

303475

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36472 (Sub-No. 5)

ENTERED
Office of Proceedings
January 3, 2022
Part of
Public Record

**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**

FINAL BRIEF OF BERKSHIRE & EASTERN RAILROAD

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: January 3, 2022

TABLE OF CONTENTS

I. Procedural Background	- 1 -
II. The Board’s Governing Standard Provides That an Exemption Should Be Granted.-	2 -
A. B&E’s operation of the PAS Lines as a contract operator will not result in any substantial anticompetitive effects, and no shippers have requested or require Board protection from the abuse of market power.	- 4 -
B. B&E’s contract operation of the PAS Lines will not result in any substantial anticompetitive effects because B&E will be contractually obligated and incentivized to operate in the best interests of PAS.	- 4 -
C. The parties have included pricing, haulage, service and other contractual commitments to ensure that no substantial anticompetitive effects arise from the transaction.	- 7 -
D. No shippers oppose B&E’s operation of PAS as a contract operator.	- 9 -
E. B&E’s proposed operations will provide benefits to the public.	- 10 -
III. The Board Should Reject the Additional Conditions Proposed by DOJ.	- 11 -
A. The DOJ request for the Board to reject the B&E Amended Petition or to condition the Primary Transaction on divestiture should be denied.	- 13 -
1. <i>The request for divestiture is overly broad and would undercut the public benefits of B&E’s contract operations of the PAS Lines.</i>	- 14 -
2. <i>PAS will be controlled by its owners CSXT and NSR, and not by GWI.</i>	- 14 -
3. <i>The proposed transactions will not result in a 2-to-1 reduction of carriers.</i>	- 15 -
4. <i>DOJ should not be skeptical of the protections in place to protect sensitive commercial information.</i>	- 17 -
IV. Labor Has Raised No Objections to B&E Serving as the Contract Operator of the PAS Lines or to the Application of the New York Dock Protective Conditions.....	- 17 -
V. Conclusion.	- 18 -

ACRONYMNS AND DEFINED TERMS

Canadian Pacific Railway Company	CP
Connecticut Southern Railroad, Inc.	CSO
CSX Transportation, Inc.	CSXT
<i>CSX Corp and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al.,</i> STB Finance Docket 36472	Primary Transaction
Green Mountain Railroad Corporation	GMRC
Genesee & Wyoming Inc.	GW
Interstate Commerce Commission	ICC
New England Central Railroad, Inc.	NECR
Norfolk Southern Railway Company	NSR
Pan Am Southern LLC	PAS
Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad	B&E
Providence and Worcester Railroad	P&W
Rail Transportation Policy of 49 U.S.C. §10101	RTP
Rapid City, Pierre and Eastern Railroad	RCPE
Springfield Terminal Railway Company	Springfield Terminal
St. Lawrence & Atlantic Railroad	SLR
Term Sheet Agreement	Term Sheet
United States Department of Justice	DOJ
Vermont Agency of Transportation Agency	VTrans
Vermont Rail System	VRS

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB 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**

FINAL BRIEF OF BERKSHIRE & EASTERN RAILROAD

B&E is petitioning the Board for an exemption under 49 U.S.C. §10502 and 49 C.F.R. §1121 from the provisions of 49 U.S.C. §§11323(a)(2) and 11324 to allow B&E to enter into contracts to operate the approximately 425 route miles of rail lines and associated trackage rights of PAS (the “PAS Lines”). If the related transactions in FD 35762 are approved, PAS will be owned jointly by CSXT and NSR.

The Board should grant the B&E Amended Petition because PAS (and its owners, CSXT and NSR) will continue as the owner of the PAS Lines, and B&E will act (and will be contractually obligated to act) exclusively in the interest of PAS. As a result, this transaction will not lead to any reduction in competitive rail carrier service. As evidence of this, no shippers have come forward seeking the Board’s protection from any abuse of market power. In addition, no connecting railroads or states oppose B&E’s proposed contract operation of the PAS Lines. As a result, the Amended Petition should be granted.

