

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36472, ET AL.

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

**BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION AND MASSACHUSETTS
BAY TRANSPORTATION AUTHORITY**

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DEPARTMENT OF TRANSPORTATION
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TRANSPORTATION AUTHORITY**

Dated: January 3, 2022

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The Commonwealth of Massachusetts Department of Transportation (“MassDOT”) and Massachusetts Bay Transportation Authority (“MBTA”) (collectively, the “Commonwealth”), in keeping with the procedural schedule set forth by the Surface Transportation Board (the “Board”) in Decision No. 4, served on July 30, 2021, in the above-referenced proceedings, hereby tender their brief in response to the primary application and to related notices of exemption and petition for exemption (respectively) presented in the main docket and the five related “sub-no.” proceedings (collectively, the “Inter-related Filings”). As

¹ The present filing also 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.

explained below, the Commonwealth do not object to, or oppose, the transactions proposed in the Inter-related Filings (the “Transactions”), nor do they support them. As discussed herein, the subject Transactions can only be assured to advance the public interest in Massachusetts if the Board were to approve them (or to permit them to take effect, as the case may be) subject to certain protective conditions as previously set forth in the Commonwealth’s Comments and Request for Conditions (the “Conditions Request”) filed on August 27, 2021. Indeed, imposition of the requested conditions is consistent with agency precedent and policy.

BACKGROUND

As the Commonwealth explained their Conditions Request, MassDOT and MBTA are key stakeholder in these proceedings, dedicated as they are to protecting and upholding the public interest in competitive and efficient freight and passenger railroad transportation; safe, reliable, and well-maintained railroad infrastructure supporting all railroad traffic; and reliable and environmentally sound commuter rail and intercity passenger service options as an alternative to motor vehicle transportation. Massachusetts hosts more of the railroad lines involved in these Transactions than any other state involved, and those lines support not only freight, but also, in many cases, extensive passenger rail service. The Commonwealth are particularly concerned about the Transactions’ potential impacts upon Commonwealth-owned railroad infrastructure,² MBTA’s extensive commuter rail service, and current and future intercity passenger service. In short, the Commonwealth seek appropriate

² In substantiating their interest in railroad service in Massachusetts, MassDOT and MBTA offered in the Conditions Request a detailed inventory of the railroad lines that each owns, amounting, collectively to hundreds of miles of track, much of which hosts both passenger and freight service. Conditions Request, 3-6.

conditions to protect the interests of the citizens of Massachusetts, and to continue to provide those citizens with safe, efficient and reliable railroad transportation options.

Specifically, upon a careful assessment of the risks of the Transactions to Commonwealth-owned railroad infrastructure and to railroad passenger service, the Commonwealth requested, and continue to request, that the Board impose as conditions to approval of the subject Transactions the following:

1. Upon consummation of the Transactions, CSXT will transfer to MBTA train dispatching responsibilities for all MBTA and MassDOT-owned line segments – (1) over which regularly-scheduled commuter rail passenger service operates; and (2) over which CSXT otherwise holds, or would hold, dispatching responsibility post-Transactions. As explained previously, this condition would place such duties in the hands of the predominant user of the subject line segments as measured by average total daily train movements, and would best balance the interests of freight and commuter train service in keeping with recent executive directives, including Executive Order Number 14036. Alternatively, if CSXT is not required to transfer dispatching responsibilities, then CSXT must be required to maintain dispatching functions permanently at MBTA’s existing Billerica dispatching offices, and must employ dispatching software and technology prescribed by MBTA to ensure that MBTA can monitor CSXT dispatching in real time, and so that MBTA can coordinate its dispatching territories with MBTA-owned routes that CSXT would dispatch.
2. CSXT must be required within three (3) months of the consummation of the Transactions to develop jointly with MBTA a written, and mutually-accepted plan to alleviate against threats to capacity and to existing and projected future passenger rail service over MBTA-owned trackage, including, most particularly between Ayer (MP-36.0) and Willows (MP-33.7). This plan should include designated traffic volume thresholds, that, when exceeded, would trigger CSXT-funded capital improvements to alleviate congestion, including, but not limited to, the installation of additional main line trackage parallel to existing MBTA Ayer-Willows main tracks.
3. Within three (3) months of the consummation of the Transactions, CSXT will, with the Commonwealth, engage in a joint inspection and evaluation of MBTA-owned and MassDOT-owned railroad facilities currently maintained by or for any rail carrier subsidiary of Pan Am Railways (“PAR”) or by or for Pan Am Southern (“PAS”) to determine whether such facilities have been maintained to a condition that – (a) meets railroad industry standards of serviceability and safety; or (b) complies with the standards of upkeep set forth in the agreement or agreements governing PAR’s and/or

PAS's use and control of each such facility, whichever standard of maintenance and safety is higher in the case of each such facility.

