporation, a railroad company, representing that company's account balance as of April 7, 2003.⁵³

Concerning Mr. Nadolny's actions, BMAC stated that it believed "Mr. Nadolny acted wholly alone, and without the knowledge or complicity of any other person employed or retained by BMAC."⁵⁴ BMAC claimed that because of the legal nature of the fitness proceedings, Mr. Nadolny had exclusive oversight of the preparation and submission of financial information to the Department in relation to the BMAC fitness review.⁵⁵ The air carrier further noted that because Mr. Nadolny had 18 years of service with the company with no indication of any problems, he was given substantial independence to manage insurance and legal matters.⁵⁶ Further, BMAC indicated that Mr. Nadolny had "access to BMAC's financial reports, and was able to reproduce those reports without necessarily involving the Finance Department."⁵⁷

Continuing Fitness

On April 24, 2006, BMAC filed additional information in the docket responding to the Department's December 5, 2005, Information Request. Specifically, the air carrier provided an audited balance sheet at December 31, 2005, as well as an audited income statement for calendar year 2005. BMAC also submitted information about changes to its management.

By letter dated June 23, 2006, the Department informed BMAC that although the Nadolny investigation was still classified under Department of Justice guidelines as "open," and any written products would not be available for request until the conclusion of any legal actions that might be taken by the Office of the United States Attorney, we, in consultation with the Inspector General, found it appropriate to resume action on BMAC's pending applications.

In that letter, however, we informed BMAC that after examining its audited financial statements, the air carrier's overall financial condition was extremely poor and that it did not appear as though BMAC had the financial wherewithal to conduct its proposed operations. The Department also noted that BMAC's audited financial statements for calendar years 2003, 2004, and 2005 showed the company having negative working capital of \$14 million, \$26 million, and \$22 million, respectively. In addition, the Department indicated that the financial statements for

⁵¹ BMAC Supplement 3, filed October 21, 2002, at 3.

⁵² See Exhibit BMA-S/6-6 to Supplement 6, filed August 18, 2003.

⁵³ BMAC's Response to DOT's Request for Updated Fitness Information, filed December 30, 2005, Attachment BMA-20 at 8.

⁵⁴ BMAC's Response to DOT's Request for Updated Fitness Information, filed December 30, 2005, at 10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

BMAC's parent company, PAA, for calendar years 2002, 2003, and 2004, showed PAA having negative working capital of \$41 million, \$21 million, and \$67 million, respectively. Further, our review of the financial statements for ST, BMAC's sister company that committed to extend the air carrier a line-of-credit, indicated that the company did not have the funds necessary to support BMAC's operations and capital expenditures, let alone its own. In light of the above, the Department stated that BMAC would need to demonstrate that it had access to \$22 million to meet our financial fitness requirements.⁵⁸

In response to the Department's June 23, 2006, letter, BMAC filed a copy of its March 31, 2006, balance sheet and its revised first-year projections, reducing its initial request for four additional large aircraft to two additional large aircraft. The air carrier indicated that it intended to pursue charter operations with its large aircraft instead of scheduled operations. Further, it also claimed that another affiliated company, Pan Am Railways, Inc. ("PAR") had a \$30 million credit facility with Bank of America, and PAR committed to extend BMAC use of that credit line up to \$7.0 million.⁵⁹

On July 20, 2006, ALPA submitted comments to BMAC's updated fitness information claiming that BMAC had misrepresented itself in its unaudited March 31, 2006, balance sheet. ALPA suggested that BMAC relabeled some of its current liabilities as long term debt, reducing the air carrier's negative working capital, and thereby reducing its working capital requirement by more than \$19 million.⁶⁰ On July 21, 2006, BMAC filed an answer to ALPA's comment, stating that it refused to respond to ALPA's "insinuations."⁶¹

Still concerned about BMAC's financial condition, by letter dated August 22, 2006, the Department reiterated its concerns about BMAC's financial ability to support additional large aircraft operations and requested that BMAC provide audited financial statements.⁶² Thus, on December 19, 2006, BMAC provided an audited balance sheet at August 31, 2006.⁶³

After reviewing the information that BMAC submitted, the Department determined that further information was necessary, and by letter dated January 26, 2007, the Department directed BMAC to provide a copy of its balance sheet at December 31, 2006, as well as bank statements for the period December 1 – 31, 2006.