I. Procedural Background

B&E filed its original Petition for Exemption on February 25, 2021, and an Amended Petition for Exemption on April 26, 2021 (the “B&E Amended Petition”). In addition, B&E filed a Supplement to the Amended Petition on July 1, 2021 (“B&E Supplement”) to provide

additional information requested by the Board in Decision No. 3, and to otherwise update the B&E Amended Petition. Various parties filed comments to the B&E Amended Petition and to the Primary Transaction. B&E filed its Response to Comments on October 18, 2021 (“B&E Response to Comments”).

B&E files this Final Brief in accordance with the Board’s Decision No. 4 and Decision No. 6.

II. The Board’s Governing Standard Provides That an Exemption Should Be Granted.

Pursuant to 49 U.S.C. §11323(a)(2), prior Board approval is required for a rail carrier to enter into a contract to operate the property of another carrier.¹ However, under 49 U.S.C. §11324(d), the Board must approve an application not involving at least two Class I railroads, unless the Board finds both 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. When analyzing transactions subject to 49 U.S.C. §11324(d), the Board has held that its “primary focus is on anticipated competitive effects” that would be both “likely and substantial.”²

Pursuant to the B&E Amended Petition, B&E is seeking Board approval to enter into a contract to be the contract operator of the PAS Lines via a petition for exemption under 49

¹ See also *Grand Trunk Western Railroad Company – Acquisition of Operating Easement – CSX Transportation, Inc.*, STB Docket No. FD 35661, slip op. at 3-4 (served Feb. 8, 2013).

² *Bessemer and Lake Erie Railroad Co. – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y.*, STB Finance Docket No. 36347, slip op. 4-5 (served Apr. 6, 2020).

U.S.C. §10502 because the use of a notice is not permitted.³ In Decision No. 4 of this proceeding, the Board determined that B&E's utilization of a petition for exemption is permissible.⁴ The Board is directed by 49 U.S.C. §10502 to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the RTP, and (2) either the transaction is limited in scope *or* regulation is not needed to protect shippers from the abuse of market power.

The Board's RTP analysis is limited to only those provisions of the RTP related to 49 U.S.C. §11324(d). As the ICC stated:

In determining whether regulation of a transaction proposed for exemption under §10505 [now 10502] is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. See Finance Docket No. 31493, Blackstone Cap. Partners -- Cont. Exempt. -- CNW Corp., Et Al. (not printed), served July 5, 1989, at 2. Section 10505 provides a shortcut analysis to see if regulation -- in this case under §11344(d) [now 11324(d)] -- is necessary. If §11344(d) does not require review of particular issues, neither does the §10505 process.

Under §11344 [now 11324], Congress has limited the Commission's jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition. If the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context need not be broadened beyond consideration of those aspects of the RTP that deal with competition. We need not look at RTP issues unrelated to the purposes of §11344.⁵

³ The proposed contract operation of the PAS Lines does not fit within one of the eight automatically exempt transactions described in 49 C.F.R. §1180.2(d). Notwithstanding the foregoing, B&E included within its Amended Petition all the information that would otherwise be required for notices of exemption under 49 C.F.R. §1180.2(d).

⁴ Decision 4 slip op. at 21. The Board also found that the Amended Petition was properly filed as a "related transaction" and was not required to be included as part of the Primary Transaction. *Id.* slip op. at 21-22.

⁵ *Indiana R. Co. -- Acq. & Oper. -- Illinois Central R. Co.* ("Indiana R. Co."), 6 ICC 2d 1004, 1006-1007 (1990), *aff'd sub nom.*, *Village of Palestine v. ICC*, 936 F. 2d 1335 (D.C. Cir 1991).

A finding that a transaction has no anticompetitive effects is dispositive of the RTP issue.⁶

A. B&E’s operation of the PAS Lines as a contract operator will not result in any substantial anticompetitive effects, and no shippers have requested or require Board protection from the abuse of market power.

The B&E transaction to be the contract operator of the PAS Lines will not result in any substantive anticompetitive effects because there will be no reduction in the number of carriers serving the region, any shipper, or any connecting carrier. PAS will be owned and controlled by CSXT and NSR with B&E serving only as the contract operator on behalf of PAS. Simply, if the Primary Transaction is approved, PAS will continue as an independent railroad providing service to all shippers that are currently able to be served by and from the PAS Lines. And, PAS will continue to maintain open gateways with all carriers that connect directly and indirectly with the PAS Lines. These matters are clear from the record and the fact that no shippers, and no connecting carriers, are raising any competitive concerns.

