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March 16, 2021

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W., Room 1034
Washington, DC 20423-0001

Re: **FD 36472**
CSX Corporation and CSX Transportation, Inc. — Control and Merger —
Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & Maine Corporation,
Maine Central Railroad Company, Northern Railroad, Pan Am Southern
LLC, Portland Terminal Company, Springfield Terminal Railway Company,
Stony Brook Railroad Company, and Vermont & Massachusetts Railroad
Company

FD 36472 (Sub-No. 5)
Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad —
Operation of Property of Property of Rail Carrier Pan Am Southern LLC —
Pan Am Southern LLC and Springfield Terminal Railway Company

Vermont Rail System's Notice of Intent to Participate, Opposition to Application and
Petition, and Reply to Proposed Procedural Schedule

Dear Ms. Brown:

Vermont Rail System (“VRS”) hereby – (1) gives notice of intent to participate in the above-referenced proceedings; (2) opposes the Board processing of the arrangements that comprise the full scope of these proceedings under the Board’s substantive and procedural rules for a “minor” transaction, when those arrangements clearly constitute, and should be governed by the Board’s procedures for, a “significant” transaction; (3) requests that the Board reject the individual petition for exemption in the Sub-No. 5 proceeding (the “Petition”), and, in so doing, direct the petitioner (and its parent company) to become Co-applicants in the main docket; and (4) opposes the Application’s ill-conceived, 60-day procedural schedule.

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The proposed transactions would re-shape railroad service throughout New England, and they are themselves shaped by concerning rail competition dynamics.

CSX Corporation and its Class I rail carrier subsidiary, CSX Transportation, Inc. (“CSXT”) (collectively, the “Applicants”) seek to acquire control of Pan Am Railways (“PAR”) and to integrate operation of PAR’s majority-owned rail carrier holdings into the CSXT system (the “CSX-PAR Transaction”). While the CSX-PAR Transaction would involve the change of ownership and operation of more than 800 miles of railroad throughout New England, it is not the end of the story. The CSX-PAR Transaction would give CSX a 50% membership stake in Pan Am Southern LLC (“PAS”), and would, absent any other arrangements, enable the Applicants to control PAS operations via Springfield Terminal Railway Company (“ST”).

PAS, however, has been critical to offsetting CSXT’s position as the only Class I railroad in New England by affording Norfolk Southern Railway Company (“NSR”) (which holds the other 50% membership in PAS) a means to compete with CSXT’s predominant regional position. PAS was formed pursuant to Board authorization almost exactly 12 years ago under a formal application process in *Norfolk Southern Railway Company, Pan Am Railways, et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern, LLC*, FD 35147 (STB served Mar. 10, 2009). Recognizing the anticompetitive impacts that would flow from a CSX-PAR transaction, CSX and NSR have agreed to install an independent carrier, the Pittsburg & Shawmut d/b/a Berkshire & Eastern) (“B&E” – a Genesee & Wyoming, Inc. (“GWI”) holding) to operate the PAS system in an attempt to correct such a result – the “B&E-PAS Transaction” that is the subject of the Petition in FD 36472 (Sub-No. 5).

The filings in these proceedings, however, conceal a troubling consequence of the B&E-PAS Transaction – it would, among other things, create a roughly 70-mile two-to-one corridor, eliminating competition in portions of northern Massachusetts and Vermont and New Hampshire. As the Petition indicates, GWI controls several carriers in New England already, including, as pertinent here, New England Central Railroad, Inc. (“NECR”), which owns and operates as a portion of a larger route a line extending between East Northfield, MA, and White River Junction, VT (the “Conn River Line”). PAS, through corporate predecessors that once owned a portion of the Conn River Line, possesses local trackage rights over the line, enabling it, like NECR, to serve customers along the route, and to interchange traffic with railroads within the VRS family at Bellows Falls, VT, and White River Junction. (VRS also interchanges with PAS at Hoosick Junction, NY.) PAS and NECR are vigorous competitors along the Conn River Line. For example, the Board less than four years ago concluded a proceeding involving a bitter trackage rights dispute between PAS and NECR, in which NECR sought to dramatically increase

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PAS's trackage rights fees for use the Conn River Line in a way that would have threatened competitive parity along the corridor – an effort that PAS ultimately thwarted.¹

VRS member railroads are vital parts of the northern New England railroad network.

Vermont Rail System (VRS), headquartered in Burlington, VT, is a business name used by six short line railroads controlled by Trans Rail Holding Company. The VRS railroads are located in New York, Vermont, and New Hampshire, and include the following three railroads, as pertinent to this proceeding:²

- Vermont Railway, Inc. (“VTR”), which operates approximately 128 miles railroad from Burlington to Hoosick Junction.
- Washington County Railroad Company (“WACR”), which operates approximately 102 miles of railroad over its Newport, VT-to-White River Junction “Connecticut River Division,” and the 13 miles of its “Granite District” extending generally southeastward from Montpelier Junction. WACR serves customers in New Hampshire and Vermont as an extension of the aforementioned “Conn River Line.”
- Green Mountain Railroad Corporation (“GMRR”), which operates over roughly 52 miles of railroad between Bellows Falls and Rutland, VT. Each of these three railroads operate on rail lines owned by the State of Vermont.