⁵⁸ The capital requirement of \$22 million includes the amount of funds needed to cover BMAC's negative working capital plus the capital required to fund its proposed expansion of operations.

⁵⁹ BMAC Updated Fitness Information, filed July 18, 2006, at 6. BMAC also submitted a letter from Mr. Fink, who is also Chief Executive Officer of PAR, committing the use of PAR's Bank of America line-of-credit to BMAC.

⁶⁰ ALPA Comment, filed July 20, 2006, at 2- 3.

⁶¹ BMAC Answer, filed July 21, 2006, at 2.

⁶² In its August 22, 2006, letter, the Department also noted to BMAC that the FAA had expressed concerns about the air carrier's operations and had denied the company authority to operate additional small aircraft until the air carrier could demonstrate to the FAA that adequate equipment, including spare parts, supplies, and materials, were available for proper servicing, maintenance, and preventive maintenance of aircraft. To that end, the Department directed BMAC to explain what corrective actions it was taking to address the FAA's concerns.

⁶³ See Exhibit BMA-FR-100 to BMAC's Updated Fitness Information, filed December 19, 2006.

BMAC submitted the request information on January 26, 2007. Specifically, the company provided its December 31, 2006, balance sheet, as requested, two statements from Bank of America, a statement from United Heritage Bank, and a statement from Valley National Bank.⁶⁴ On February 15, 2007, BMAC submitted a bank statement that it had inadvertently omitted from its January 26, 2007, submission.⁶⁵ In that submission, the air carrier noted that it had received a capital contribution of \$400,000 from its sister company, ST, and proceeds from the sale of its assets.⁶⁶

TENTATIVE DECISION

After careful review of the record and based on the totality of the circumstances, we tentatively find that BMAC is not fit, willing, and able to provide air transportation as a U.S. certificated air carrier and its authority should be revoked. Our review of the record in this case indicates that BMAC has failed to establish that it possesses the (1) financial wherewithal to continue or expand its operations without posing an undue risk to consumers and their funds, (2) managerial competency to oversee its current and proposed operations, and (3) proper regard for the laws and regulations governing its services to ensure that its aircraft and personnel conform to applicable safety standards and that acceptable consumer relations practices will be followed.

Specifically, we find that BMAC's authority to operate large aircraft was based on false financial information submitted to the Department, without which the air carrier would not have been found fit to hold such authority when it first sought to expand its operations. We find further that BMAC's management knew or should have known about the false financial information and it therefore fails to have an adequate compliance disposition and lacks the competence necessary to oversee the air transportation authorized in the air carrier's certificate. Finally, not only was BMAC's financing insufficient to be found fit in 2004, but the air carrier has, since that time, been in extremely poor financial condition, placing undue risk on consumers and their funds, and therefore, has failed to demonstrate its financial fitness at this time.

Importantly, when an applicant applies for initial or expanded economic authority, the burden of establishing that it is fit for the operations it proposes rests with that applicant.⁶⁷ In determining an applicant's fitness, it is the Department's practice, as is the case herein, to review, among other things, the applicant's financial wherewithal to conduct its proposed operations.⁶⁸

With respect to BMAC's request to operate large aircraft, the Department unknowingly relied on false financial information in making its fitness determination. As stated previously, after having reviewed the air carrier's pre-operating and first-year expense forecasts for its three large aircraft, the Department determined that BMAC needed approximately \$2.3 million to meet our financial fitness requirements. In support of its ability to operate three large aircraft, BMAC

⁶⁴ See Exhibit BMA-FR/S-1-101 to BMAC's January 2007 Response, filed January 26, 2007.

⁶⁵ See Exhibit BMA-FR/S-1-104 to BMAC's February 2007 Response, filed February 15, 2007.

⁶⁶ BMAC February 2007 Response, filed February 15, 2007, at 2.

⁶⁷ See, e.g., Order 91-3-17, issued March 8, 1991, *Tropical Airways, Application for Fitness Redetermination*.