B. B&E’s contract operation of the PAS Lines will not result in any substantial anticompetitive effects because B&E will be contractually obligated and incentivized to operate in the best interests of PAS.

Although the operating agreement between PAS and B&E (the “Operating Agreement”) will not be effective until the B&E Amended Petition and the Primary Transaction have been approved and implementing agreements are completed, the parties have finalized the terms and a copy was filed with the Board by CSXT on December 29, 2021. The Operating Agreement incorporates the essential terms of the Term Sheet that was previously provided to the Board.⁷

⁶ *Indiana R. Co.* at 1009.

⁷ See B&E Amended Petition at 4 and Exhibit D, Term Sheet Agreement. Now that the Operating Agreement has been finalized, B&E will reference the Operating Agreement herein; however, the essential terms discussed can also be found in the Term Sheet.

Under the Operating Agreement, B&E will be required to operate the PAS Lines for the benefit of PAS and its owners.

The Operating Agreement requires B&E to establish market-based interline rates for PAS under PAS revenue waybills.⁸ Under the Operating Agreement, B&E is required to establish rates that advance the economic interest of PAS as an independent rail carrier, and B&E will not be permitted to set rates that are intended to favor the interests of any individual PAS owner (i.e., NSR or CSXT) or the separate interests of GWI (B&E's owner) or its controlled carriers. B&E will be permitted to establish rates taking into consideration the relative volume of traffic interchanged with a particular railroad, the commodity involved, the mileage traveled, and any equipment provided, so long as any such rates are reasonably based on cost differences associated with handling such variations in traffic, as is customary in the rail industry.

Importantly, the Operating Agreement provides for a penalty (termination) for failure to perform.⁹ In addition to the risk of termination, PAS will have the right to remove B&E as contract operator if PAS determines after the third full calendar year of B&E operations that PAS is not expected to be operated profitably on a long-term and recurring basis. GWI has no financial incentive to cause B&E to operate in a manner that undermines PAS (such as diverting PAS traffic to NECR) because to do so would risk removal after a start-up investment of up to \$20,000,000 in capital for B&E operations and hundreds (if not thousands) of hours of management time and attention dedicated to this Board process and the creation and implementation of start-up and integration plans.

⁸ See Operating Agreement, Section 7.

⁹ See Operating Agreement, Section 11(c).

The Operating Agreement also provides B&E a meaningful annual operating bonus that both incentivizes strong PAS performance and serves to fully align B&E with PAS's owners.¹⁰ The B&E operating bonus is a graduated payout that shares a percentage of PAS's operating income with B&E based on PAS's annual adjusted operating ratio. This operating bonus increases not only as PAS's operating income increases but also with improved performance. As a result, B&E will be incentivized to retain and win enough traffic, and efficiently manage its costs and operations, so as to enable it to earn the highest possible operating bonus.¹¹ The B&E operating bonus is similar to the bonus that Springfield Terminal is eligible to receive under its current contract with PAS.

In addition, the B&E management team (i.e., general manager, assistant general manager, sales & marketing, etc.) will be fully aligned and incentivized to operate B&E solely in the best interest of PAS, as their own performance bonuses will be based on the financial and safety performance of B&E. This independent incentive bonus structure for the managers of B&E based on PAS performance will be a new and aligned incentive for the PAS operator as Springfield Terminal currently does not award individual performance bonuses based on PAS performance.

GWV has further incentives to see B&E maintain a strong and viable PAS as another GWV railroad, P&W, interchanges substantial amounts of traffic with PAS and relies on PAS as a partner in handling such traffic. This traffic, which amounts to thousands of annual carloads, traverses the entirety of PAS's east-west line, including through the Hoosac Tunnel.¹² The continuation of PAS as a viable and independent overhead line that acts as a competitor to CSX's

¹⁰ See Operating Agreement, Section 10(b).

¹¹ Wagner Response V.S. at 3.