For current purposes, VTR, WACR, and GMRC are participating collectively in these proceedings, and as their respective interests may appear, as VRS.

The Lines operated by VTR, WACR and GMRC are all owned by the State of Vermont. Hence, any adverse impacts of the proposed transactions that could befall VRS are equally of concern to the state. The VRS railroads moved approximately 5.5 million tons of freight in 2018, principally including commodities such as limestone, feed grains, rock salt, biodiesel, heating oil, gasoline, propane, forest products, stone and other mineral products. A

¹ See *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, FD 35842 (STB served Oct. 31, 2017).

² The other three railroads comprising the VRS system are the New York & Ogdensburg Railway Company, Inc. (operating in NY), the Merrimack & Grafton Railroad Corporation (operating in NH), and The Clarendon and Pittsford Railroad Company (operating in and between Vermont and New York).

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large, and growing share, of traffic handled by the VRS railroads is interchanged with PAS at the Conn River Line interchanges and at Hoosick Junction.

The B&E-PAS Transaction would reduce competition by placing operational and marketing control of the Conn River Line and the VRS-PAS interchange at Hoosick Junction in the hands of a single company.

VRS interchanges traffic with third-party carriers at seven separate locations – (1) Burlington, VT (with NECR); (2) Montpelier Junction, VT (with NECR); (3) Newport, VT (with CMQR US, and indirect holding of Canadian Pacific Railway Company – “CP”); (4) Whitehall, NY (with Delaware and Hudson Railway Company, Inc., also an indirect holding of CP); (5) Hoosick Junction (with PAS and, virtually, with NSR, via NSR haulage rights over PAS); (6) White River Junction (with PAS and NECR); and (7) Bellows Falls (with PAS and NECR). See, generally, maps attached as Exhibit A. As indicated, NECR currently is present at four of VRS’s seven interchange points, including at White River Junction and Bellows Falls, where PAS offers an independent competitive service alternative to NECR.

But NECR is not just VRS’s “most frequent contact,” it is also VRS’s chief competitor for local (origin and destination traffic), particularly in Vermont and in portions of western New Hampshire, as the map offered as Exhibit A indicates. In addition, VRS and NECR compete as north-south bridge carriers, with VRS’s CP-Newport-VRS-White River Junction -PAS route functioning as a competitive alternative to NECR’s bridge route from Rouses Point, NY, (and connections there to CP and to Canadian National Railway Company) to PAS and CSXT interchanges at Millers Falls, MA, and Palmer, MA, respectively. As bridge carriers, VRS and NECR compete as portions of alternative overhead routes linking Southern Quebec markets and U.S. markets in southern New England and west and south of New England, again as the Exhibit A map reflects. The viability of the VRS bridge route depends upon effective PAS service on the Conn River Line.

The B&E-PAS Transaction would place PAS under the operational control of B&E, a sister company of NECR under GWI common control. GWI, which, as the Exhibit A map also shows has an extensive New England presence through a number of GWI family short lines, would commit its extensive “marketing and commercial resources in the region” in support of B&E. Petition, 4. As a result, VRS’s southern gateway access points – White River Junction, Bellows Falls and Hoosick Junction – would fall under the exclusive control of GWI through B&E and NECR, also placing five of VRS’s seven interchange points in the hands of GWI carriers, reducing the independent rail service options for VRS (and its customers) at Bellows

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Falls and White River Junction from two to one.³ Currently, PAS accounts for the vast majority of Conn River Line interchange traffic with VRS, reflective of both better PAS service and other competitive considerations that favor VRS's use of PAS over NECR.

The Application covering the CSX-PAR Transaction is incomplete and does not present a transaction that the Board should ever consider to be "minor."

The notion that the CSX-PAR Transaction, even when viewed in isolation of the interrelated B&E-PAS Transaction, could be viewed as "minor" under the applicable standards of 49 U.S.C. § 11325(a)(2) and 49 C.F.R. 1180.2(b) is far-fetched at best. Even if the Application and the Petition were to be considered as currently presented – and they most certainly should not be – the Application fails to make the case for minor transaction treatment, especially since the CSX-PAR Transaction threatens its own anticompetitive impacts if not for the proposed mitigation of the allegedly "related" B&E-PAS Transaction. Clearly, the Application is incomplete, thanks to the Applicant's highly-questionable attempt to segregate the B&E-PAS Transaction from the more searching formal application process. The CSX-PAR and B&E-PAS transactions are not "related;" they are interdependent parts of a whole, and must be examined by the Board as such. This is no more evident than when B&E – which seeks to avoid formal Applicant status – nevertheless piggybacks on the extensive competitive impacts analysis contained in the Application (Petition, 10), and when the Application, in turn, devotes an outsized portion of its expert analysis to a B&E-PAS Transaction that is allegedly deserving of individual petition for exemption treatment.

