

301769

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

ENTERED
Office of Proceedings
March 17, 2021
Part of
Public Record

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

JANET H. GILBERT
(312) 252-1507
jgilbert@fletcher-sippel.com

March 17, 2021

RPUB-2

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: **Docket No. FD 36472**
CSX Corporation and CSX Transportation, Inc., et al. --
Control and Merger -- Pan Am Systems, Inc., et al.

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

Dear Ms. Brown:

Attached for filing in the above-captioned proceedings are the **Comments of Republic Services, Inc., ECDC Environmental, L.C. and Devens Recycling Center, LLC on Proposed "Minor" Classification of Transaction and on Petition for Exemption (RPUB-2)**, dated March 17, 2021.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

/s/ Janet H. Gilbert

Janet H. Gilbert
Attorney for Republic Services, Inc., ECDC
Environmental, L.C. and Devens Recycling Center, LLC

JHG:tjl
Attachment
cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
-- CONTROL AND MERGER --
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND 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

DOCKET NO. FD 36472 (SUB-NO. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
-- OPERATION OF PROPERTY OF ANOTHER RAIL CARRIER --
PAN AM SOUTHERN LLC AND SPRINGFIELD TERMINAL RAILWAY COMPANY

**COMMENTS OF REPUBLIC SERVICES, INC.,
ECDC ENVIRONMENTAL, L.C. AND DEVENS RECYCLING CENTER, LLC
ON PROPOSED "MINOR" CLASSIFICATION OF TRANSACTION
AND ON PETITION FOR EXEMPTION**

Janet H. Gilbert
Stephen J. Rynn
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR
REPUBLIC SERVICES, INC.,
ECDC ENVIRONMENTAL, L.C. AND
DEVENS RECYCLING CENTER, LLC**

Dated: March 17, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
-- CONTROL AND MERGER --
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND 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

DOCKET NO. FD 36472 (SUB-NO. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
-- OPERATION OF PROPERTY OF ANOTHER RAIL CARRIER --
PAN AM SOUTHERN LLC AND SPRINGFIELD TERMINAL RAILWAY COMPANY

**COMMENTS OF REPUBLIC SERVICES, INC.,
ECDC ENVIRONMENTAL, L.C. AND DEVENS RECYCLING CENTER, LLC
ON PROPOSED "MINOR" CLASSIFICATION OF TRANSACTION
AND ON PETITION FOR EXEMPTION**

Republic Services, Inc. ("Republic Services"), ECDC Environmental, L.C. ("ECDC") and Devens Recycling Center, LLC ("Devens" and, collectively with Republic Services and ECDC, "Republic") hereby provide these initial comments regarding the Board's handling of the Application and the Petition for Exemption that are the subject of these related proceedings. The Applicants in Docket No. FD 36472¹ and the Petitioner in Docket No. FD 36472 (Sub-No. 5)² have proposed a single, integrated transaction of plainly significant nature,

¹ CSX Corporation, CSX Transportation, Inc. ("CSXT"), Pan Am Systems, Inc., Pan Am Railways, Inc. ("PAR") and PAR's various rail carrier subsidiaries.

² Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad ("B&E"), a subsidiary of Genesee & Wyoming Inc. ("GWI").

with important competitive and service implications and questions for rail transportation in the New England region. The complex and inter-dependent aspects of that proposal cannot be improperly segmented into separate “minor” and exempt proceedings for consideration by the Board. The Applicants themselves have acknowledged potential competitive effects arising from an unconditioned CSXT-PAR combination – associated primarily with PAR’s ownership interest in and operation of Pan Am Southern LLC (“PAS”) – and have essentially conditioned their own transaction through the proposed operation of PAS by B&E. That “solution” may in turn give rise to its own questions, but in any event all of these elements need to be carefully evaluated by interested parties and the agency in a single, coordinated review.

Republic has not developed, and does not take in this pleading, a position on the merits of a CSXT-PAR merger or a B&E/PAS operating arrangement. But whether considered under the statutory standard of 49 U.S.C. § 11325(a)(2) (“of regional or national transportation significance”) or under the regulatory standard of 49 C.F.R. § 1180.2(b) (determination of no anticompetitive effects, or of public interest contributions outweighing anticompetitive effects, cannot clearly be made), the integrated transactions proposed by the Applicants in Docket No. FD 36472 and by B&E in the related Sub-No. 5 docket are plainly “significant,” and the categorization of those transactions as minor (in the first case) or exempt (in the second case) should be rejected. Indeed, if the acquisition of one of the largest regional rail systems in the country by a Class I railroad is not a “significant” transaction, it is difficult to imagine what transaction would ever fall into that category.

Republic Background

Republic Services, through its various subsidiaries including ECDC and Devens, is a major provider of recycling and non-hazardous solid waste disposal services across the

United States. Republic conducts extensive operations in New England that utilize rail services provided by the Applicants in these proceedings. Through ECDC, Republic transports substantial volumes of containerized municipal solid waste from the Boston metropolitan area by rail through an intermodal transload facility located on a PAS rail line in Ayer, Massachusetts. Devens owns and operates a construction and demolition (C&D) debris recycling facility near Ayer, Massachusetts served by PAS that likewise ships significant volumes of C&D debris by rail. *See Devens Recycling Center, LLC -- Petition for Declaratory Order*, Docket No. FD 34952 (STB served Jan. 10, 2007). Republic's customers include the municipalities and localities of the surrounding region, and those communities depend on Republic to provide cost-effective outlets for recycled and waste materials. Increases in transportation costs or decreases in transportation options for Republic ultimately impact the public entities and communities that Republic serves.