⁶⁸ See Order 2002-12-20, issued December 27, 2002. In instances where a company has agreed to provide funding to support an applicant's proposed operations, we also review that company's financial ability to extend that funding amount.

provided a balance sheet at March 31, 2004, showing that the air carrier had \$7.7 million in current assets and \$500,900 in current liabilities, giving it positive working capital of \$7.2 million, along with \$10.5 million in total assets, no long term debt, and \$10 million in total shareholder's equity.⁶⁹ Based on this information, the Department found that BMAC had access to sufficient resources to operate up to three large aircraft in scheduled passenger service without posing undue risk to consumer funds, and by Order 2004-8-21, issued August 18, 2004, the Department confirmed its oral action of July 16, 2004, making BMAC's authority effective on that date.

BMAC later admitted that its March 31, 2004, balance sheet, which it used to prove that it had sufficient funding to meet the Department's financial fitness test, did not accurately portray the financial position of the air carrier at the time it received effective authority. Therefore, in an effort to establish its financial fitness around the time the Department granted BMAC effective authority to operate three large aircraft, BMAC, in its December 30, 2005, submission recreated its balance sheet, using ledger balances, at June 30, 2004. That recreation showed the air carrier as having had, as of June 30, 2004, current assets of \$935,231, current liabilities of \$2.7 million, and negative working capital of \$1.8 million. Based on this information, BMAC's true working capital had a variance of \$9.0 million from what it certified was true in its March 31, 2004, balance sheet. Moreover, BMAC had total assets of only \$2.5 million and negative shareholder's equity of \$16.2 million for the same time period. Thus, the air carrier had no equity against which it could borrow and clearly failed the Department's financial fitness test, under which BMAC needed to demonstrate that it had access to \$2.3 million. Had the Department been aware of the company's true financial condition, it would not have granted the authority that BMAC was seeking.

Regarding an air carrier's management and compliance disposition, the Department has long held that violations that have occurred under an executive's leadership can support a finding that he or she lacks an adequate compliance disposition.⁷⁰ Moreover, "a carrier's key personnel are responsible for conducting its operations in a way so as to ensure that reasonably expected compliance problems do not occur."⁷¹ It is also well-established that key personnel need not have had actual knowledge of problems if they should have known of the deficiencies.⁷² Indeed, failure by an executive of a company seeking certification to pay sufficient attention to the proceeding is negligent and demonstrates lack of managerial competence.⁷³

The false information at issue in this proceeding was knowingly submitted to the Department from 2002 to 2005 by Mr. Nadolny, BMAC's then Senior Vice President and General Counsel. Although BMAC asserts that Mr. Nadolny had exclusive oversight responsibilities of the fitness process for the air carrier and the ability to reproduce its financial reports without involvement of the air carrier's finance department, and it was, therefore, unaware of the numerous submissions of fraudulent information made by him, we tentatively find that BMAC's assertion not only begs credulity but, even if true, demonstrates a glaring lack of competence in the air carrier's

⁶⁹ See Exhibit BMA-S/10-3 to Supplement 10.

⁷⁰ *ATX, Inc., Fitness Investigation*, Docket 48780, Opinion and Order on Review, issued April 5, 1994, at 7.

⁷¹ *Id.*, citing *Yute Air Alaska*, Order 89-11-48.

⁷² *ATX*, at 8.

⁷³ *Aero West, Fitness Investigation*, Docket 40662, Order on Review, issued October 24, 1984, at 7.

management to oversee the operations of a certificated air carrier and supports a finding that the air carrier's management does not have the compliance disposition required by our fitness standards.

Moreover, we find it hard to believe that the chief legal officer of an air carrier, especially one as small as BMAC, could prepare or alter already-prepared documents over a three-year period in such a drastic fashion as was done here without arousing the slightest attention of any other officer or key personnel of BMAC and, in particular, that of the air carrier's two owners or Chief Financial Officer. Indeed, as the air carrier's Senior Vice President and General Counsel, Mr. Nadolny reported directly to BMAC's President and minority owner, Mr. David Fink. Based on this reporting relationship alone, BMAC's President should have been aware of Mr. Nadolny's actions, if not his motive for altering certain financial information in favor of the air carrier's proposed expansion. Even if Mr. Nadolny's unlawful actions at first were unknown, given the contentious nature of this fitness proceeding and the numerous requests to BMAC for financial information by the Department over a considerable period of time, it strains credulity to assert that the financial information attributed to BMAC that was published in the important Department show cause order, which formed a primary basis for that tentative decision but which was patently overstated, would go unnoticed by Mr. Fink. Accordingly, even if, as suggested by the air carrier, Mr. Fink had no direct actual knowledge of Mr. Nadolny's deliberately deceptive actions, it is clear that he should have known of or exercised the discretion to discover those illegalities and that his failure to have done so reflects extremely negatively on both his compliance disposition and his ability to effectively manage and run an airline. Hence, we tentatively conclude that BMAC is not fit under Mr. Fink's direction and control.