- As part of this joint inspection process CSXT, PAS and the Commonwealth shall assemble a panel of three inspectors (the "Panel"), each member of which will be qualified in the inspection and evaluation of railroad facilities. The Panel, by a majority vote will– (i) ascertain or, of not already prescribed, establish the appropriate standards to which each facility should be evaluated; and (ii) determine whether each facility inspected meets the applicable standard. If the condition of a facility inspected does not meet the appropriate standard, the Panel shall prescribe the remedial steps necessary to bring the deficient facility to conformance with the appropriate standard.
- CSXT and PAS shall, collectively, appoint one Panel member, the Commonwealth will appoint one Panel member, and the CSX/PAS and Commonwealth Panel members shall select and appoint the third, independent, Panel member.
- CSXT or PAS (as applicable) will be responsible for the costs of all work necessary to bring any deficient facility to a condition that meets the applicable standard, including the cost of design. To the extent that CSXT and/or PAS use such facilities post-Transactions, CSXT and PAS will maintain such facilities to the governing standard.

This condition will assure compliance with the general assurances woven into the application that CSXT and the other parties to this transaction will adhere to, and honor their commitments to abide by the terms of the agreements that PAS and the various PAR subsidiary carriers currently have with others.

4. PAS will maintain the MassDOT-owned Knowledge Corridor to a condition that satisfies the Federal Railroad Administration's safety standards for Class 4 railroad track, in adherence with existing agreements between MassDOT and PAS. In so doing, PAS will comply with the terms of the Operating Agreement between MassDOT, MBTA and PAS dated May 21, 2015, and more specifically, Exhibit B to that agreement – Service Outcome Agreement of the 2015 Operating Agreement.
5. CSXT, on behalf of itself and as the future 50% owner of PAS, commits to work with MassDOT, Amtrak, and any future local rail authority (i.e., a Western Massachusetts Intercity Rail Authority) in good faith, to explore, study, and allow additional expanded passenger service in Western Massachusetts under the governance and operations framework described in MassDOT's Intercity Rail Governance White Paper and on mutually acceptable terms, including, but not limited to, the proposed

passenger service identified in MassDOT's East West Rail Study over the former Boston & Albany main line and the PAS main line west of Ayer.

6. In keeping with condition #5, CSXT must be required to reach an accord with the National Railroad Passenger Corporation ("Amtrak") with respect to certain Amtrak-operated and Commonwealth-supported intercity passenger train initiatives (as Amtrak may discuss in its own responsive filing to the Board) that will benefit mobility within, and proximate to, Massachusetts, including, but not limited to – (a) the introduction of seasonal round-trip service (with certain multiple daily starts) between Albany, New York and Pittsfield, Massachusetts (known as the Berkshire Flyer, under terms to be provided by Amtrak); (b) multiple round-trip service between Springfield and Worcester, Massachusetts; (c) up to two daily round-trip service between Albany and Worcester, Massachusetts; and (d) the negotiation in good faith (under general terms and conditions regarding modelling and impacts analysis and mitigation set forth by Amtrak) of expansion of or modification to existing intercity service within Massachusetts.

7. CSXT must be required to support the continued development of a Springfield Master Plan for capital improvement investment to enhance North-South, East-West and multidirectional passenger services in and around Springfield Union Station, including, but not limited to, construction of passenger layover facility(ies), additional tracks and platform access, and expanded interlockings. Consistent with the goals and purpose of the Springfield Master Plan, CSXT will not remove, without MassDOT's written consent, the currently-installed, 950-foot-long "shoo fly track."