Currently, Republic's PAS-originated rail traffic moves westward via both the PAS Patriot Corridor and the parallel CSXT "Boston & Albany" line across Massachusetts, depending on the routing and destination of the traffic. Republic's railcar volumes on these routes are significant, and Republic is one of the largest individual shippers on the current PAR system. Despite that status, only recently has CSXT engaged Republic in discussions regarding the proposed transactions.

Areas of Concern

Having asserted that the CSXT-PAR transaction is properly categorized as "minor" and broken off the contemplated operation of PAS by B&E into a separate exemption proceeding, Applicants propose that interested parties have a total of sixty (60) days to submit all evidence and comments on the Application. In that time frame, parties would need to consider

and address not only CSXT’s control and merger of PAR and B&E’s proposed operation of PAS, but also the wide-ranging – and significantly redacted – settlement agreement between CSXT and Norfolk Southern Railway Company (“NS”)³ submitted with the Application. CSXT/PAR-1, Pelkey V.S., Attachment. NS has filed trackage rights notices of exemption in four related dockets, but otherwise has not participated to date in these proceedings.⁴ Other parties, such as Republic, are thus left to sort through the extremely detailed operating protocols and various other matters that have apparently been extensively negotiated and agreed to by and between CSXT, NS, PAR and GWI/B&E with respect to how rail operations throughout Massachusetts will be allocated, coordinated and conducted – all in connection with an assertedly “minor” transaction. It is simply not reasonable to believe that such arrangements warrant the lowest level of regulatory categorization available under 49 U.S.C. §§ 11323-11325 – or, in the case of B&E’s Sub-No. 5 docket, exemption from regulation altogether.

As a particular example that concerns Republic, Section IX of the NS Settlement Agreement, entitled “Ayer Switching District,” refers to a so-called “Rotterdam commitment” pursuant to which CSXT will, for a redacted “transitional period,” route certain Ayer traffic via a CSXT-PAS interchange at Rotterdam Junction, New York and the PAS Patriot Corridor across northern Massachusetts. This will evidently affect significant volumes of Republic traffic that currently move from Ayer to CSXT at Barbers Station, Massachusetts and then via CSXT’s B&A main line across central Massachusetts. The result of this obscure but – to Republic – incredibly important traffic diversion may be to increase transit times for Republic’s traffic from

³ NS, with PAR, is the current co-owner of PAS.

⁴ On November 6, 2020, NS filed a letter in Docket No. FD 35147, *Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC* expressing concerns about a potential CSXT-PAR transaction.

Ayer to CSXT's Selkirk Yard in New York by several days. Yet one reads the Application virtually in vain for any reference to this aspect of the NS Settlement Agreement. To the contrary, CSXT offers assurances that "the only significant operating change involves the diversion of one NSR intermodal train pair from PAS lines to CSXT's roughly parallel lines" Application at 13.⁵ This is a demonstrable understatement, and is but a single example of many that may exist within the extensive documentation included in the Application, much of it redacted.

Applicants are also notably inconsistent in their treatment of the GWI/B&E proposal to operate PAS. B&E itself is explicit that its operation of PAS is "a transaction integrally related to, and dependent upon," approval of the CSXT-PAR transaction. Petition for Exemption at 2. Applicants likewise explicitly acknowledge the B&E arrangement is intended to address potential anticompetitive effects of the CSXT-PAR transaction. Application at 11 ("The agreements with NSR and GWI will eliminate the possibility that the Proposed Transaction could result in CSXT operations and pricing power over two generally parallel lines (PAS and the existing CSXT east-west mainline in Massachusetts.); *see also* Application, Exhibit 22, Huneke V.S. at 3. Indeed, the Applicants' expert witnesses spent nearly as much time in their verified statements talking about the "related" transactions as they do the "main" CSXT-PAR transaction that is supposedly amenable to characterization as "minor."

⁵ *See also, e.g.*, Application at 19 ("In addition, the Settlement Agreement with NSR involves the addition of capacity on PAS lines near Ayer and the establishment of operating protocols that will improve the efficiency of operations on PAS and ensure the unimpeded movement of traffic from CSXT's lines into New England."); Application, Exhibit 15, Minor Transaction Operating Plan, at 21 ("Therefore, the Proposed Transaction and the Related Transactions will not produce significant changes to the existing routes, patterns, or types of service for the PAR System, PAS, or CSXT, or redirect existing traffic over those networks, with the exception of one NSR intermodal train per day that will run on CSXT's lines instead of PAS.").

