

ENTERED  
Office of Proceedings  
March 23, 2021  
Part of  
Public Record

**FLETCHER & SIPPEL LLC**  
ATTORNEYS AT LAW

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

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

**ROBERT A. WIMBISH**  
(312) 252-1504  
rwimbish@fletcher-sippel.com

March 23, 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**

---

***Supplemental Response of the Commonwealth of Massachusetts Department of***  
***Transportation, and the Massachusetts Bay Transportation Authority***

Dear Ms. Brown:

The Massachusetts Department of Transportation (“MassDOT”) and the Massachusetts Bay Transportation Authority (“MBTA”) (collectively, the “Commonwealth”) request leave of the Surface Transportation Board (the “Board”) to respond to the March 18, 2021 Sur-reply of Applicants CSX Corporation and CSX Transportation, Inc., which the Applicants have styled as a “Response to Initial Comments,” and to respond to the late-filed comments of Norfolk Southern Railway Company (“NSR”), and Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad (“B&E”). The Commonwealth’s response is warranted here considering that – (1) the Board’s rules of procedure do not entitle the Applicants to respond to reply comments, and generally prohibit such filings (see 49 C.F.R. § 1104.13(c)); and (2)

# FLETCHER & SIPPEN LLC

Ms. Cynthia T. Brown

March 23, 2021

Page 2

parties claiming not to be co-applicants – specifically, NSR and B&E – have filed “comments” intended to shore up concerns over the Board’s processing of the Application, which comments are either replies to earlier-filed replies or late-filed responsive comments, and, in either case, violate the Board’s rules at 49 C.F.R. §§ 1104.13(a) and (c). This response is also warranted to address certain inconsistencies in the Sur-reply.

The Commonwealth has been eager to resolve its transaction-related concerns and potential mitigation with the Applicants, and reach terms under which the Commonwealth could support the Application and its constituent parts or not oppose them. In its letter of January 14, 2021 (the “January 14 Letter”), the Commonwealth identified several concerns, and pressed for written terms protective of the Commonwealth’s public interest. Unfortunately, the Applicants did not respond substantively to the Commonwealth’s concerns until *after* the Application was filed, and then only by a letter, as the Applicants have acknowledged. The Applicants have explained that they spent several months forging the arrangements surrounding the Application, but they failed to extend the same level of effort to address and resolve the Commonwealth’s concerns. Now, the Applicants would limit the Commonwealth to a 60-day time frame under which it must endeavor to work with the Applicants while also preparing to seek Board-imposed conditions if a voluntary accord cannot be reached.

The Applicants’ “evidence” of regard for the nine issues identified in the January 14 Letter is their stated assurance that B&E would “fully ‘step into the shoes’ of Springfield Terminal regarding Springfield Terminal’s current contractual obligations to MassDOT and MBTA.” CSXT/PAR-5, 13. Whether and how anyone would “step into the shoes” of Springfield Terminal is not among the issues in the Commonwealth’s January 14 Letter. And that commitment was to be expected. On the other hand, the Applicants failed to address the Commonwealth’s plea for a written arrangement or protocol to protect against freight train interference with MBTA commuter operations, and for definitive measures to protect the integrity of the Wachusett Reservoir.

The Applicants do not explain why CSXT has only been willing to this point to talk and to listen. CSXT avoided any written accord, as the Applicants surely know. The Commonwealth is thus deeply disappointed that the Applicants would cover their lack of proactive effort by dismissing as “glib” (id., 12) the Commonwealth’s genuine expression of frustration. If CSXT’s “team of in-house executives specifically dedicated” to address Commonwealth issues believed that they were “close to resolving” those issues (id., 12-13), the Commonwealth must respectfully point out that by they are mistaken.