The Application is fundamentally incomplete by excluding the B&E-PAS Transaction and the parties to it, and it must be rejected for that reason alone. Moreover, were the B&E-PAS Transaction properly included in the Application, then that revised Application unquestionably would warrant processing under the Board's procedures for a significant transaction, based upon both conceded regional scope and anticompetitive impact.⁴

³ The Application asserts that B&E's operation of PAS will "allow GWI to achieve efficiencies among its New England carriers" (Application, Verified Statement of Sean Pelkey, 2), but GWI (and, through it, NECR) will gain access to competitively-sensitive VRS and PAS information, denying shippers the present benefits of competitive pricing and routing that come from two independent railroads competing for connections with VRS. Without competitive pressure from PAS, GWI can reduce frequency of service or maintain higher shipper rates without regard for customer preference.

⁴ In offering their view of the purported benefits of the interrelated transactions that are the subjects of these proceedings, the Applicants assert that the proposed terms and conditions to

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The Petition presents a transaction that, on its face, cannot meet the individual exemption criteria, and must be rejected.

Even if it were appropriate to divorce the B&E-PAS Transaction from the Application (and it isn't), that transaction plainly cannot qualify for an individual exemption. To become authorized under a petition for exemption, the B&E-PAS Transaction must be – (a) limited in scope; or (b) one for which regulation is not needed to protect shippers from an abuse of market power. Without question, the transaction encompassed by the Petition is neither.

PAS, the subject of the Petition, was formed via *formal application* in 2009, not a petition for exemption. Additionally, because the transaction involves the operation of a 425-mile railroad that was created roughly 12 years ago as a consequential counterbalance to CSXT's New England hegemony, and because it is intended to maintain NSR's competitive foothold in the region, the B&E-PAS Transaction is decidedly not limited in its scope.

B&E itself has acknowledged that the appropriate "market power" analysis under 49 U.S.C. §§ 11324(d) and 10502 focuses upon "adverse impacts on rail transportation or lessening of competition." Petition, 10. B&E-PAS Transaction's adverse impact on competition are obvious. It would eliminate independent rail service options along the Conn River Line, and would reduce competitive service and interchange options along the southern end of the VRS system, with each VRS south end interchange falling under the indirect operational control of GWI. As VRS's chief competitor, NECR (through GWI and B&E) would gain unfair service and marketing advantages over VRS, due to GWI's newfound access to route, origin-destination, customer, and rates data related to VRS-PAS interline service, none of which GWI currently has, and all of which GWI would have every incentive to leverage for its advantage.

If forced to choose, VRS would rather the CSX-PAR Transaction proceed *without* the B&E-PAS Transaction, given the harms. VRS does not necessarily have that choice. VRS

govern B&E's operation of PAS "will prevent any potential adverse competitive effects," yet they also concede that "VTR and the shippers it serves will only have the option [along the Conn River Line] of interchanging with GWI-owned or operated railroads." Application, 5, and Verified Statement of Dr. David Reishus VS, par. 63. Dr. Reishus goes on to try to explain how certain pricing limitations that CSXT and NSR have included in the proposed B&E operating arrangement would adequately protect against market power abuse and the loss of competitive service options. While the asserted limitations intended to protect price competition are dubious at best, the Applicants' experts fail to address the loss of competitive *service* options or the ways that GWI could use newly-gained market and price information that would give GWI unfair competitive advantages over VRS.

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expects that CSXT, GWI, NECR and others will engage VRS in discussions to resolve VRS's concerns. But, until those concerns are resolved, VRS has no choice but to contest the Petition, and highlight its anticompetitive harms. VRS cannot risk foregoing the pursuit of potential mitigation conditions – which could include a responsive application – and, so, VRS urges the Board to reject the Petition, and to direct the B&E-PAS Transaction parties to re-present their transaction (if they believe that it can be redeemed) in the context of a joint Application for a significant transaction, along with the CSX-PAR Transaction Applicants.

If the Board were to accept the Application as one involving a minor transaction, parties such as VRS must have more than 30 days to evaluate the proposed transaction, comment on its merits, and seek protective conditions.