We also tentatively find that BMAC's other key management personnel should have been aware of the company's weak financial posture and therefore, its financial ability, or lack thereof, to acquire, operate, and support large aircraft in interstate and foreign air transportation. It stands to reason that as part of a company's normal business practice, the financial condition of a company would be discussed among its key management personnel, including its Chief Financial Officer and Treasurer, prior to any decision to pursue expanded operations. Moreover, as noted above, in issuing BMAC authority to operate large aircraft, the Department specifically referenced in its public orders the financial statements and the capital required to meet the Department's financial fitness criteria. Therefore, the air carrier's assertion that it was completely ignorant of Mr. Nadolny's fraudulent submissions suggests that BMAC's key management personnel are completely uninvolved in the air carrier's current and proposed operations, which itself suggests that these individuals lack the managerial competence to oversee the air carrier. In the alternative, it is possible that they knew of the air carrier's precarious finances, and perhaps even noticed the significant discrepancies in financial data submitted to the Department, but in the confines of the corporate culture of a closely held company in which the owners are actively involved in day-to-day decisions, they did not speak up.⁷⁴ Thus, while other key personnel may individually be qualified to hold their respective positions and regardless of any complicity on their part in the scheme to defraud the Department, the failure of these persons to recognize and/or act on the false information leads us to tentatively conclude that BMAC lacks the managerial competence necessary to hold certificate authority.

⁷⁴ This situation, if it existed, creates its own fitness issues. See Order 88-6-6, issued June 3, 1988, *Application of Ryan Air Service* (Closely held corporation in which owners may be involved in day-to-day decisions creates potential for interference with operating officers' carrying out necessary duties.).

In addition, it is particularly troubling that the FAA has advised the Department this it has been extremely concerned about the ability of BMAC's management to oversee the air carrier's existing operations, never mind expanded operations. The FAA has informed the Department that the air carrier's staffing levels have decreased so much that BMAC's maintenance manuals had to be rewritten because the positions responsible for specific tasks remained vacant. This situation further supports the Department's tentative finding that BMAC lacks adequate managerial competence.

Furthermore, the false submissions to the Department are not the only compliance disposition issue BMAC has had with the Department. In 2006, the Department's Office of Aviation Enforcement and Proceedings investigated BMAC for its apparent failure to comply with federal laws requiring timely credit refunds to consumers and Department enforcement case precedent applicable to timely refunds to consumers for cash ticket purchases. That investigation was concluded with the issuance of Consent Order 2006-7-7, issued July 7, 2006, which found that BMAC had violated 14 CFR Part 374, which requires airlines to make prompt credit refunds as required by the Consumer Credit Protection Act and Regulation Z of the Board of Governors of the Federal Reserve System, 15 U.S.C. §§1601-1693r and 12 CFR Part 226. That order further found that BMAC had engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. 41712 and directed the air carrier to cease and desist from further violations and assessed the air carrier \$50,000 in civil penalties.

Our tentative determinations that BMAC lacks the requisite disposition to comply with the laws of the United States as well as the managerial competence to run an airline clearly are, without more, sufficient to support our tentative conclusion that the air carrier has failed to demonstrate that it continues to be fit to hold authority to operate as an air carrier. Even so, we also tentatively find that, in addition to the fact that had the Department known BMAC's true financial position in 2004, we would not have found the air carrier fit to receive expanded authority, we tentatively conclude that the air carrier today has failed to demonstrate its financial fitness. In this regard, after learning of the false submissions to us, we provided BMAC numerous opportunities to update the record and submit current information on its financial posture. Our review of the financial statements ultimately submitted reveals that BMAC's financial condition, along with that of its parent, PAA, has been extremely poor for more than five years.⁷⁵ According to BMAC's September 30, 2007, balance sheet filed with the Bureau of Transportation Statistics, BMAC reported current assets of \$3.4 million and current liabilities of \$5.9 million, giving the company negative working capital of \$2.5 million.