The Commonwealth disputes the Applicant’s conclusory statement that the proposed transactions’ anticompetitive effects will “clearly” be outweighed by the proposed

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown

March 23, 2021

Page 3

transactions' anticipated contribution to the public interest. The Applicants have not accurately presented a balancing of interests here at all, considering that they have chosen to exclude discussion of known Commonwealth concerns from the Application. In fact, in the presence of statements of concern and opposition from the Commonwealth, Vermont Rail System, Republic Services, and the Vermont Agency of Transportation, and others, the Board cannot possibly reach an informed public interest determination at this juncture, and certainly not one that supports the most streamlined procedural processes that the Applicants have invoked. In any event, the Application, with its extensive expert analysis on competition, reads and is formed as one involving a significant transaction – one that does not “clearly” promote the public interest.

NSR's late-tendered “comments” reflect yet another lack of clarity. According to NSR, “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.” NSR March 19, 2021 Letter Filing, unnumbered 4 (emphasis added). However, according to the Applicants, “CSXT (as the owner of Springfield Terminal) will not operate PAS and will not have any control over the rates set by PAS, *as rate-setting will be exclusively the responsibility of B&E.*” CSXT/PAR-2, Ex. 22, Verified Statement of Sean Pelkey, 11. Who are interested parties such as the Commonwealth to believe? The Applicants seek authorization for an integrated series of inter-dependent transactions that depend on the agreements and coordination of three parties – CSXT, B&E and NSR. But those parties seem unable to agree upon what they've agreed upon.

The Applicants contend that the amalgam of filings in this proceeding is rather routine, arguing that the Board “has processed many control and merger transactions that included directly-related requests for Board authority in sub-dockets to the primary finance docket.” *Id.*, 5-6 (citing *Norfolk Southern Railway Company – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC*, Docket No. FD 35147 (STB served June 26, 2008), slip op. at 1-2; *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196, 293 (1998)).<sup>1</sup> But in those cases, the directly-related sub-dockets were filed by *the applicants*, not by unaffiliated non-applicants to the underlying transaction, and certainly not by quasi-responsive applicants whose proposed transactions serve to remediate the anti-competitive impacts of the primary transaction.<sup>2</sup>

---

<sup>1</sup> While Applicants cite to page 293 of the *CSX/NS-Conrail* decision, that page has no discussion of the various sub-dockets in that proceeding, which are addressed elsewhere. 3 S.T.B. at 237-244, 345-353.

<sup>2</sup> Viewed in this manner, it is unclear whether NSR's proposed trackage rights acquisitions in Docket No. FD 36472 (Sub-Nos. 2-5) qualify for processing under the class exemption that

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown

March 23, 2021

Page 4

What the Board and all other interested parties confront here isn't normal, procedurally, after all. The Applicants have selectively, and inaccurately, quoted the Board's rules by stating that they require "concurrent filing with the primary application of 'all directly related applications, e.g., those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc.'" CSXT-PAR-5, 5 (quoting 49 C.F.R. § 1180.4(c)(2)(vi)). But the quoted regulation, read in its entirety, states as follows: "*Applicant shall* file concurrently all directly related applications, e.g., those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc." 49 C.F.R. § 1180.4(c)(2)(vi) (emphasis added). If this is the regulation offered to justify B&E's concurrently-filed and sub-docketed petition for exemption, then B&E is an applicant in the main docket, even if B&E disagrees. BE-1, at 4 ("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").

MassDOT does not envy the Board's task to sort out Applicants' jumble of parties, proceedings and positions. But, however untangled or reconfigured, none of it adds up to a "minor" transaction.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Audrey L. Brodrick

Bradon J. Smith

**ATTORNEYS FOR MASSACHUSETTS  
DEPARTMENT OF TRANSPORTATION AND  
MASSACHUSETTS BAY TRANSPORTATION  
AUTHORITY**

RAW:ah

cc: Parties of Record

---

NSR has invoked. See 49 C.F.R. § 1180.2(d)(7) (governing trackage rights "not filed or sought in responsive applications in rail consolidation proceedings.").