Both before and after its Conditions Request filing, the Commonwealth have been engaged in discussions with the Applicants, primarily CSXT, to explore a mutually-acceptable arrangement addressing the Commonwealth's concerns. Those discussions have been generally constructive and positive, but they have not led to the sort of definitive written agreements or understandings that would assure the Commonwealth and enable them to support the Inter-related Filings. However, while CSXT has exuded confidence that it would not allow the Transactions (and the railroad freight volume increases expected to result from them) to result in undue deterioration to Commonwealth assets or to harm passenger rail service, it has maintained that firm, written commitments are unnecessary, pointing to its general assurances on these issues of concern, as CSXT has previously set forth in the record. The Commonwealth

appreciate CSXT’s confidence and “can-do” spirit, but would remind all involved that CSXT has miscalculated in the past in such situations.³ Discussions with CSXT and other Applicants continue, and the Commonwealth remain hopeful that an appropriate, and comprehensive, written agreement can be reached allowing the withdrawal of the Commonwealth’s past filings.

ARGUMENT

The Transactions have been presented to the Board in a series of filings (the Inter-related filings) that consist of a combination of notices of exemption (primarily for a handful of inter-dependent trackage rights arrangements), a petition for exemption (to allow for the operation of a regional carrier – Pan Am Southern LLC by a new operator, Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad – the “PAS Transaction”), and an application (for acquisition of control and consolidation – the “CSX-PAR Transaction”). The standards for authorization or approval (as applicable) differ, depending upon the procedures invoked.

Specifically, in order to obtain an individual exemption under 49 U.S.C. § 10502 to undertake PAS Transaction, the petitioner must convince the Board that regulatory review of the proposed transaction under the more exacting requirements and involved merits assessment of a formal application is “not necessary to carry at the transportation policy of [49 U.S.C. § 10101];” and that either – “the transaction is of limited scope” or formal regulation “is not needed to protect shippers from the abuse of market power.”⁴ The Application covering the

³ See *CSX Transportation, Inc. – Acquisition of Operating Easement – Grand Trunk Western Railroad Company*, FD 35522 (various decisions culminating in order served on December 10, 2018) (chronicling CSXT’s misjudgment over the acquisition of, and operations over, a railroad line in the Chicago terminal area, including CSXT’s offer, in the face of such disruption, to take certain steps to address traffic problems caused by train stops that, in retrospect, were not plausible and were instead counter-productive).

⁴ 49 U.S.C. § 10502(a).

CSX-PAR Transaction, on the other hand, is subject to the standards set forth at 49 U.S.C. § 11324(d) under an analysis under which the Board will assess various “public interest considerations” (FD 36472, Decision No. 4 (STB served July 30, 2021 (“Decision No. 4”), 13).

The Commonwealth respectfully submit that it is unclear whether – (a) the CSX-PAR Transaction, as currently presented (absent the benefit of a definitive agreement with the Commonwealth addressing and resolving their concerns about potential adverse impact) adequately protects the public interest; or (b) that the PAS Transaction, also as currently presented, warrants approval under the railroad transportation policy (“RTP”) at 49 U.S.C. § 10101.⁵ What is clear to the Commonwealth, however, is that, with appropriate conditioning – those that the Commonwealth have requested, specifically – each element of the Transactions before the Board, in the Commonwealth’s view, could warrant approval.

Before turning to the agency’s own well-established policy and precedent supporting the Commonwealth’s requested conditions, it is appropriate once again to note a strong and growing federal policy interest in protecting and promoting railroad passenger service, particularly when those service interests may be resisted by private rail carriers such as CSXT. Specifically, barring an eventual resolution of the Commonwealth’s concerns by way of a written accord, Executive Order Number 14036, *Promoting Competition in the American Economy*, section (n)(iii), 86 FR 9 36987 (July 9, 2021) (“E.O. 14036”) supports targeted Board intervention in the face of Applicant inaction and indifference toward potential passenger service obstacles. The Chairman of this Board has been called upon in E.O. 14036 to work with his fellow members to, among other things, “ensure that passenger rail service is not subject to

⁵ The Commonwealth take no position on the merits of the related trackage rights notices or the discontinuance notice of exemption proceeding.

unwarranted delays and interruptions in service due to host railroads' failure to comply with the required preference for passenger rail, vigorously enforce new on-time performance requirements adopted pursuant to the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110-423, 122 Stat. 4907) that will take effect on July 1, 2021, and further the work of the passenger rail working group formed to ensure that the [Board] will fully meet its obligations.” The Commonwealth are confident that the Board will be mindful of the call of this Executive Order, and that the Board can and will weigh this call to action in its assessment of both intercity and commuter rail service issues that the agency confronts here and in other proceedings as they may emerge in the future. Indeed, the Chairman has already, in response to E.O. 14036, conveyed that the Board “. . . takes seriously the administration’s emphasis on ensuring that passenger rail is not subject to unwarranted delays and interruptions in service.”⁶

The central guiding principle in the Board’s review and approval of railroad Transactions such as the ones currently before the agency is to ensure that they be designed to uphold and promote the public interest. As an extension of that principle, the Board is entitled to impose appropriate conditions upon a transaction that does not adequately address public interest concerns.⁷ Moreover, the public interest, for the Board, is most definitively shaped and informed by the RTP.⁸ By exercising its conditioning authority, the Board can ensure that the interests of

⁶ Board Press Release 21-29 (issued July 9, 2021).

