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Finance Docket No. 36472

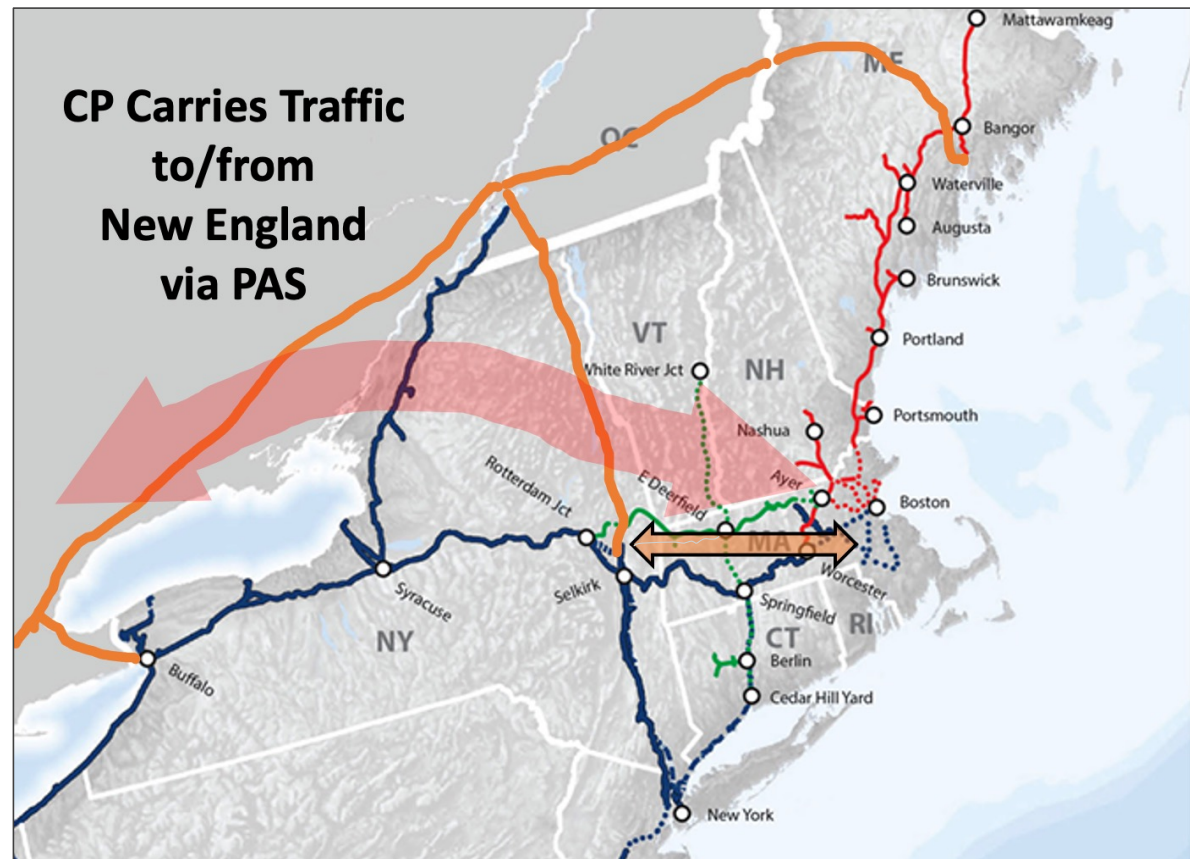
January 14, 2022

CP Has an Interest in New England Rail Traffic

CP has a strong interest in preserving competitive rail access to New England via PAS's Hoosac Tunnel Route

CP handles thousands of carloads of traffic between New England and points across its U.S. and Canadian network

Most of CP's New England Traffic Connects with PAS via Mechanicville, NY Gateway and CP's Mohawk Yard