Considering BMAC's poor financial history, its present financial condition, and the concerns raised by the FAA regarding the air carrier's cutback in management personnel, the Department tentatively finds that the air carrier lacks the financial wherewithal to continue to operate, let alone expand its operations to include foreign scheduled authority with additional large aircraft, without posing an undue risk to consumers and their funds. Further, we already have experienced BMAC failing to provide consumers timely refunds, which can be indicative of direct public harm stemming from financial shortfalls, and based on the concerns raised by the FAA, we believe that BMAC's weak financial condition may adversely affect the air carrier's ability to fund the maintenance of its aircraft, creating a safety risk. Thus, we tentatively find

⁷⁵ We reviewed the financial information on PAA because BMAC stated that its access to funding would be provided by PAA.

that the air carrier lacks the requisite financial resources necessary to continue to operate the services as a certificated air carrier without posing an undue risk to consumers.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order finding that (1) Boston-Maine Airways Corp. is not fit, willing, and able to hold a certificate of public convenience and necessity, (2) its applications for foreign scheduled certificate authority in Docket DOT-OST-2003-14985 and exemption authority in Docket DOT-OST-2004-19919 should be dismissed and (3) its certificate of public convenience and necessity authorizing it to engage in interstate scheduled air transportation issued by Order 2004-8-21 on August 18, 2004, should be revoked.

2. We direct interested parties having objections to the issuance of an order making final any of the proposed findings and conclusions set forth herein to file them with Department of Transportation Dockets Section, West Building Ground Floor, 1200 New Jersey Avenue, SE (M-30, Room W12-140), Washington, D.C. 20590, in Dockets DOT-OST-2000-7668, DOT-OST-2003-14985, and DOT-OST-2004-19919, and serve them upon all persons listed in Appendix B no later than 30 days after the service date of this order; answers to objections shall be filed no later than 7 days thereafter.

3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.⁷⁶

4. In the event that no objections are filed, we will consider all further procedural steps to be waived, and we will enter an order making final our tentative findings and conclusions set out here.

5. We will serve a copy of this order on all persons listed in Appendix B.

6. We will publish a summary of this order in the Federal Register.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary
for Aviation and International Affairs

An electronic version of this document is available on the World Wide Web at:
<http://www.regulations.gov>

⁷⁶ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

BOSTON-MAINE AIRWAYS INACCURATE FILINGS WITH DOT*				
<u>Date of Filing</u>	<u>Supplement #</u>	<u>Exhibit #</u>	<u>Item</u>	<u>Notes</u>
5/2/2005	14	102	Mellon Bank Statement dated 4/1/05	Incorrect share balance. Listed as 6.72 million shares when actual share balance is 1.85 as of March 31, 2005. Overstated by 6.72 million shares.
4/5/2005	13	103	Boston Maine Balance Sheet dated 3/31/05	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger as of 3/31/05. Balance sheet data not obtained from finance department. Amount of cash reported was taken from inaccurate Mellon statement in Exhibit 14-102.
4/5/2005	13	105	Traffic Revenue and Expense	No comments provided.
4/5/2005	13	106	Working Capital	Working capital figures prepared off incorrect balance sheet in Exhibit 103, therefore had working capital for additional aircraft. With recalculations of corrected balance sheet and \$7.2 million line-of-credit from Springfield Terminal, BMA's financial needs are met. Provided ST financials 3/31/05.
6/24/2004	12	1	Boston Maine Balance Sheet dated 3/31/04	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger as of 3/31/04. Cash balance based off incorrect 6/1/04 Mellon Bank and 5/28/04 Fleet Bank account statements listed in Exhibit 12-2.
6/24/2004	12	2	Fleet Statement dated 5/28/04	Totally false and incorrect. Listed ending balance as \$1.54 million, when it was actually over drafted by \$7,000. Overstated by \$1.54 million as of 5/28/04.
6/24/2004	12	2	Mellon Statement dated 6/1/04	Mellon Statement, page 2 of filing, is inaccurate. Actual share balance is 14,800, not 5.43 million. Overstated by 5.41 shares as of 5/31/04.
6/24/2004	12	3	Boston Maine P&L dated 1/1/04 - 5/31/04	5-month income statement figures are false, origin of figures unknown. Amounts and balance do not match up to internal documentation.