⁷ *See Canadian National Railway Company, et al — Control — Kansas City Southern et al.*, FD 36514 (Decision No. 5) (STB served Aug. 31, 2021), 20-21.

⁸ *Id.* at 23 (“To be clear, the Board’s responsibility under these circumstances is to assess whether the proposed [transaction] is ‘consistent with the public interest’ . . . and not—as Applicants appear to argue—to help private parties realize their transactional preferences regardless of that broader assessment.”).

parties such as the Commonwealth that are necessarily affected by the proposed Transactions are fully considered and adequately protected.⁹

The unaffected operation—if not improvement—of railroad passenger service is certainly a public interest that the Board is entrusted to protect.¹⁰ Indeed, the Board’s rules specifically require that potential passenger service impacts (including impacts on commuter rail service) be assessed and considered as part of the review of transactions qualifying as “significant” under the agency’s standards and procedures.¹¹ Where a railroad transaction threatens adverse impacts to passenger service, and where the transaction’s proponents have not adequately addressed those potential harms, the Board must exercise its conditioning authority, rather than take the chance of significant service disruptions warranting post-transaction investigation and remedial steps to address those problems.¹²

The potential harms of the Transactions that the Commonwealth seek to protect against are, in some instances, directed to specific actions that the Applicants propose to take that can and will affect passenger rail service in Massachusetts. For example, to facilitate its proposed single-line service between points on the current CSXT system and points in northern

⁹ See *Bessemer & Lake Erie Railroad Company — Acquisition and Operation — Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence and Franklin Counties, N.Y.*, FD 36347 (Decision No. 4) (STB served Apr. 6, 2020), 10 (conditioning the transaction for the protection of shippers and future rail line purchasers despite noted, public benefits of the transaction in other areas).

¹⁰ 49 U.S.C. § 10101 (4), (5), and (8) (requiring consideration of the needs of the public, effective consideration between modes, and public health and safety).

¹¹ 49 C.F.R. § 1180.8(b)(2).

¹² FD 36472 (Decision No. 3), 7 n. 16 (noting with skepticism that “. . . there is no support for [Applicants’] assertion that there would not be any impact on passenger or commuter trains operated on the lines that are part of these proceedings”); *Joint Petition for Service Order*, 2 STB 275 (1997) (slip op. at 1997 WL 677444 at *7) (detailing chronic rail service issues (including passenger service disruption) in the aftermath of the Union Pacific-Southern Pacific merger).

New England on the Pan Am Railways network, CSXT has requested the rescission of an existing cap on the number of freight trains that Pan Am Railways may operate over Pan Am Southern through Ayer, Massachusetts – where east-west (Pan Am Southern), north-south (Pan Am Railways), and MBTA trains converge. The Commonwealth’s first two requested conditions (transfer of dispatching) and (capacity monitoring, service plan adjustment, and infrastructure enhancement) are specifically intended to ameliorate the disruptions that could be caused by the lifting of the freight traffic cap. These conditions would provide effective and clear protection against potential congestion and concomitant delays to commuter passenger service that could result from CSXT prerogative and preference for its own trains and those of PAS, particularly as freight traffic volumes grow, as CSXT expects that they will. Absent clear protective measures such as those discussed immediately above, Board approval of the Transactions endangers the public interest in reliable commuter rail service.