Transaction Threatens Horizontal Competition

PAS's Hoosac Tunnel Route

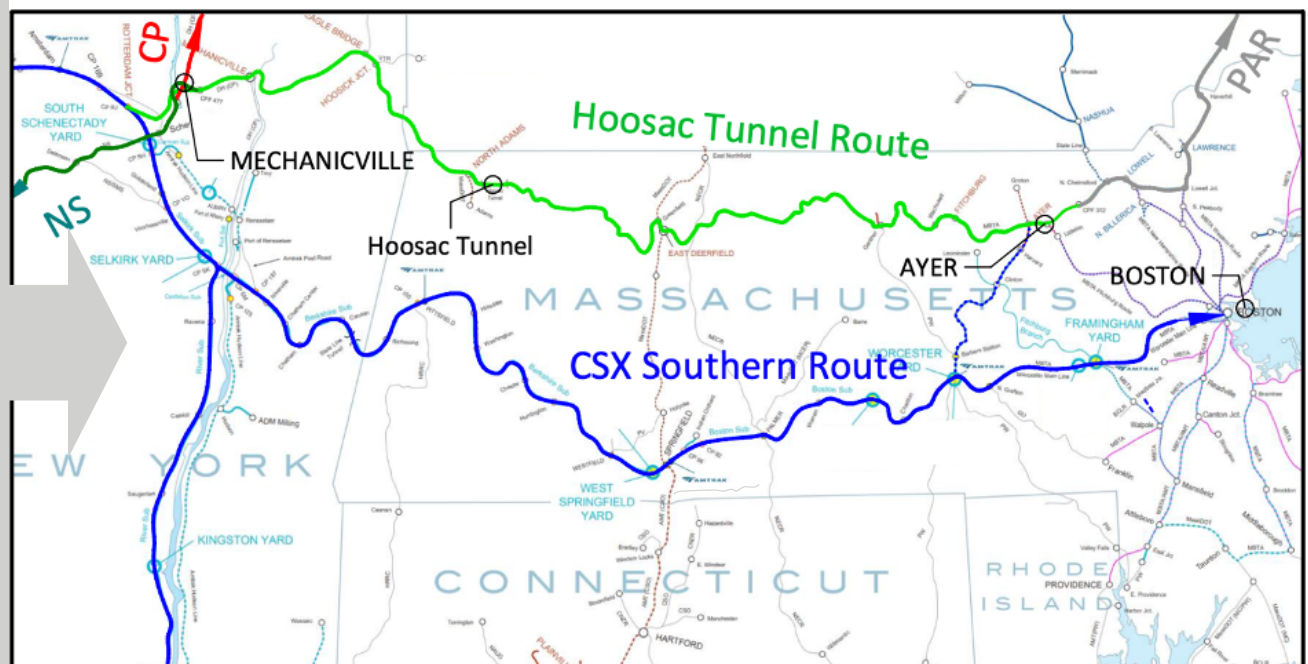
Only Viable Alternative to CSXT's Southern Route for Traffic to/from New England

Connects with CP and NS at Mechanicville Gateway

Efficient Route to Boston Area and Connection with Pan Am Railway at Ayer

A Service Route Today for Intermodal/Automotive Traffic to/from Boston Area via Ayer Facilities

PAS Invested in Hoosac Tunnel Repair to Reopen Line After Partial Collapse



PAS's Was Formed to Spark Competition with CSXT

When the Board approved the formation of PAS, its role in competing against CSXT was front and center.

The application states that Norfolk Southern would infuse \$87.5 million into PAS for improving infrastructure. PAS would use part of that capital to remove long-term slow orders along the Patriot Corridor and to add capacity and clearances along that line for better traffic flow. PAS would also use a portion of the capital to create new, or expand existing, transloading capacity at three locations: (1) a new intermodal and automotive facility at Mechanicville, NY (the Mechanicville Facility); (2) an expanded intermodal facility at Ayer, MA; and (3) a new automotive facility near Ayer at San Vel. **According to Applicants, the Transaction would strengthen the existing Norfolk Southern/Springfield Terminal competitive alternative to the single-line service of CSXT into the Boston area by making PAS a more efficient competitor.**

Norfolk Southern Ry., Pan Am Rys, Inc., et al. – Joint Control & Operating/Pooling Agreements – Pan Am Southern LLC, Finance Docket No. 35147 (STB served Mar. 10, 2009) at 2-3.

The Transaction Fundamentally Changes Incentives

Today
PAS jointly owned by NS and Pan Am, with incentives to invest and compete against CSXT.
PAS hosts two daily premium intermodal trains, providing compelling incentive to maintain service levels for through traffic.
Pan Am subsidiary (ST) operates PAS in competition with CSXT.
PAR interlines with both CSXT and PAS.



Post-Transaction
CSXT becomes half-owner of PAS.
NS's service-sensitive intermodal trains shifted away from PAS to CSXT's Southern Route.
To avoid CSXT operating PAS, B&E appointed as operator despite relationship with other New England rail lines
New CSXT single-line routes likely will attract additional traffic from PAS routes; CSXT commitment to route traffic via PAS will expire.

CP Is Not Alone In Recognizing the Impact

Applicants acknowledge that an unconditioned transaction would harm competition.

The question is whether those undertakings are sufficient to protect competition.

B. CSXT Has Structured Its Acquisition of an Interest in PAS to Avoid Any Adverse Impact on Competition

As to PAS, CSXT will acquire both Boston & Maine's 50 percent ownership interest in PAS and PAS's current contract operator and rate-setter, Springfield Terminal. By replacing Springfield Terminal with Pittsburg & Shawmut Railroad, LLC, doing business as Berkshire & Eastern Railroad ("B&E"), a GWI subsidiary, as the operator and price setter for PAS, CSXT has eliminated any potential for competitive harm that would occur if CSXT, through its acquisition of an interest in PAS or its acquisition of the PAS operator, were able to exercise control over the price of access to New England over PAS or otherwise prevent rail carriers from accessing New England through PAS. There are currently two direct routes to and from New England through upstate New York – PAS and CSXT's mainline route described earlier. Through a series of agreements with NSR and GWI, CSXT has structured the Proposed Transaction to eliminate any risk of competitive harm relating to these two roughly parallel routes.

Amended Application, Exh 12, Market Analysis at 16, APP-288..