* This table was created from BMA's Response to DOT's Request of Updated Fitness Information filed December 30, 2005, Attachment BMA-20.

6/17/2004	11	3	Net Working Capital	Working capital figures prepared off incorrect balance sheet; only way BMAC would meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided Springfield Terminal ("ST") financials 3/31/04.
5/20/2004	10	3	Boston Maine Balance Sheet dated 3/31/04	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger. Balance sheet data not obtained from finance department. Cash balance taken from incorrect bank statements, see Exhibit 12-1. Actual figures from 3/31/04 statement show large variance.
5/20/2004	10	6	Mellon Statement dated 4/4/04	Page 2 of filing, is incorrect. Actual balance was, \$14,600 not \$5.42 million. Overstated by \$5.41 million as of actual balance on 3/31/04.
5/20/2004	10	7	Working Capital	Calculated off incorrectly prepared balance sheet, only way BMAC would meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided ST financials 3/31/04.
7/17/2003	7	12	Working Capital Combined	Calculated based on incorrectly prepared balance sheet; only way BMA would meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided ST financials 6/30/03.
7/17/2003	7	5	Working Capital Interstate	Calculated based on incorrectly prepared balance sheet; only way BMA would meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided ST financials 6/30/03.
7/17/2003	7	6	Boston Maine P&L dated 7/1/02 - 6/30/03	Inaccurate figures reported on yearly income statement, source of incorrect figures unknown. According to internal unaudited statement, estimates loss to \$4.43 million for fiscal year ending 6/30/03. According to general ledger, loss amounts to \$5.94 million for same time period.
7/17/2003	7	7	Boston Maine Balance Sheet dated 6/30/03	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger as of 6/30/03. Cash balance based off incorrect 7/1/03 Mellon and correct 7/1/03 Fleet operating account balance. Actual figures from 6/30/03 statement show large variance.

7/17/2003	7	8	Mellon Statement dated 7/1/03	Page 2 of filing is inaccurate. The actual share balance of account was 4.22 million, not 5.93 million. Overstated by 1.71 million of actual balance as of 06/30/03
4/18/2003	6	5	Boston Maine Balance Sheet dated 3/31/03	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger as of 3/31/03. Balance sheet data not obtained from finance department. Contrary to filing, there is no BMAC common stock, no additional paid-in capital, did not have \$872,400 in cash.
4/18/2003	6	6	Mellon Statement dated 4/16/03	Page 3 of filing of filing is incorrect. BMAC did not have an account with the bank until 4/18/03. This is a falsified document of different company with similar name, Boston Maine Corporation's, account balance as of 4/7/03.
4/18/2003	6	7	Working Capital Interstate	Calculated off incorrectly prepared balance sheet, otherwise would not meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided ST financials 3/31/03.
10/21/2002	3	5	Boston Maine Balance Sheet dated 9/30/02	Origin of balance sheet figures unknown and inconsistent with actual figures from general ledger as of 9/30/02. Balance sheet data not obtained from finance department. Contrary to filing, there is no BMAC common stock, no additional paid-in capital, BMAC did not have \$109,700 in cash.
10/21/2002	3	6	Working Capital Interstate	Calculated off incorrectly prepared balance sheet; only way BMAC would meet fitness requirement. With recalculations of corrected balance sheet, including a \$7.2 million line-of-credit from Springfield Terminal, BMAC can support operations. Provided ST financials 9/30/02.
9/26/2002	2	1	Pan Am Balance Sheet dated 9/15/02	Origin of balance sheet figures unknown. Finance does not prepare interim month balance sheets. \$1.99 million of cash listed was not available. Possible that Nadolny included \$1.6 million wire received by Pan Am Airways Corp on 9/18/02. Nonetheless, this transaction should be on 9/15/02 balance sheet.

