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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
COPORATION, 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 RAIL CARRIER PAN AM SOUTHERN LLC –
PAN AM SOUTHERN LLC AND
SPRINGFIELD TERMINAL RAILWAY COMPANY**

**REPLY OF BERKSHIRE & EASTERN RAILROAD
TO PRELIMINARY COMMENTS AND OPPOSITION**

ERIC M. HOCKY
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

JUSTIN J. MARKS
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for
Pittsburg & Shawmut Railroad, LLC d/b/a
Berkshire & Eastern Railroad*

Dated: March 19, 2021

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Pittsburg & Shawmut Railroad, LLC doing business as Berkshire & Eastern Railroad (“B&E”), the petitioner in Docket No. FD 36472 (Sub-No. 5), files this Reply to the various preliminary comments and opposition statements that have been filed in Docket No. FD 36472 (the “Primary Docket”) and in Sub-docket No. 5. The comments and opposition statements generally fall into three categories – (1) challenges to the status of the Application in the Primary Docket as a “minor transaction,” (2) challenges to the filing of the B&E Petition in a separate sub-docket, and (3) requests to extend the comment period in the proposed schedule. B&E files this Reply in support of the Response of the Applicants filed on March 18, 2021 (the “Applicants

Response”) supporting the treatment of the Application as a minor transaction, the filing of the B&E Petition as a related proceeding, and agreeing to certain extensions of the comment period.

Background

B&E provides this summary background to correct misstatements in some of the comments mischaracterizing the scope of the authority that B&E is seeking in its Petition, and B&E’s proposed role as the contract operator to Pan Am Southern LLC (“PAS”).

On February 25, 2021, CSX Transportation (“CSXT”) and the other Applicants filed an Application in the Primary Docket seeking to control the railroads (the “PAR Railroads”) controlled by Pan Am Systems, Inc. (“Systems”) and Pan Am Railways, Inc., a subsidiary of Systems (defined in the Application as the “Proposed Transaction”). If the Application were approved, CSXT would acquire joint control of PAS¹ as part of the Proposed Transaction through CSXT’s control of Boston and Maine Corporation.

PAS owns and has operating authority of approximately 425 route miles of lines and incidental trackage rights (the “PAS Lines”). The PAS Lines are currently operated by Springfield Terminal Railway Company (“Springfield Terminal”), a PAR Railroad that CSXT would control if the Application were approved. CSXT and NSR have agreed that if the Board approves the Application and the Proposed Transaction closes, they, as the owners of PAS, would cause PAS to enter into an agreement with B&E, a Class III carrier, to operate the PAS Lines. CSXT has further agreed that CSXT would cause Springfield Terminal to assign its operating rights over the PAS Lines to B&E. PAS would continue to own and have operating authority of the PAS Lines; all interchanges with other carriers will remain open, and service to all PAS shippers will continue.

¹ Control of PAS would be shared with Norfolk Southern Railway Company (“NSR”), which currently jointly controls PAS.

B&E is not under common control with CSXT or any of the PAR Railroads, or with PAS.² Under the terms of its proposed operating agreement, B&E would be required to operate the PAS Lines for the benefit of PAS (and its owners).³ The terms that would govern B&E’s operations were submitted as part of the Application in connection with the proposed acquisition by CSXT of joint control of PAS, and will be subject to review as part of the Board’s consideration of the Proposed Transaction.

The proposed transfer of operating rights from Springfield Terminal to B&E is subject to the Board’s authorization of B&E to operate the PAS Lines. Accordingly, B&E filed a Petition for Exemption (the “B&E Petition”) with the Board as a related proceeding in Sub-docket No. 5.

(1) The Application should be accepted by the Board as a minor transaction.