DOJ's Analysis Finds Likely Competitive Harm

DOJ sees the contractual arrangements as magnifying competitive risks.

DOJ sees sufficient threat to competition to propose the divestiture of Pan Am's interest in PAS.

The Proposed Transaction and the Proposed Remedy

Today, CSX and Pan Am offer competing rail service between the Albany and Boston areas on parallel lines. Pan Am's service uses the PAS line, which runs through northern Massachusetts in the "Patriot Corridor," and CSX uses its own line in Southern Massachusetts. Pan Am owns the PAS line through a joint venture with Norfolk Southern Railway Co. ("NS"). A Pan Am subsidiary currently operates the PAS line service on behalf of the joint venture. The proposed transaction would give CSX both control over the operating entity on a competing line and a 50% stake in the track and physical infrastructure of that line. **This arrangement is likely to diminish competition between CSX and PAS on these parallel routes.** Additionally, the transaction may allow CSX to impair the ability of its remaining rival, NS, to effectively compete. Although NS owns, and will continue to own, the other 50% of the PAS line, CSX could potentially hamstring its rival through its stake in PAS and its control of the joint venture's operating entity. Because certain joint venture customers will purchase service attributable to NS, CSX could undermine NS notwithstanding the joint venture by sabotaging this service and expecting to recapture traffic on its independent line.³

DOJ Comments (filed Aug. 26, 2021) at 3.

The Board Has Authority to Impose Conditions

Under 49 U.S.C. § 11324(d)

Conditions can be imposed to address aspects of Transaction that pose competitive risk even if other aspects are beneficial.

subsection (d)(2).¹² Thus, when the Board determines that an aspect of a non-major transaction is likely to result in anticompetitive effects of the sort described in subsection (d)(1) (e.g., substantial lessening of competition), it may impose a condition to alleviate or eliminate those anticompetitive effects, and approve the transaction, without also determining whether the anticompetitive effects would outweigh the public interest under subsection (d)(2). Because such conditioning would remove the potential for competitive harm found under subsection (d)(1), there would be no need for a specific (d)(2) weighing of such harm against the public interest, and therefore (d)(2) would not apply in these circumstances. Accordingly, the Board will impose competition-related conditions in non-major transactions only after concluding that, absent such conditions, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade under § 11324(d)(1).¹³ As stated above, the Board may impose such conditions without also making a finding under § 11324(d)(2) that those anticompetitive effects would outweigh the overall public interest.

Bessemer & Lake Erie R.R. – Acquisition & Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y., Finance Docket No. 36347 (STB Decision No. 7 served Feb. 25, 2021) at 9.

The Board Has Authority to Impose Conditions

Under 49 U.S.C. § 11322(b)

“The Board may impose conditions governing the pooling or division...”

It is not apparent from the face of the Application or the Transaction documents why pooling authority would be necessary to effectuate the Transaction. This agency has long held that pooling authority is necessary only for arrangements between parties that would otherwise be competitors. See *Canadian Nat'l Ry, Grand Trunk et al.—Control—IL Central Corp. et al.*, 4 S.T.B. 122 (1999). Here, it does not appear that the Transaction is an arrangement between parties that would otherwise be competitors but for the Transaction. The purpose and effect of this end-to-end Transaction is merely to improve the flow of traffic interchanged between the parties over the Patriot Corridor, and Applicants have not explained how Springfield Terminal's operation of PAS under contract with that carrier could alter this purpose and effect. Parties can easily return to the Board to request approval if a pooling agreement is needed in the future.

Norfolk Southern Ry., Pan Am Rys, Inc., et al. – Joint Control & Operating/Pooling Agreements – Pan Am Southern LLC, Finance Docket No. 35147 (STB served Mar. 10, 2009) at 20.

- In *PAS-Formation*, the parties sought pooling approval under Section 11322 because they would be pooling revenue generated by PAS.
- The Board declined to grant that approval because NS and Pan Am/ST would not “otherwise be competitors.”
- That will no longer be the case.

The Board Should Act to Protect Competition

- The Board has authority to impose conditions safeguarding against Transaction-related competitive harm
- What needs to be protected?
 - ✓ Incentives to maintain competitive viability of the Hoosac Tunnel Route
 - ✓ Continued investment in the Route to keep it open as a viable through route
 - ✓ Preservation of existing service levels for PAS traffic
 - ✓ Continued incentives to offer competitive rate and service terms for PAS traffic
- Applicants suggest that the Transaction will do all of this and more, so conditions ensuring a competitive outcome ought not interfere with the Transaction's goals.

CP's Modest Competition-Preserving Conditions

- **Hold the Transaction Participants to all of their representations** relating to the competitive viability of the Hoosac Tunnel Route
- Require that the Transaction Participants **keep gateways open on commercially reasonable terms – including PAS's Mechanicville Gateway with CP**
- Require that PAS and its owners support sufficient spending on maintenance and infrastructure on to **maintain the the Hoosac Tunnel Route's physical condition at or above pre-Transaction levels;**
- Require that PAS **provide service levels (frequency, transit times, and consistency)** that are at least comparable to those provided pre-Transaction for through traffic