¹² Wagner Response V.S. at 3-4.

line across Massachusetts is of material importance to P&W. If GWI were to cause B&E to breach its contractual obligations to PAS and undermine PAS performance, it would negatively impact the competitive options available to P&W.

C. The parties have included pricing, haulage, service and other contractual commitments to ensure that no substantial anticompetitive effects arise from the transaction.

The B&E transaction is not anticompetitive; if it were, shippers would seek the Board's protection, which they have not done. The B&E transaction to become the contract operator of the PAS Lines does not give rise to anticompetitive effects. The assertion that the transaction will be anticompetitive because B&E is a member of the GWI corporate family, which also includes NECR, a carrier that also serves some of the same customers as PAS and that interchanges with some of the same carriers as PAS, is without merit. However, to alleviate the concerns raised by non-shipper parties, the PAS owners – CSXT and NSR – in conjunction with B&E, voluntarily agreed to implement pricing, haulage, service and other measures that will ensure that no substantial anticompetitive effects arise from the transaction. These commitments have now been memorialized and expanded in the settlement agreement entered into among VTrans, VRS, NSR, CSXT and GWI (the "Vermont Settlement").¹³ The commitments as now set forth in the Vermont Settlement not only will prevent any substantial anticompetitive effects arising from B&E's contract operation of the PAS Lines by preserving PAS's status as an independent carrier, but they will also enhance VRS's competitive options. As a result of the Vermont Settlement, VRS and VTrans have now withdrawn their opposition to B&E's Amended Petition. Thus, at this time, not only are there no shippers that raise concerns about B&E's

¹³ A copy of the Vermont Settlement was filed by CSXT with the Board on December 31, 2021.

contract operation of the PAS Lines, but now there are no connecting railroads (or any states) that oppose B&E becoming the contract operator of the PAS Lines.

CSXT, NSR and B&E are requesting that the Board impose the terms of the Vermont Settlement as conditions to the approval of the transactions so that if the parties were to fail to comply, then affected parties would have recourse at the Board. The essential elements of the Vermont Settlement, all of which are subject to the Board's approval of the Primary Transaction and the B&E Amended Petition, are:

- (1) GWI will cause NECR to grant to VRS railroad, GMRC, permanent overhead trackage rights between Bellows Falls, Vermont, and White River Junction, Vermont, to connect VRS's operations at the two endpoints. GMRC will no longer have to rely on NECR haulage for this traffic.
- (2) PAS will not only continue to provide haulage for NSR between Mechanicville and Hoosick Jct., but those rights will be expanded to permit interchange with GMRC at East Deerfield Yard. These haulage rights ensure that VRS's traffic with NSR over the Mechanicville / Hoosick Jct. gateway will not be affected by this transaction or B&E's contract operation of the PAS Lines.¹⁴ NSR, not PAS or B&E, will manage pricing for the traffic together with VRS. And NSR, as an owner of PAS, can ensure that B&E's haulage service is not degraded.
- (3) PAS will establish certain haulage rights for traffic moving in CSXT's accounts between Rotterdam Junction and Hoosick Junction, with the option to interchange the traffic with GMRC at East Deerfield Yard.
- (4) PAS will provide VRS with 5-day per week service in these lanes if volumes support this level of service. VRS does not currently have a service commitment from Springfield Terminal, and Springfield Terminal currently provides service less frequently than B&E will be obligated to provide as the contract operator of the PAS Lines. In addition, PAS has agreed to establish a mechanism for VRS and VTrans to present service concerns adversely impacting or delaying VRS freight directly to representatives of CSXT and NSR.
- (5) GWI will cause NECR to grant GMRC contingent and limited use trackage rights, and PAS will grant GMRC certain operating rights, for the movement of VRS traffic between (i) Bellows Falls, on the one hand, and (ii) one of two

¹⁴ Neither NECR nor any other GWI controlled railroad serve the Mechanicville gateway, or compete with VRS for the NSR traffic that is interchanged between NSR and VRS through this gateway.

connections with PAS – one being Millers Falls, Massachusetts and the other being East Northfield, Massachusetts, on the other hand, for the sole purpose of interchanging traffic with, or delivering traffic to, PAS in East Deerfield Yard. The trackage rights are intended to be used by GMRC if and when carload traffic destined or originated by VRS dwells for the periods of time set forth in the Vermont Settlement, which periods of time vary based on commodity and direction of traffic.