**SERVICE LIST FOR
BOSTON-MAINE AIRWAYS
CORPORATION, INC.**

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**CAPTAIN DIRCK HECKING
8213 COFFMAN ROAD
INDIANAPOLIS, IN 46268**

Exhibit No. 4

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Attorney General

[Home >](#)**MARTHA COAKLEY**
ATTORNEY GENERAL**Contact:**
Harry Pierre (AGO)
(617) 727-2543
Ed Coletta (MassDEP)
(617) 292-5737**April 03, 2008 - For immediate release:**

PAN AM RAILWAYS AND SUBSIDIARIES INDICTED ON CHARGES OF FAILING TO REPORT ENVIRONMENTAL CONTAMINATION

WOBURN – A Middlesex Grand Jury returned indictments against a New Hampshire railway company, and three of its subsidiaries, for failing to report a hazardous spill and contamination on its rail yard property in Ayer. Pan Am Railways, Inc., of Portsmouth, NH, is charged with violating the Massachusetts Oil and Hazardous Material Release Prevention Act (2 counts). Massachusetts' law requires that any owner or operator of a site, as soon as it has knowledge of a release or threat of release of oil or hazardous material, shall immediately notify the Department of Environmental Protection (MassDEP).

Pan Am Railways, previously known as Guilford Rail Systems, is a privately-owned freight railroad that services northern New England, from Mattawamkeag, Maine, to Rotterdam Junction, New York. The Maine Central Railroad Company, which owns the locomotive from which the spill occurred; the Boston & Maine Corporation, which owns the Ayer rail yard; and the Springfield Terminal Railway Company, which is the operator of both the locomotive and the rail yard, were also charged with two counts each of violating the Massachusetts Oil and Hazardous Material Release Prevention Act.

An investigation conducted by the Massachusetts Environmental Crimes Strike Force (ECSF) found that, on the evening of August 8, 2006, a locomotive left idling at Pan Am Railways' rail yard in Ayer, spilled hundreds of gallons of diesel fuel onto the ground. Despite a two-hour time period for reporting spills of ten gallons or more to the MassDEP, the fuel spill was not reported by the company or its subsidiaries either that night or the next morning, but instead investigators allege that an attempt was made to cover it up.

The MassDEP was first notified of the fuel spill on the afternoon of August 9, 2006, by a caller, who wished to remain anonymous out of a concern for retribution by the railroad. The caller indicated that the railroad was alleging the spill was less than the reportable quantity of ten gallons, but that workers believed the spill was significantly greater. The caller stated that the railroad appeared to be trying to hide the spill and avoid its detection by covering the spill area with fresh ballast.

The Ayer Fire Department, a member of MassDEP's Emergency Response team, and inspectors from the Federal Railroad Administration responded to the scene late in the afternoon of August 9, 2006, and initiated an investigation into the circumstances surrounding the spill. Initial assessments by the responding agencies indicated that a fuel spill of hundreds of gallons occurred at the site. The Federal Railroad Administration's investigation eventually concluded that over 900 gallons of diesel fuel had leaked from the locomotive.

Subsequent investigation by the ECSF revealed numerous ways in which the railroad companies learned of the spill, and its extent, but failed to report what it knew to MassDEP. Each failure to report is

punishable by a criminal fine of up to \$100,000.

A Grand Jury returned the indictments on April 1, 2008. A Superior Court arraignment date has not yet been scheduled.

The Environmental Crimes Strike Force (ECSF) is an interagency unit that includes prosecutors from Attorney General Martha Coakley's Office, Environmental Police Officers assigned to Attorney General Coakley's Office, and investigators, engineers and attorneys from the MassDEP. The Strike Force investigates and prosecutes crimes that harm the state's water, and air, and that pose a significant threat to human health. The ECSF is overseen by Attorney General Coakley, MassDEP Commissioner Laurie Burt, and Energy and Environmental Affairs Secretary Ian Bowles.

Members of the public who may have information of a potential environmental crime are encouraged to contact the MassDEP Environmental Strike Force Hotline at 1-888-VIOLATE (846-5283) or Attorney General Coakley's Office at 617-727-2200.

The case is being prosecuted by Assistant Attorney General Wendoly Ortiz Langlois, of Attorney General Coakley's Criminal Bureau. The investigation was conducted by MassDEP Investigators Robert Dunne and Dino DelleChiaie and Environmental Police assigned to the Attorney General's Office.

