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March 19, 2021

VIA E-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 Rail Carrier Pan Am Southern LLC
– Pan Am Southern LLC and Springfield Terminal Railway Company**

Reply Comments of Norfolk Southern Railway Company

Dear Ms. Brown:

Norfolk Southern Railway Company (“NSR”) hereby submits the following comments in reply to the Application (the “Application”) filed by CSX Corporation (“CSX”) and CSX Transportation, Inc. (“CSXT”) (collectively, the “Applicants”).

NSR supports the proposed transaction as submitted.

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NSR initially had some concerns about possible adverse anticompetitive effects that would arise from an unconditioned transaction,¹ but CSXT and NSR have discussed and worked through those concerns. The outcome of that negotiation is a carefully and thoughtfully proposed transaction that not only provides sufficient protections for the competitive structure currently in play in the Northeast United States, but—as discussed below—also clearly contributes to the public interest in meeting significant transportation needs.

NSR is aware that several interested parties have filed initial comments in which they request that the Board treat the proposed transaction as “significant” under the Board’s substantive and procedural rules, as opposed to “minor.” However, those seeking this change have failed to establish that the transaction at issue qualifies as “significant” under the applicable legal standard and, as such, there is no basis for the Board to reclassify or reject the Application.

Under 49 CFR 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if, based on the application itself, it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs. See 49 CFR. § 1180.2. Under this standard, the transaction under consideration is minor. The transaction will “clearly” not have any anticompetitive effects. Even assuming, *arguendo*, that one could argue that the transaction will “clearly” have anticompetitive effects, such alleged anticompetitive effects would “clearly” be outweighed by the transaction’s contribution to the public interest.

Only once in recent history has the Board found sufficient basis for converting a transaction between a Class I and Class II, such as the one at issue here, from a “minor” transaction into a “significant” transaction. The decision was issued in November 2007 and involved an application seeking Board approval of the acquisition of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation, a wholly owned rail subsidiary of DM&E by Soo Line Holding Company, an indirect subsidiary of Canadian Pacific Railway Corporation. See Canadian Pacific Ry. Co., et al.—Control—Dakota, Minn. & Eastern R.R. Corp., et al., FD 35081, Decision No. 2 (STB served Nov. 2, 2007). In that proceeding, the parties seeking reclassification provided expert economic and waybill testimony during the 30-day acceptance period establishing that the proposed transaction involved the acquisition of the largest U.S. regional carrier by a foreign-owned Class I carrier; involved the largest rail construction project in modern history that even the Federal Government had recognized had national implications; and was dissimilar from all other previous and potential Class I/Class II transactions. In that situation, the Board reclassified the transaction from minor to significant because it was unclear from the

¹ Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, FD 35147 (11/6/2020 NSR Letter).

statement of the applicants' economist whether there may be anticompetitive effects that were not adequately investigated by the applicants. *Id.*, slip op. at 6-7.

In the present Application, there are no such similar issues; quite to the contrary, the Applicants and their economists have meticulously identified potential anticompetitive issues and, through various well-established and well-accepted remedial measures, have sought to address any such issues in advance of filing the Application. The parties who seek reclassification of the transaction have failed to identify any issues that were not already considered and addressed by the Applicants. For example, the comments of Vermont Rail System (“VRS”) argue that potential competitive harm will result from Pan Am Southern LLC (“PAS”) hiring B&E to be its contract operator, for no other reason than B&E, as part of the Genesee & Wyoming Inc. (“GWI”) family of railroads is affiliated with short lines in the region that compete with VRS. *See VRS Opp.* at 4. However, PAS is and will continue to exist as an independent common carrier railroad. B&E will serve merely as the contract operator for PAS. As such, B&E will be contractually obligated to operate in the interest of PAS and its members (NSR and CSXT). B&E has no contractual right to set rates and divisions in a manner that would disfavor movements via PAS in favor of movements over other GWI railroads. If it did so, this be an act contrary to the interests of PAS, and would result in termination of the operating agreement and removal of B&E as operator of PAS. Further, NSR is economically incentivized to ensure the continued competitiveness of PAS and NSR/PAS routings. NSR would not have entered into the settlement agreement if that agreement permitted B&E to act contrary to the interests of PAS.

Ultimately, VRS concedes and recognizes (as do the Massachusetts Department of Transportation and the Massachusetts Bay Transportation Authority in a separate filing) that the Application contains protections associated with regard to movement rates so long as B&E is the operator of the lines in question. Perhaps that is not an approach that VRS would have taken, but that fact is not a valid basis for converting a “minor” transaction into a “significant” transaction. Rather, any valid concerns that VRS has can be addressed within the parameters of a “minor” transaction.² Indeed, with the one exception discussed above, the Board has always treated Class I/Class II deals—like the proposed transaction—as “minor” transactions.³

² VRS has previously raised its concerns with NSR and NSR has engaged in numerous rounds of discussions with VRS that included a variety of market-based proposals.

³ See CN/GLT Transaction - STB Finance Docket No. 34424, Canadian National Railway Company and Grand Trunk Corporation – Control – Duluth, Missabe and Iron Range Company, Bessemer and Lake Erie Railroad Company and the Pittsburg & Conneaut Dock Company; KCS/TM Transaction - STB Finance Docket No. 34342, Kansas City Southern – Control – The Kansas City Southern Railway Company, Gateway Eastern Railway, and the Texas Mexican Railway Company; CN/WC Transaction - STB Finance Docket No. 34000, Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. - -Control--Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Saulte Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.;

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Despite commenters' conclusory statements to the contrary, the proposed transaction will not "clearly" have anticompetitive effects. Even assuming for the sake of argument that the transaction "clearly" would have anticompetitive effects—which it does not – the Board should still treat the transaction as "minor" because any alleged anticompetitive effects would "clearly" be outweighed by the transaction's contribution to the public interest. The evidence presented by Applicants, especially CSXT's Sean Pelkey, is overwhelming that the proposed transaction would result in a strengthening of the competitive rail environment in Boston and the greater New England area. Further, for the first time, the transaction will also allow NSR to provide double-stack intermodal service into the Boston market without the need for the time consuming and costly "filet/toupee" operations.⁴ This "clearly" improves service to shippers generally. Indeed, the numerous letters of support filed in conjunction with the application make the benefits of this transaction even more certain.

Accordingly, based on the foregoing, NSR respectfully requests that the Board deny the various commenters' requests to treat the subject of the Application as a "significant" transaction, as well as all corresponding relief associated with such treatment. The transaction is appropriately classified as "minor."

Sincerely,

/s/ William A. Mullins

Attorney for Norfolk Southern Railway Company

cc: All parties of record

KCS/GWWR Transaction - STB Finance Docket No. 33311, Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company – Control -- Gateway Western Railway Company And Gateway Eastern Railway Company; IC/CCP Transaction - STB Finance Docket No. 32858, Illinois Central Corporation and Illinois Central Railroad Company – Control -- CCP Holdings, Inc., Chicago, Central & Pacific Railroad Company and Cedar River Railroad Company.

⁴ Currently NSR intermodal service bound for the Boston area must be interchanged to PAS at Mechanicville. Because the route over the Patriot Corridor between Mechanicville and Ayer, Massachusetts is not double-stacked cleared, any east-bound double-stacked traffic must be "fileted" (with all double-stacked traffic being converted to a single-stacked configuration). Any west-bound traffic is then "touped" in Mechanicville (where single-stacked traffic is converted to a double-stacked configuration). The new routing resulting from the proposed transaction will significantly strengthen competition by permitting the creation of an NSR double-stacked cleared route for NSR to use in direct competition with CSXT.