- (6) PAS will provide VRS “Price Stability”¹⁵ for interline traffic moving over PAS between Bellows Falls and PAR destinations and origins through East Deerfield and Ayer. And, PAS will provide Price Stability for haulage between Mechanicville and Hoosick Junction and between Rotterdam Junction and Hoosick Junction.
- (7) In the Operating Agreement, PAS will prohibit B&E from sharing rate divisions that B&E learns of through its operation of PAS with any other GWI controlled railroad that is not otherwise in the route. This prohibition – reiterated in the Vermont Settlement – is consistent with 49 USC §11904 which prohibits the disclosure of traffic information “that may be used to the detriment of the shipper or consignee, or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.” To address the concerns raised by commenters, GWI has also committed to establish structural, organizational and electronic information barriers to prevent B&E from sharing competitively sensitive information that B&E might be privy to as the contract operator of the PAS Lines with any other GWI subsidiary that is not in the route.¹⁶

VRS and VTrans are now satisfied that the totality of these pricing, haulage, service and other contractual commitments ensure that there will not be any substantial anticompetitive effects arising from B&E’s operation of the PAS Lines, and accordingly have agreed to withdraw their opposition to the B&E Amended Petition.

D. No shippers oppose B&E’s operation of PAS as a contract operator.

The Board should recognize the total lack of shipper concern as compelling evidence that the proposed contract operations of the PAS Lines by B&E is not anticompetitive, and that there is no risk that shippers will suffer from an abuse of market power. In 2015, the Board made just

¹⁵ Under the Vermont Settlement, “Price Stability” provides pricing at then-current levels with annual adjustments to be made pursuant to a mutually agreed upon index.

¹⁶ Wagner Response V.S. at 4.

this observation in *Norfolk Southern R.Y. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson R.Y. Co., Inc.* STB Finance Docket No. 35873, slip op. at 18-19 (May 15, 2015) (“*NSR/D&H Transaction*”). The Board noted “that no shipper presently on the D&H South Lines (or on connecting short lines) has opposed the proposed acquisition transaction— indeed, over 80 shippers explicitly support it—which strongly suggests that the transaction will not cause substantial competitive harm.”

As noted by the Board in Decision No. 6, CSXT has submitted support from nearly 100 shippers for the Primary Transaction. And, no shippers have objected to the B&E Amended Petition. Because no shipper has sought protective conditions from the Board with respect to B&E’s contract to operate the PAS Lines, the Board should take this lack of concern as strong evidence that the transaction will have no anticompetitive effects.

E. B&E’s proposed operations will provide benefits to the public.

The exemption standard under 49 U.S.C. §10502 does not require the same demonstration of public benefits as 49 U.S.C. §11324(d). Nonetheless, B&E’s contract to operate the PAS Lines will have significant public benefits for PAS, its employees, customers, and the public because B&E, as a subsidiary of GWI, will have GWI’s safety training programs, as well as GWI’s experience and corporate and regional resources, available to support B&E in its startup and operation of the PAS Lines as an independent contract operator.

G&W’s affiliated railroads have long been recognized as industry leaders in safety.¹⁷ Further, the transition of the contract operator of the PAS Lines from Springfield Terminal to B&E will be a significant undertaking, with the need to hire more than 150 employees, acquire and deploy over 30 locomotives and other required equipment and vehicles, and establish an

¹⁷ B&E Supplement at 5.

entire operating organization. GWI is one of few companies nationally, and the only regional or short line operator, that has the vast experience that GWI and its subsidiaries have in successfully starting up new rail operations, hiring, onboarding and training full workforces, acquiring equipment, and preparing and implementing safety and operating rules and policies. In particular, GWI is the only short line holding company that has started a Class II railroad from scratch, that being the RCPE, which was formed in 2014 and operates in South Dakota, Minnesota, Nebraska, and Wyoming.