Agency precedent supports these and other passenger service-protecting conditions that the Commonwealth have requested, particularly where such conditions are rooted in the development and improvement of coordination between those supporting and providing passenger rail service and those engaging in the proposed freight carrier consolidation.¹³ In keeping with such past practice, the Board should require formal cooperative arrangements as the Commonwealth are seeking in many of the conditions it has requested, including Conditions 1, 2, 4, 5, 6 and 7. Such cooperative arrangements were within reach, are not unduly burdensome to the Applicants, and would better protect against harms to passenger rail service disruption

¹³ See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating/Lease Agreements—Conrail Inc. and Consolidated Rail Corporation*, 3 STB 196 (slip. op at 1998 WL 456510 at *51) (conditioning approval on continued cooperation with passenger interests on basis of previously-produced study recommending capital improvements in and around New York City).

than would relying upon CSXT's assurances that implementation of the proposed Transactions will not harm passenger rail service or result in undue deterioration of Commonwealth-owned railroad assets supporting both freight and passenger service. Unless a mutually-satisfactory, voluntary agreement resolving these issues is forged, post-Transactions Board oversight will be necessary to adequately protect passenger service going forward – a taxing alternative to effective Board conditions. For these reasons, requiring the Applicants to negotiate appropriate protocols and to adopt specific infrastructure plans in the event of passenger service delays resulting in whole or in part from post-Transactions freight operations would be consistent with Board precedent.

Barring any other relief – which the Commonwealth have proven above would be supported by Executive and Board policy and agency precedent – the Applicants must, at a minimum, be held to the commitments they have made on the record; otherwise, the Applicants will have been rewarded with regulatory approval for “running out the clock” on the Commonwealth by avoiding substantive commitments specifically designed to protect Commonwealth-owned railroad infrastructure and rail passenger service.¹⁴ If the Board were to adopt this minimum requirement that the Applicants be held to their representations and assurances regarding Commonwealth-owned facility upkeep, that rail passenger service will not be affected by the Transactions, and that the Applicants will negotiate in good faith to reach an accord on current and forecasted railroad passenger service in Massachusetts, such a requirement should, of course, also include the expectation of an ongoing cooperative dialogue with the

¹⁴ See, e.g., *Norfolk Southern Railway Company, Pan Am Railways, Inc. et al — Joint Control/Operating Pooling Agreements—Pan Am Southern LLC*, FD 35147 (STB served Mar. 10, 2009), 6 (“. . . we will hold Applicants to all representations made on the record in this proceeding”).

Commonwealth to address and resolve currently unforeseen Transactions-related service and facilities impacts as they may arise in the future.¹⁵

CONCLUSION

The public interest requires that Transactions such as those proposed in the above-referenced dockets be implemented responsibly, and with appropriate provision for – (a) the use and upkeep of publicly-owned railroad assets that the merged Applicants will, as a result of the proposed Transaction, include within their consolidated network; and (b) the protection and promotion of commuter and intercity railroad passenger service. As has been shown in their Conditions Request, the Commonwealth are responsible here for the protection and preservation not only of hundreds of miles of railroad implicated in these Transactions, but they also have justifiable reason for concern over the future of MBTA’s commuter rail and Amtrak’s intercity passenger rail service within Massachusetts should the Transactions involved here be approved and subsequently implemented. That concern is based, in no small part, on CSXT assurances that – (a) are not backed by definitive written commitments; and (b) beg a discernible plan should post-Transactions freight patterns, traffic growth, shifting freight carrier priorities, or even poorly-executed implementation (or a combination of those circumstances) contribute to inadequate rail facilities upkeep or trigger passenger rail service deterioration.

For these reasons, and in keeping with guiding policy and precedent, the Board should impose the relief that the Commonwealth have requested as conditions to approval of the Inter-related Filings. But in the event the Board should conclude that affirmative protections of

¹⁵ See, e.g., *Genesee & Wyoming Inc. — Acquisition of Control Exemption — Providence & Worcester Railroad Company*, FD 36064 (STB served Dec. 16, 2016), 5-6 (“The Board expects . . . GWI will work with MassDOT . . . to help address any unforeseen service impacts, should they arise, following the transaction’s approval.”).

the Commonwealth's interests (as they have requested herein) are unwarranted, then the Commonwealth urge that, at a minimum, the Board should hold the Applicants to the commitments they have made on the record to preserve Commonwealth-owned railroad assets, and to protect and promote passenger rail service in Massachusetts.

Respectfully Submitted,

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AUTHORITY**

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd Day of January, 2022, arranged to serve the foregoing Brief of the Commonwealth of Massachusetts Department of Transportation and Massachusetts Bay Transportation Authority upon all parties of record by electronic service or, where such service is not available, by U.S. Mail, postage prepaid.

/s/ *R. A. Wimbish*
Robert A. Wimbish