VRS clearly opposes the Board's processing of the Application and the Petition as they are each currently presented. But if the Board were to accept the Application and assess it under the agency's procedures for a minor transaction, then, it must reject CSX's entirely unfair procedural schedule. Instead, the Board should implement the following procedural schedule:

- Day 30: Board accepts application and establishes schedule. Discovery begins.
- Day 45: Notices of intent to participate must be filed with the Board.
- Day 105: Comments due from all parties, including the Attorney General and Secretary of Transportation, on the transportation merits of the Proposed Transaction.
- Day 135: Responses to comments on the transportation merits of the Proposed Transaction due. Applicants' rebuttal in support of the application due. Close of Record.
- Day 180: Board serves final decision

* * *

The transactions that are the subject of the Application and the Petition are far too interrelated to treat as distinct transactions for purposes of Board authorization. They must be evaluated for their collective merit, and conditioned, as necessary, as part of a comprehensive re-shaping of New England railroad service. The B&E-PAS Transaction, as proposed, threatens VRS and its customers with substantial competitive harm flowing from the involvement of GWI, which despite nominal safeguards and vague assurances, will have the motive and the

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wherewithal to operate PAS (through B&E) to the detriment of VRS, its customers, and competitive rail flows in northern New England. While it may yet prove necessary for VRS to file a responsive application to seek remedial conditions for the transactions (or to seek other, more limited, relief), VRS is pleased that CSX, in particular, has expressed interest in resolving the anticompetitive impacts of the B&E-PAS Transaction. But it will take more than CSX-driven accommodations to resolve the problems that the B&E-PAS transaction creates. Other interested parties must actively participate in such efforts going forward. But, until such a resolution may be achieved, VRS must oppose the Application (and its allegedly “minor” status) and the Petition (which must be rejected), and the Application’s procedural schedule, which is unfair and illogical.

Very truly yours,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Thomas J. Healey

Bradon J. Smith

Stephen J. Rynn

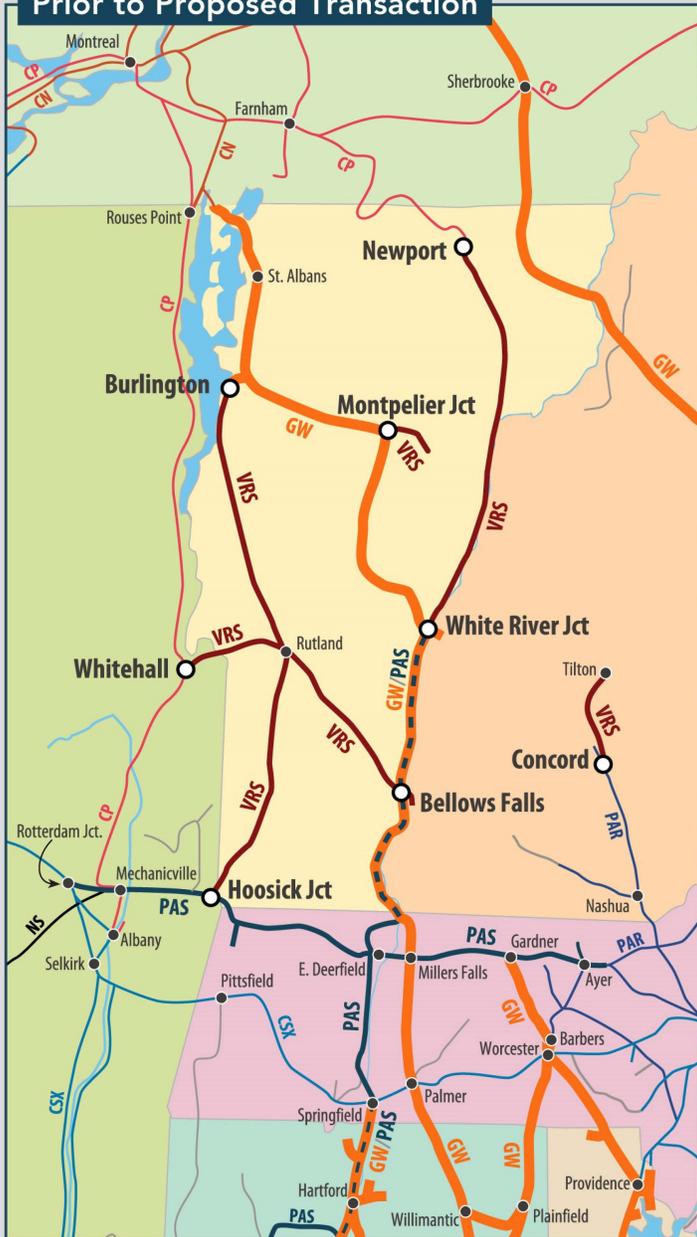
Attorneys for Vermont Rail System (Vermont Railway, Inc.; Washington County Railroad Company; and Green Mountain Railroad Corporation)

RAW:ah
Attachment – Exhibit A

cc: All parties of record

RAIL OPERATORS & INTERCHANGES

Prior to Proposed Transaction



After Proposed Transaction