To the extent that issues arise during the transition or at any time after start-up, B&E also will have access to GWI's dedicated customer service team to address any such issues. GWI's affiliated railroads in New England (NECR, P&W, CSO and SLR) have received excellent scores from their customers in the most recent survey commissioned by GWI, the results of which were received by GWI in December 2021. These railroads received an overall satisfaction score from the respondents of 8.49 on a scale of 1 to 10, as compared to such respondents' score of the railroad industry generally of 6.86 on a scale of 1 to 10.

Finally, GWI's experience in operating railroads in New England means that GWI has long-established relationships with a significant portion of the labor unions, customers and state departments of transportation in the region, as well as the commuter and intercity passenger operations that operate over the PAS Lines, including Amtrak and Metro-North.

III. The Board Should Reject the Additional Conditions Proposed by DOJ.

In Decision No. 4 of this proceeding approving B&E's use of a petition for exemption, the Board stated that it "can still impose conditions relating to B&E operations of PAS lines as part of the Merger Transaction approval, even if the B&E is in a separate docket."¹⁸ Under 49

¹⁸ Decision No. 4, slip op. at 20.

U.S.C. §11324(c), the Board has authority to impose conditions on a transaction subject to §11324(d) “to ameliorate harm that would result from the transaction.” However, “the harm caused by the transaction ‘must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing’ ...i.e., pre-existing disadvantages that will neither be caused nor exacerbated by the transaction.”¹⁹ The Board’s authority to order conditions is not a tool to expand competitive options, but instead to preserve competitive options.²⁰ Notwithstanding the lack of opposition by shippers or connecting railroads, DOJ has requested that the Board require divestiture by CSXT of the 50% ownership interest in PAS held by Pan Am, together with operation of the PAS Lines by a carrier other than B&E. The DOJ request is overbroad, inconsistent with the Board’s conditioning standards and would undermine the public benefits of B&E operating the PAS Lines.

Under 49 USC §11324(c), the Board has the theoretical authority to impose divestiture of a rail line as a condition, as requested by DOJ. However, the Board has held that divestiture is an intrusive remedy only to be used in extreme conditions. “Divestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy will suffice.”²¹ The Board has – in the past – expressed its preference to impose other conditions that are “narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger’s substantial public benefits” in lieu of divestiture.²²

¹⁹ *Bessemer and Lake Erie Railroad Co. – Acquisition and Operation – Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y.*, STB Finance Docket No. 36347, slip op. 4 (served Apr. 6, 2020).

²⁰ *Id.* (internal citation omitted).

²¹ *Union Pac. Corp., et al. – Control and Merger – S. Pac. Rail Corp. et al.*, STB Finance Docket No. 32760, slip op. at 156-57 (served Aug. 6, 1996) (Decision No. 44).

²² *Id.* at 157.

The Board has previously used its conditioning authority to impose voluntary commercial agreements entered into by parties to a transaction to ameliorate potential anticompetitive effects of a transaction. In the *NSR/D&H Transaction*, the Board imposed voluntary commercial agreements to protect shippers and “connecting short lines from potential disadvantageous modifications of service.”²³ As discussed in Section II.C. above, CSXT, NSR and B&E proposed pricing, haulage, service and other commitments that they requested be imposed as conditions of the Board’s approval of the Primary Transaction, and as part of the Operating Agreement. These commitments have been reiterated and enhanced in the Vermont Settlement, which the parties have requested be imposed as conditions on Board approval of the transactions. These voluntary conditions effectively ameliorate any anti-competitive issues or concerns regarding the proposed transactions. As evidence of this, no shippers have requested any additional protective conditions, and VRS and VTrans no longer oppose the proposed transactions, including B&E acting as the contract operator of the PAS Lines.

As the request of DOJ fails to meet the Board’s standards for imposing conditions and would undermine the public benefits of B&E acting as the contract operator of the PAS Lines described above, the request for additional conditions should be denied.

A. The DOJ request for the Board to reject the B&E Amended Petition or to condition the Primary Transaction on divestiture should be denied.

DOJ submitted comments to the Board arguing that B&E should not be the contract operator of the PAS Lines by asking the Board to either reject the B&E Amended Petition, or to only authorize CSXT’s acquisition of PAR on the condition that CSXT will divest its interest in

²³ *Norfolk Southern Ry. Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Ry. Co., Inc.* STB Finance Docket No. 35873, slip op. at 18-19 (May 15, 2015).