The Application was filed as a minor transaction. A number of commenting parties, including Vermont Rail System (“VRS”), the State of Vermont Agency of Transportation (“VTrans”), Commonwealth of Massachusetts Department of Transportation and Massachusetts Bay Transportation Authority (“MassDOT/MBTA”), Republic Services, Inc., ECDC Environmental, L.C., and Devens Recycling Center, LLC (“Republic”) and various Massachusetts legislators have requested that the Application be rejected as a minor transaction and be reclassified as a significant transaction. As set forth more fully in Applicants Response, and as demonstrated in the Application, the Proposed Transaction when considered together with the transactions in the related proceedings filed in the sub-dockets (the “Related Transactions”) clearly will not have any competitive harm, and clearly advances the public interest through its establishment of a strong multi-carrier network in New England. The issues raised by the commenting parties raise

² B&E is also not under common control with NSR, which jointly controls PAS.

³ B&E would not be able to divert traffic or revenue away from PAS to any related railroad of B&E through discriminatory rate-setting for PAS traffic.

individual localized concerns, and do not meet the Board’s criteria to determine that the Proposed Transaction together with the Related Transactions as a whole should be classified as “significant.” Accordingly, B&E supports the arguments set forth in the Applicants Response that the Application should be accepted by the Board as a minor transaction.

(2) The B&E Petition has been properly filed as a related proceeding in Sub-docket No. 5, and the requests to reject the Petition should be denied.

Several of the commenting parties (VRS, VTrans, MassDOT/MBTA, and Republic) have requested that the B&E Petition be rejected, and that B&E (and its parent company) be required to join in the Application. The commenting parties have not cited any authority for this proposed rejection, or cases where similar action has been taken.

As noted above, B&E is not under common control with CSXT, any of the PAR railroads, or PAS. As such, it would not be appropriate for B&E to be included in the Application, or for its request for operating authority to be included in the Application. Further, B&E’s limited role as a substitute operator for Springfield Terminal will only be effective after the Application is approved and the Proposed Transaction closes. For these reasons, the B&E Petition is properly considered as a related filing and not as part of the Application in the Primary Docket.

In raising their objections, the commenting parties gloss over the continued role of PAS and the limited role of B&E. PAS will retain its common carrier obligations with respect to the PAS Lines. B&E will be required to manage and operate for the benefit of PAS and its owners. The owners of PAS will have every incentive to ensure that B&E does not shift traffic or revenue to other carriers (related to B&E, or otherwise).

Moreover, B&E’s separate filing does not mean that the terms of its proposed operating agreement will not be subject to review as part of the Application. The joint control of PAS is part

of the Proposed Transaction covered by the Application, and the operating arrangement with B&E, and the proposed terms have been included in the Application.

Operating and other licensing authority is commonly the subject of related proceedings in merger and control proceedings. For example, in the original PAS formation proceeding, the primary transaction was the formation of PAS (including the transfer of the PAS Lines to PAS), and the joint control of PAS by NS and PAR. PAS's authority to operate the PAS Lines was the subject of a sub-docket in which PAS obtained an exemption to operate the PAS Lines. *Norfolk S. Ry. Co.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC*, FD 35147 (STB served June 26, 2008) (accepting primary application, and acquisition and operation sub-docket), and (STB served March 10, 2009) (approving the primary application and related filings including the acquisition and operation exemption sub-docket). That B&E is seeking operating authority as a related proceeding in a sub-docket is no different than PAS seeking an acquisition and operating exemption authority in the original PAS formation proceeding. Moreover, the operating authority being sought by B&E in Sub-docket No. 5 is no different than the new trackage rights authority being sought by NSR in Sub-Docket Nos. 1-4, none of which were challenged by any of the commenting parties.

(3) B&E does not oppose a limited extension of the comment period.

The parties opposing the status of the Application as a minor transaction have also in the alternative sought an extension of the comment period in the schedule in the Primary Docket as originally proposed by CSXT. In addition, various labor unions, although not challenging the classification of the transaction as minor, also requested extension of the comment period.⁴

⁴ The “Allied Unions” also note in their comments that they requested certain additional information related to labor impacts from B&E, and that B&E had not yet responded. B&E has now provided the information requested, and has advised counsel for the Allied Unions that B&E,

In the Applicants Response, Applicants address the concerns raised with the schedule and propose an extension of the comment period by thirty days. B&E has no objection to, and supports, the proposed extension.