Elsewhere, however, Applicants seem to want to hedge as to whether the CSXT-PAR control transaction and the B&E/PAS operation transaction are linked after all. Application at 5-6 (“However, if the Proposed Transaction is consummated prior to the replacement of Springfield Terminal by B&E and the initiation of PAS operations by B&E, CSXT, NSR, and GWI have agreed that Springfield Terminal will continue to operate PAS until Springfield Terminal is replaced as the PAS operator.” (footnote omitted, redacted in original)); *see also* Application, Exhibit 15, Minor Transaction Operating Plan at 3, n.1 (same). This makes no sense; Applicants cannot predicate a substantial bulk of their primary case on the B&E/PAS operational arrangement, but then divorce the two transactions when it comes to consummation. It is incumbent on the Board to treat those related transactions as what they are – a single proceeding appropriately considered as “significant” under the Board’s governing statutory and regulatory provisions.

Procedural Schedule

The Applicants have proposed a procedural schedule that is confusing in several respects. It provides that discovery would begin on Day 30, but that all comments and evidence from all parties would be due on Day 60 – ten days after the earliest return date (in the best of circumstances) for discovery requests. It also provides for a blank 45-day period between the last filing by the Applicants and the “close of record” – a gap which appears to serve no purpose for any party.

In any event, the 60-day period that Applicants would provide for interested parties to analyze the various proposed transactions, develop the record and prepare and submit evidence and comments is plainly inadequate under all circumstances, even if the Board were to accede to Applicants’ request for a “minor” classification for their transactions. Republic would

propose that parties should have 120 days for the submission of evidence and comments, with an appropriate reply period provided for Applicants.

Republic does not here take a position in opposition to the merits of the transactions presented in either the Application or the Petition for Exemption. Republic does believe, however, that those proposals warrant careful consideration by the agency as a “significant transaction,” including a sufficient opportunity for interested parties to review and understand these important matters and adequately develop and present their evidence and arguments.

WHEREFORE, Republic respectfully requests that the transactions proposed in Docket No. FD 36472 and Docket No. FD 36472 (Sub-No. 5) be considered a single, integrated “significant” transaction under the Board’s governing regulations, and that a procedural schedule be adopted to govern those proceedings accordingly.

Respectfully submitted,

/s/ Janet H. Gilbert

By: _____

Janet H. Gilbert
Stephen J. Rynn
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

**ATTORNEYS FOR
REPUBLIC SERVICES, INC.,
ECDC ENVIRONMENTAL, L.C. AND
DEVENS RECYCLING CENTER, LLC**

Dated: March 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2021, a copy of the foregoing **Comments of Republic Services, Inc, ECDC Environmental, L.C. and Devens Recycling Center, LLC on Proposed “Minor” Classification of Transaction and on Petition for Exemption** (RPUB-2) was served by electronic mail upon all parties of record in these proceedings, as follows:

Anthony J. LaRocca, Esq.
Peter W. Denton, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
alarocca@steptoe.com
pdenton@steptoe.com

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
Lou@lgrailaw.com

Steven C. Armbrust, Esq.
Assistant General Counsel
CSX Transportation, Inc.
500 Water Street J-150
Jacksonville, FL 32202
steven_armbrust@csx.com

Robert B. Culliford, Esq.
Senior Vice President & General Counsel
Pan Am Systems, Inc.
1700 Iron Horse Park
North Billerica, MA 01862
rculliford@panamrailways.com

Eric M. Hocky, Esq.
Clark Hill PLC
Two Commerce Square
2001 Market Street, Suite 2620
Philadelphia, PA 19103
ehocky@clarkhill.com

Justin J. Marks, Esq.
Clark Hill PLC
1001 Pennsylvania Avenue, N.W.
Suite 1300 South
Washington, DC 20004
jmarks@clarkhill.com

Jeffrey A. Bartos, Esq.
Antonia Bird, Esq.
Guerrieri, Bartos & Roma, P.C.
1900 M Street, N.W., Suite 700
Washington, DC 20036
jbartos@geclaw.com
abird@geclaw.com

Robert A. Wimbish, Esq.
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208
rwimbish@fletcher-sippel.com

Joshua D. McInerney, Esq.
Barkan Meizlish, LLP
4200 Regent Street, Suite 210
Columbus, OH 43219
jmcinerney@barkanmeizlish.com

Richard S. Edelman, Esq.
Mooney, Green, Sandon, Murphy & Welch,
P.C.
1920 L Street, N.W., Suite 400
Washington, DC 20036
redelman@mooneygreen.com

Jenny E. Ronis, Esq.
Assistant Attorney General
Vermont Agency of Transportation
219 North Main Street, Suite 201
Barre, VT 05641
jenny.ronis@vermont.gov

Kevin C. Brodar, Esq.
General Counsel
American Train Dispatchers Association
4239 W. 150th St.
Cleveland, OH 44135
brodar@atda.org

Allison B. Greenstein, Esq.
Assistant Attorney General
Transportation and Construction Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
allison.b.greenstein@doj.nh.gov

Erika A. Diehl-Gibbons, Esq.
Associate General Counsel
SMART – Transportation Division
24950 Country Club Blvd., Ste. 300
North Olmsted, OH 44070
ediehl@smart-union.org

/s/ Thomas J. Litwiler

Thomas J. Litwiler