

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
August 27, 2021
Part of
Public Record

STB Docket No. 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

Comments on the Revised Application

Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4143

Jeff.Moreno@ThompsonHine.com
Jason.Tutrone@ThompsonHine.com

*Counsel for the American Chemistry
Council*

Dated: August 27, 2021

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. 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

Comments on the Revised Application

The American Chemistry Council (“ACC”) files these opening comments on the revised merger application (“Revised Application”) filed July 1, 2021 in this proceeding by CSX Corporation (“CSXC”), CSX Transportation Inc. (“CSXT”), 747 Merger Sub 2, Inc. (“747 Merger Sub 2”), Pan Am Systems, Inc. (“Systems”), Pan Am Railways, Inc. (“PAR”), Boston and Maine Corporation (“Boston & Maine”), Maine Central Railroad Company (“Maine Central”), Northern Railroad (“Northern”), Portland Terminal Company (“Portland Terminal”), Springfield Terminal Railway Company (“Springfield Terminal”), Stony Brook Railroad Company (“Stony Brook”), and Vermont & Massachusetts Railroad Company (“V&M”) (collectively, “Applicants”). The Revised Application seeks approval from the Surface Transportation Board (“STB” or “Board”) for: CSXC, CSXT, and 747 Merger Sub 2 to control the railroads that Systems and PAR control; and CSXT to

merge the Boston & Maine, Maine Central, Norther, Portland Terminal, Springfield Terminal, and Stony Brook into CSXT (collectively, the “Merger Transaction”).¹

ACC takes no position on the merits of the Merger Transaction, but urges the Board to condition any approval on the commitments of Applicants and third parties identified in the Revised Application and on the consummation of the Related Transactions² no later than the Merger Transaction. These commitments and consummation of the Related Transactions are essential to Applicants’ claim that the Merger Transaction satisfies the standard for Board approval by not having any anticompetitive effects and by providing substantial public benefits.

I. ACC’s Identity and Interest.

ACC represents the leading companies in the business of chemistry. ACC members apply the science of chemistry to provide innovative products and services that make people’s lives better, healthier, and safer. As an \$565 billion enterprise, the business of chemistry is a key element in the nation’s economy, one of the largest exporting sectors, and one of the largest customers of the U.S. freight rail system.

¹ (Revised Application at APP-10 to -11.)

² The Related Transactions are: four trackage rights agreements between Norfolk Southern Railway Co. (“NS”) and CSXT, Providence and Worcester Railroad Company, Boston & Maine, and Pan Am Southern LLC; discontinuance of common carrier service by SMS Rail Lines of New York, LLC, and termination of its lease rights over NS track near Voorheesville, NY; and the replacement of Springfield Terminal by Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad. (Revised Application at APP-17.)

II. The Board should condition any approval of the Merger Transaction on the commitments Applicants identify in support of the Revised Application and the consummation of the Related Transactions no later than the Merger Transaction.

Applicants cannot complete the Merger Transaction without Board approval.³ Under 49 U.S.C. § 11324(d), the Board must approve the transaction unless it finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.⁴ If a transaction will have anticompetitive effects, the Board has “broad authority to impose conditions to ameliorate the competitive harm that might result from the . . . transaction.”⁵

Here, to prevent the Merger Transaction from having anticompetitive effects and to ensure that it satisfies the standard for Board approval, Applicants have made several commitments—by Applicants and third parties⁶—and entered into agreements that contemplate the Related Transactions. These commitments and the Related Transactions are essential elements of Applicants’ claim that the

³ 49 U.S.C. § 11323(a). (See Revised Application 1.)

⁴ 49 U.S.C. § 11324(d).

⁵ *Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry.*, FD 35873, slip op. at 22 (STB served May 15, 2015).

⁶ For example, Applicants identify commitments by: CSXT, Norfolk Southern Railway, and Genessee & Wyoming Inc. in an agreement to replace Springfield Terminal as operator of Pan Am Southern LLC; and CSXT and the State of Maine Department of Transportation in an agreement regarding infrastructure upgrades. (Revised Application at APP-21, APP-453 to -462.)

Merger Transaction “will not have anticompetitive effects and will provide substantial public benefits.”⁷ Thus, a failure of any commitment or Related Transaction could fundamentally alter the competitive impacts and public benefits of the Merger Transaction, resulting in significant harm to shippers and the public.

Although Applicants have requested that the Board impose the commitments in support of the Revised Application as conditions to approval of the Merger Transaction, whether this request extends to commitments of third parties is unclear. For example, Applicants refer to commitments of Norfolk Southern regarding Pan Am Southern LLC (PAS) and request that the Board “impose these commitments as conditions.”⁸ But Applicants also state that any competitive issues the Merger Transaction raises have been resolved “by **CSXT’s** commitments.”⁹ They also ask the Board to grant their Revised Application “subject to . . . the commitments made **by Applicants.**”¹⁰

Similarly, while Applicants contemplate that the Merger Transaction and Related Transactions would be consummated simultaneously,¹¹ the Revised Application does not clearly call for this to be imposed as a condition to approval of the Merger Transaction. In fact, applicants indicate that the Merger Transaction could be consummated before Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire

⁷ (Revised Application at APP-23.)

⁸ (Revised Application at APP-22.)

⁹ (Revised Application at APP-22 (emphasis added).)

¹⁰ (Revised Application at APP-56 (emphasis added).)

¹¹ (Revised Application at APP-18.)

& Eastern Railroad (“B&E”) replaces the Springfield Terminal as operator of PAS, which is one of the Related Transactions.¹² If this occurs, Springfield Terminal will continue to operate PAS until Springfield Terminal is replaced as PAS’s operator.¹³ The result is that CSXT, which would acquire Springfield Terminal under the Merger Transaction, would control operations on PAS and the two main rail routes between New York and New England indefinitely.¹⁴ To avoid this and the other anticompetitive effects of the Merger Transaction that the Related Transactions are designed to address, the Board must not allow Applicants to consummate the Merger Transaction before the Related Transactions.

At bottom, to protect against anticompetitive effects of the Merger Transaction and promote the public benefits that Applicants promise, the Board should impose as conditions to the approval of the Merger Transaction: (1) the commitments of Applicants and third parties that Applicants identify in support of the Revised Application; and (2) the Merger Transaction will not be consummated before the Related Transactions.

III. Conclusion.

To prevent the Merger Transaction from having anticompetitive effects and to ensure that it provides public benefits, Applicants rely on the anticipated consummation of the Related Transactions and on commitments made by

¹² (*Id.*)

¹³ (*Id.*)

¹⁴ The two routes are the PAS line and a parallel CSXT line between New York and eastern Massachusetts. (Revised Application at APP-24.)

Applicants and third parties. ACC thus respectfully requests that the Board condition any approval of the Merger Transaction on these commitments and the consummation of the Related Transactions no later than the Merger Transaction.

Respectfully submitted,

/s/ Jason D. Tutrone
Jeffrey O. Moreno
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 263-4143

Jeff.Moreno@ThompsonHine.com
Jason.Tutrone@ThompsonHine.com

*Counsel for the American Chemistry
Council*

Dated: August 27, 2021

Certificate of Service

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by first-class mail or e-mail.

Respectfully submitted,

/s/ Jason D. Tutrone
Jason D. Tutrone

Dated: August 27, 2021