CONCLUSION

For the foregoing reasons, B&E requests that the Board (1) accept the Application as a minor transaction, (2) deny the requests to reject the B&E Petition, and accept the B&E Petition as a related proceeding, and (3) adopt an amended schedule for the Primary Docket with an extended comment period as proposed in the Applicants Response.

Respectfully submitted,

/s/ Eric M. Hocky

ERIC M. HOCKY
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

JUSTIN J. MARKS
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for
Pittsburg & Shawmut Railroad, LLC d/b/a
Berkshire & Eastern Railroad*

Dated: March 19, 2021

as part of the approval process and in concert with CSXT, welcome further discussions with the employees providing service on PAS, and their representatives.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Reply was served on the following
by U.S. first class mail, postage pre-paid, or by email where indicated:

Robert A. Wimbish
29 N Wacker Drive
Suite 800
Chicago, IL 60606-3208
rwimbish@fletcher-sippel.com
*Counsel for Massachusetts Department of
Transportation and the Massachusetts Bay
Transportation Authority and Vermont Rail
System (Vermont Railway, Inc.; Washington
County Railroad Company; and Green
Mountain Railroad Corporation)*

Jeffrey A. Bartos
1900 M Street, NW
Suite 700
Washington, DC 20036
jbartos@geclaw.com
Counsel for IAM District Lodge 19

Jenny E. Ronis
219 North Main St.
Suite 201
Barre, VT 05641
jenny.ronis@vermont.gov
*Counsel for State of Vermont, Agency of
Transportation*

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

Robert B. Culliford
1330 Connecticut Avenue, NW
Washington, DC 20036
rculliford@panamrailways.com
Counsel for Pan Am Systems, Inc.

Janet H. Gilbert
29 North Wacker Dr.
Suite 800
Chicago, IL 60606-3208
jgilbert@fletcher-sippel.com
*Counsel for Republic Services, Inc., ECDC
Environmental L.C., and Devens Recycling
Center, LLC*

Allison B. Greenstein
33 Capitol Street
Concord, NH 03301-6397
allison.b.greenstein@doj.nh.gov
*Counsel for New Hampshire Department of
Transportation*

Erika A. Diehl-Gibbons
4239 W. 150th Street
Cleveland, OH 44135
ediehl@smart-union.org
*Counsel for The American Train Dispatchers
Association; The Transportation Division of the
International Association of Sheet Metal, Air,
Rail and Transportation Workers*

Joshua D. McInerney
4200 Regent Street
Suite 210
Columbus, OH 43219

jmcinerney@barkanmeizlish.com

Counsel for The Brotherhood of Locomotive Engineers and Trainmen National Division and The Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment 120, for Delaware & Hudson Railway Co., Springfield Terminal Railway, St. Lawrence & Atlantic Railroad, Connecticut Southern Railroad, New England Central Railroad, New York & Susquehanna Western Railway

Jeffrey A. Bartos
1900 M Street, NW
Suite 700
Washington, DC 20036

jbartos@geclaw.com

Counsel for Transportation Communications Union/IAM

Anthony J. LaRocca
1330 Connecticut Avenue, NW
Washington, DC 20036

alarocca@steptoe.com

Counsel for CSX Corporation and CSX Transportation, Inc.

Antonia Bird
1900 M Street, NW
Suite 700
Washington, DC 20036

abird@geclaw.com

Counsel for Transportation Communications Union/IAM and IAM District Lodge 19

Richard S. Edelman
1920 L Street, NW
Suite 400
Washington, DC 20036

redelman@mooneygreen.com

Counsel for The Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU

/s/ Eric M. Hocky

Eric M. Hocky

Dated: March 19, 2021