PAS and/or for a non-GWI affiliated railroad to operate PAS.²⁴ This request is based on misapprehensions or misrepresentations regarding PAS's continued existence as an independent railroad, B&E's role as the contract operator of the PAS Lines, of the "control" that GWI will be able to exercise to the detriment of PAS, and of GWI's incentives to ensure that PAS is successful, and accordingly should be denied by the Board.

1. *The request for divestiture is overly broad and would undercut the public benefits of B&E's contract operations of the PAS Lines.*

Divestiture is an intrusive remedy that would undercut the public benefits of B&E's assumption of the role of contract operator of the PAS Lines, and the startup of those operations. DOJ is not offering a "narrowly tailored" remedy to resolve its perceived merger-related competitive harms. Instead, DOJ offers a vague argument built on an unsupportable assertion to infer that B&E will operate the PAS Lines to the detriment of PAS and for the benefit of another GWI railroad, NECR. DOJ fails to understand that GWI has more incentive to operate PAS profitably and efficiently and in good faith, than it does to undermine PAS in order to benefit NECR. See the discussion in Section II.B above.

2. *PAS will be controlled by its owners CSXT and NSR, and not by GWI.*

In order to justify its argument that the Board should reject the B&E Amended Petition, DOJ mistakenly argues that GWI will control PAS – it will not. DOJ argues, "as a result of the parties' proposed remedy, a single entity will control all operations on the NECR line and within the overlapping portions of the Knowledge Corridor."²⁵ B&E will merely be the contract operator of the PAS Lines, and PAS will at all times be controlled by its owners CSXT and NSR – not by B&E or GWI. Further, the Vermont Settlement now ensures PAS will not be operated

²⁴ DOJ Comment at 3.

²⁵ DOJ Comment at 4.

for the benefit of GWI or NECR, and that connecting railroads will not lose any competitive options.

Just as it is today, neither PAS nor its contract operator (currently Springfield Terminal, or B&E in the future) will control the VRS gateway at Hoosick Junction for interchange with NSR due to the continuance of the NSR haulage rights. Pricing will continue to be in the hands of NSR and VRS, and not in the hands of PAS or B&E. NSR as an owner of PAS can ensure that B&E's haulage service is not degraded. Moreover, neither PAS nor NECR serve Whitehall where VRS connects with CP, and NECR's Conn River Line is not competitive with the movements with VRS over Hoosick Junction. Accordingly, most of VRS's traffic movements will be unaffected by the proposed transactions.

Other VRS – PAS traffic and interchanges at White River Junction and Bellows Falls will be further protected by the contractual commitments in the Vermont Settlement discussed in Section II.C that CSXT, NSR and B&E have asked to be imposed as conditions to the approval of the transactions. These conditions will ensure that VRS continues to have independent service from PAS, free from any ability of B&E (or GWI) to interfere.

3. *The proposed transactions will not result in a 2-to-1 reduction of carriers.*

DOJ further attempts to justify its unfounded request to the Board by claiming that the B&E transaction to be the contract operator of the PAS Lines will “in effect” result in a 2-to-1 reduction in carriers.²⁶ DOJ fails to present a cogent argument that a 2-to-1 reduction in carriers exists. DOJ ignores the fact that, as discussed above, PAS will continue to function as an independent carrier operated for the benefit of its owners CSXT and NSR. Under the transaction, PAS will remain as the owner and holder of trackage rights of the PAS Lines. B&E

²⁶ DOJ Comment at 4.

will be the contract operator only and will be required by contract to operate the line for the benefit of PAS and not for the benefit of NECR or any other GWI railroads. B&E will in no way be an alter ego of NECR. As discussed above, protections have been built into the transactions, and commitments made by the parties in the Vermont Settlement, to ensure that PAS will be independently operated and all gateways and traffic to and from Vermont and the Vermont railroads will be protected from any potential adverse effects of the transactions.²⁷ Based on the foregoing, it is clear that a 2-to-1 reduction in carriers will not occur.

