

ENTERED
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August 26, 2021
Part of
Public Record

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36472¹

**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**

COMMENTS OF THE CHLORINE INSTITUTE

In accordance with Decision No. 4 herein, served July 30, 2021, The Chlorine Institute (“CI”), a party of record, hereby files its Comments.

IDENTITY AND INTEREST

CI is a 185-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. CI exists to support the chlor-alkali industry in advancing safe, secure, environmentally compatible, and sustainable production, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, the distribution and use of hydrogen chloride, and the distribution of vinyl chloride monomer. The Institute’s North American Producer members account for more than 91 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. CI’s mission

¹ This proceeding embraces the following dockets: Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36472 (Sub-No. 1); Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad, Docket No. FD 36472 (Sub-No. 2); Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp., Docket No. FD 36472 (Sub-No. 3); Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 4); Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 5); SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y., Docket No. AB 1312X. Decision No. 4 at 1 n.1.

chemicals are used throughout the U.S. economy and are key to the protection of public health, so it is critical that CI's members can safely ship their products by rail in a cost-effective manner. CI's members ship a significant volume of their commodities by bulk in rail tank cars, which is a category of railcar that has consisted of nearly 100% Private Railcars for decades.

Certain of CI's members ship chemicals on the lines of CSX Transportation, Inc. ("CSXT") or the various railroads CSX seeks authority herein to control, and with which it seeks to merge. Accordingly, CI has a substantial interest in the outcome of this proceeding.

COMMENTS

The Revised Application filed herein, "seeks Board approval under 49 U.S.C. §§ 11321-26 for: (1) CSX Corporation, CSXT, and an entity known as '747 Merger Sub 2' to control the seven railroads controlled by Pan Am Systems, Inc. ('Systems') and Pan Am Railroad, Inc. ('PAR') (collectively, 'the Applicants') and (2) CSXT to merge six of the seven railroads into CSXT." Decision No. 4 at 1. For simplicity, we will refer to these actions as "the proposed transaction."

The Board has undisputed authority, under 49 U.S.C. §§ 10101 and 11321-26, when determining whether to authorize a railroad to acquire, control, or merge with another railroad, to adopt conditions on its approval of such transactions.²

² 49 U.S.C. § 11324(c); Decision No. 4 herein, slip op. at 2 (comments and requests for conditions due by August 27, 2021); *see also, e.g., CSX Corp., CSXT, Norfolk Southern Corp., and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements –Conrail, Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 245-47 (1998); *Union Pacific Corporation, Union Pacific Railroad Co., and Missouri Pacific Railroad Co. – Control and Merger --- Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPSCCL Corp., and the Denver and Rio Grande Western Railroad Co.*, 1 S.T.B. 233, 362-67 (1996).

Accordingly, CI urges the Board, if it decides to approve the transaction proposed herein, to adopt the following conditions (which any party of record or entity with an interest in the proposed transaction should be allowed to seek enforcement thereof by the Board):

- (1) The Board shall hold Applicants to all of their representations in (a) the Revised Application, (b) the testimony submitted on their behalf, (c) the Briefs filed by Applicants herein, and (d) any other submission by Applicants herein, as well as (e) representations made in settlements, agreements, or communications with any entity about the proposed transaction herein, in order to gain that party's support, or to avoid that party's opposition, to the proposed transaction;³ and
- (2) Any anti-competitive effects of the proposed transaction shall be fully ameliorated either at the time of the Board's approval of the proposed transaction, or at any time thereafter in which the Board is presented with evidence that the proposed transaction has caused anti-competitive effects on rail transportation, on any of the Applicants' systems.⁴

³ In the past, applicants seeking authority from the Board or the Interstate Commerce Commission ("ICC") to acquire, control, and merge with other railroads made numerous, off-the-record representations to, had communications with, or entered into agreements with, various entities with an interest in acquisition/control/merger proceedings before the ICC or the Board, whether or not such entities were parties of record. *E.g.*, Decision No. 29, FD 35087, *Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co.* served June 9, 2011 (agreement reached by Canadian National with Village of Wayne, IL imposed as a condition of the transaction). From time to time, disagreements have developed over such conditions, and the entities to whom the representations were made seek to enforce those representations before the Board. *E.g.*, Decision No. 107, FD 32760, *Union Pacific Corporation, Union Pacific Railroad Co., and Missouri Pacific Railroad Co. – Control and Merger --- Southern Pacific Rail Corporation, Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPSCCL Corp., and the Denver and Rio Grande Western Railroad Co.* (served Dec. 30, 2014), *aff'd sub nom. G3 Enterprises, Inc. v. STB*, Case No. 15-70597 (9th Cir., Feb. 24, 2017)(unpublished). The Board should clearly provide that such entities, whether or not they were parties of record at the time the proposed transaction in question was considered and approved, will have the ability to seek to have the Board enforce such agreements, communications, or representations.

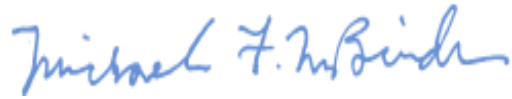
⁴ See 49 U.S.C. 11324(d) (the Board must consider anti-competitive effects of a merger or control transaction involving one Class I railroad with one or more other railroads).

Member companies of CI may file their own independent or supplemental comments herein.

CONCLUSION

If the Board approves the proposed transaction described in the Revised Application (see Decision No. 4 herein), CI urges the Board to adopt the two proposed conditions contained herein, as well as those conditions that may be proposed by any CI member company.

Respectfully submitted,



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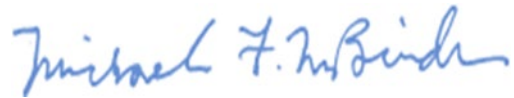
Attorneys for The Chlorine Institute

August 26, 2021

CERTIFICATE OF SERVICE

In accordance with Decision No. 4, I hereby certify that I have served, this 26th day of August 2021, a copy of the foregoing Comments of The Chlorine Institute on (1) the Secretary of Transportation, (2) the Attorney General of the United States, (3) Applicant's representative Anthony LaRocca, Esq., (4) Systems', Par's, and PAR Railroad's representative Robert Culliford, Esq., and (5) on all Parties of Record for this proceeding.

Respectfully submitted,



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