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Exhibit No. 5



PAN AM RAILWAYS

IRON HORSE PARK
NO. BILLERICA, MA 01862

LAW DEPARTMENT
(603) 816-0042

July 11, 2008

George T. Casey
General Chairman
United Transportation Union
North District and New England Lines
PO Box 404
74 Main Street
Framingham, MA 01702

Re: Pan Am Southern, LLC
STB Finance Docket No. 35147

Dear Mr. Casey:

Please accept this letter in response to your correspondence of July 7, 2008 to Mr. Lomanto of the Springfield Terminal Railway Company ("ST") in relation to the application pending before the Surface Transportation Board for the formation and operation of Pan Am Southern LLC ("PAS"). At the outset, I would like to clarify that this transaction has always been intended to improve the efficiency of the lines of Pan Am Railways west of Ayer, Massachusetts through a significant capital program, and assuredly not to avoid labor protection as implied in the United Transportation Union's ("UTU") recent filing at the STB. Indeed, in the application filed to form and operate PAS, it was clearly stated that the Applicants do not expect any adverse effect on ST employees because, among other things, ST will continue to operate over PAS as its contract operator, ST is obligated to continue to abide by its presently existing collective bargaining agreements, and ST will continue to perform capital work that its collective bargaining agreements require it to perform under pre-transaction circumstances.

Article I, Section Four of the *New York Dock* Conditions requires negotiation of an implementing agreement only if "a transaction which is subject to these conditions may cause the dismissal or displacement of any employees or rearrangement of forces..." Clearly, the transaction as contemplated will not have any of these effects, as ST

employees will continue to perform the same functions as they do today, in the same jobs, and subject to the same work rules and conditions. Accordingly, ST must respectfully deny UTU's request for a meeting to negotiate an implementing agreement related to this transaction, as this condition is not relevant.

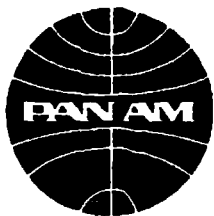
In light of the above, I hope that any questions you have regarding the potential impact on ST labor or the UTU's interests have been answered. However, if you wish, ST representatives are available to discuss any continuing concerns you have and, without prejudice to our position above, propose a meeting at ST's North Billerica offices on July 17, 2008 at 1 p.m. Please let me know promptly if you wish such a meeting and, in any event, feel free to contact me if you should have any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Culliford", written in a cursive style.

Robert B. Culliford
Senior Vice President &
General Counsel

Exhibit No. 6



PAN AM RAILWAYS

IRON HORSE PARK
NO. BILLERICA, MA 01862

July 29, 2008

Mr. George T. Casey
General Chairman
United Transportation Union
Northern District & New England Lines
PO Box 404
7 Main Street
Framingham, MA 01702

Dear Mr. Casey:

Please accept this in response to your correspondence dated July 17, 2008, which was presented to the Springfield Terminal Railway Company ("ST") immediately following the meeting among ST, the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET"). Despite the fact that ST in good faith offered to discuss the details of the proposed formation of Pan Am Southern with the UTU and BLET, both the UTU and the BLET seemed more intent upon expressing opposition to this beneficial transaction in an attempt to extract concessions from ST. Nevertheless, ST continues to believe that the formation of Pan Am Southern will be of benefit to the entire Northeast, including improved service to shippers, reduced congestion from trucks on the roads and increased work opportunities for ST employees.

With regard to your assertion that ST "disavows any obligation to provide New York Dock...protection.", this is completely untrue and is in direct contradiction to both the statements made in the application for approval to form Pan Am Southern and statements made during our meeting. To reiterate, ST expects that New York Dock labor protective conditions will be imposed upon elements of this transaction including ST's operation of the Pan Am Southern lines. However, negotiation of an implementing agreement will not be required because ST is expected to continue operating Pan Am Southern lines following this transaction under ST's existing collective bargaining agreements and without adverse labor impacts. Finally, ST stressed in our meeting that BLET and UTU's concern that ST will be removed as the operator on behalf of Pan Am Southern to avoid ST's labor contracts is unfounded. I want to assure both the BLET and the UTU again that ST has no such plans and that such a removal has not been a part of any of its discussions with Norfolk Southern or others and is simply not ST's intent.

Exhibit 6

Thank you for your attention to this matter. Please feel free to contact me if you should have any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Culliford", written in a cursive style.

Robert B. Culliford
Senior Vice President &
General Counsel

cc: C.S. Scarano
M. Twombly