In addition, only two shippers located along the northern Conn River Line / Knowledge Corridor are currently entitled to service from both PAS and NECR – and neither is opposed to the transaction or seeking Board protection from market abuse or a potential anticompetitive situation.²⁸ Simply, overhead service to connecting carriers in Vermont will not be affected by the proposed transaction, and will be improved by the haulage rights and additional commitments made by CSXT, NSR and B&E in the Vermont Settlement.

As a result of the Vermont Settlement, DOJ is now alone in its concerns. Notably, DOJ has not provided the Board with any supporting verified statements from shippers in Vermont (or elsewhere) that share its concerns. And, no shippers in Vermont or otherwise served by PAS or VRS have filed independently to raise competitive concerns.

²⁷ See also Reishus Reply V.S., ¶57.

²⁸ One of those two customers, Cushman Lumber, has asked to participate in the public hearing in support of the transactions.

4. *DOJ should not be skeptical of the protections in place to protect sensitive commercial information.*

DOJ argues that the commitments made by the parties to protect commercial data is insufficient.²⁹ However, this concern is misplaced and overstated because, as fully explained in Section II.C above, restrictions incorporated in the Vermont Settlement, in the Operating Agreement, statutory requirements, and the additional haulage rights that have been promised, will prevent there being any improper disclosures.³⁰

IV. Labor Has Raised No Objections to B&E Serving as the Contract Operator of the PAS Lines or to the Application of the *New York Dock* Protective Conditions.

B&E has agreed that it will negotiate implementing agreements where and when required under the protective conditions set forth in *New York Dock*,³¹ and none of the commenting labor unions oppose B&E's transaction to operate the PAS Lines.

Multiple unions request that the Board condition its approval on recognition of the unions that currently represent Springfield Terminal employees. The unions' request that the Board address representation issues is unnecessary because the National Mediation Board ("NMB") has exclusive jurisdiction over representation matters, as the Board has specifically recognized. *See, e.g., Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western Railroad Inc.—Control—Illinois Central Corp., et al.*, 2011 WL 4578616 (S.T.B.), *11 and n. 64 ("We agree that questions of labor representation are reserved to the NMB, and are not within the jurisdiction of the arbitrator or the Board to decide.") (citation omitted).

²⁹ DOJ Comment at 5.

³⁰ Based on the Vermont Settlement, VRS and VTrans are now satisfied that confidential information will be protected from disclosure.

³¹ B&E Amended Petition at 14-15.

B&E addresses other union concerns in its August 18, 2021 Response to Comments. In totality, B&E's operation of the PAS Lines will be a good deal for labor because B&E agreed to negotiate implementing agreements with all of the unions currently representing Springfield Terminal employees, and to abide by substantially similar terms and conditions to those currently in existing Springfield Terminal labor agreements. This, combined with B&E's willingness to recognize the unions currently representing Springfield Terminal employees, will effectively guarantee continuity in representation, rates of pay, rules and working conditions.³² And B&E has agreed to the application of *New York Dock* protective conditions which will provide benefits to those Springfield Terminal employees that currently work on the PAS Lines whose positions may be abolished or adversely affected.

V. Conclusion.

Based on the voluntary commitments and conditions agreed to by B&E (and CSXT and NSR), no shippers or connecting railroads oppose B&E's operation of the PAS Lines. Nor does labor raise any concerns that are not satisfied by the agreed-upon application of *New York Dock* protective conditions. These commitments and conditions ensure that the B&E transaction will not have any anti-competitive effects. The imposition of additional conditions has not been justified under Board precedent and would be overbroad compared to the tailored voluntary conditions proposed by the parties. For these reasons, and as more fully set forth above, B&E respectfully requests that the Board find that the B&E Amended Petition satisfies the

³² The proposed operations by B&E are obviously substantially better for the unionized Springfield Terminal employees than if the proposed operator had a non-unionized work force, such as VRS, and/or sought reduced or no labor protective conditions.

requirements of 49 U.S.C. §10502, and grant the petition without any conditions beyond those voluntarily agreed to by B&E.

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: January 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Berkshire & Eastern Railroad Final Brief was served on all parties of record by email or by U.S. first class mail, postage pre-paid.

/s/ Eric M. Hocky

Eric M. Hocky

Dated: January 3, 2022