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Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

cc: Parties of Record

Re: STB Docket No. FD 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

Dear Ms. Brown:

Further to the public hearings on January 13-14, 2022 with respect to STB Docket No. FD 36472, I submit the following for consideration by the Surface Transportation Board (the “Board”).

“the public interest weighs very heavily on the mind of folks, members here on the Board...and fully recognize how much the public interest plays in this decision.”

- Board Member Robert Primus: [STB Hearing – January 13-14, 2022 – Day 1](#) , 8:04:00 / 8:47:12

There were two very important issues that were raised in the hearings but not fully addressed, issues which should be thoroughly addressed by the Board prior to any approval of the CSX Transportation (“CSX”) application.

1. The first issue is insuring that the transaction is in the public interest and that it is without significant anticompetitive effects, not only for short-term, e.g., over the next couple of years, but also for the long-term, i.e., 10 years or more into the future, especially since it has been stated in the hearings that this is a “100 year transaction” and what is decided under this application could well carry on “into perpetuity”.

Background - Historically, eastbound rail freight into Massachusetts and westbound rail freight out of Massachusetts have transited via two railroad lines which were purpose built to carry a substantial amount of freight into and out of the state: (1) the former Boston & Maine railroad line across northern Massachusetts, now the Pan Am Southern line, originally from Boston, through Ayer, MA, to the west (the “Northern Route”), and (2) the former Boston & Albany railroad line, across southern Massachusetts, now the CSX line, originally from Boston MA, through Framingham, MA and Worcester, MA to the west. A substantial portion of each of these two lines was built for double track freight service, and used for heavy volumes of freight traffic in the first half of the twentieth century. Since then, as a result of freight traffic being

shifted from rail to truck with the advent of the interstate highway system, along with a decline of manufacturing in New England, many sections of at least the Pan Am Southern line have been reduced from double track to single track. Nevertheless, the fact remains that the right-of-way and roadbeds of these two lines are in place and available to handle a substantial increase east/west traffic.

The two routes were fairly competitive with each other until about 1997 when Pan Am Railways' predecessor Guilford Transportation worked with Norfolk Southern Railway ("NSR") to increase the vertical clearance of the Hoosac Tunnel¹ to enable double-stack international container trains (but not double-stack domestic container trains which require even more clearance) as well as autorack trains to run over the Northern Route. Double-stack domestic container trains have been precluded from that line not only because of tunnel height restrictions, but also because of height restrictions on a number of road bridges that cross over the railroad line.

Next, in 2010 the Massachusetts Department of Transportation ("MassDOT") announced a \$100 million transaction with CSX providing that the state (1) would provide funding for clearance improvements along the current CSX rail line from the NY state line to Westborough, MA, through a combination of raising bridges and lowering track grade beneath a range of structures, to enable double-stack domestic container trains to traverse this route², and (2) the state would purchase two rail lines from CSX. Clearance work for double-stack domestic container trains was completed within a few years.

In its application, CSX defines the "Southern Route" as comprising the CSX line east/west between the New York state line and Worcester, MA plus the north/south rail line between Worcester, MA and Ayer, MA (the "Worcester Main"). The Worcester Main consists of one single-track rail line, built with a roadbed for single track only and having only one passing siding less than 4,000 feet long. It crosses the Wachusett Reservoir, and for at least the last several years has handled only one northbound and one southbound train per day.

Before reading further, turn to ATTACHMENT 1, click on the video links for "Route 1" and then click on the video links for "Route 2". Ask yourself, "which Route looks much more capable of handling large volumes of freight traffic and more than four trains per day without a significant capital investment to increase capacity?"

The links for Route 1 are taken at various points on the single track Worcester Main between Ayer, MA and Worcester, MA on the Southern Route, while the links for "Route 2" are for videos taken at various points along the Northern Route.

Regarding clearance limitations preventing double-stack domestic container trains from running on the Northern Route, the State of Massachusetts and the Federal Government have recognized the public interest of removing these obstacles, just as they recognized a few years ago the importance of removing them from CSX's east-west rail line in southern Massachusetts. To that end, there is a project underway by the State of Massachusetts and supported by the Federal Railroad Administration (FRA) called the "Patriot Corridor Double-Stack Initiative Project" (the "Project") (see <https://www.mass.gov/info-details/about-the-patriot-corridor-double-stack->

¹ See <https://www.cmrpc.org/sites/default/files/Documents/Trans/Chapter%20III-D%20Freight.pdf>, p. III-129

² See http://archive.boston.com/news/local/massachusetts/articles/2010/06/16/much_is_riding_on_worcester_rail_deal/

[clearance-initiative-project](#) and <https://www.mass.gov/doc/patriot-corridor-double-stack-clearance-initiative-fact-sheet-winter-2021/download>). The objective of the Project is to enable railroads to operate double-stacked domestic containers trains along the existing 155 mile long freight railroad corridor known as the Pan Am Southern (“PAS”) railroad Freight Main Line, i.e., the Northern Route. The FRA sees this Project as an investment in long-distance rail freight service in New England and New York. There are 2 tunnels and 21 bridges and on the corridor that are too low for trains to carry double-stacked containers. The Project would raise the height of bridges and tunnels or lower the railroad tracks so these freight trains can use the line. MassDOT and PAS received funding from the FRA to collect data, develop a preliminary design, and prepare and file environmental documents.

Clearly, a key factor for Project progress and completion will be the pro-active support from both CSX and NSR, owners of Berkshire & Eastern Railroad (“B&E”) which would be the successor to PAS. If CSX does not commit to proactively supporting the Project, including providing its share of the requisite funding in a timely manner to ensure that the Project is completed in a timely fashion, the Project could die, or at least be delayed for years.

The killing or delay of the Project would be a substantially anti-competitive event and clearly against the public interest as it would prevent shippers who move freight into and out of Northern New England from having two routes across Massachusetts for double-stack domestic container trains. It also would be detrimental to the objective of shifting long-haul freight from truck to rail.

Note also that CSX Executive Vice President of Operations Jamie Boychuk stated that the Northern Route has a better grade and less mileage compared to the Southern Route, and is more cost-effective than the Southern Route (which includes the Worcester Main) which requires extra locomotives and another crew (see [STB Hearing – January 13-14, 2022 – Day 1](#) , 5:27:32 / 8:47:12).

Future Anti-Competitive Issues – In its application CSX proposes that, due to current double-stack domestic container clearance issues on the Northern Route, one westbound train per day and one eastbound train per day to and from Ayer will be diverted from the Northern Route to the Southern Route (the “Diverted Traffic”).

The rationale is that it reduces the cost to NSR because it avoids the need for trains with double-stacked domestic container trains to go through a “filet and toupee” operation at Mechanicville, NY. In such an operation, the top containers of Massachusetts-bound double-stack, intermodal trains need to be removed (i.e., “filleted”) in order to permit the trains to fit through the Hoosac Tunnel, and on the return trip, single-stack trains need to stop in Mechanicville to have containers placed on top, or a “toupee,” before heading west. This results in significant additional expenses and time delays in getting the trains to their destinations. Currently, the trains affected are NSR trains.

Because of this additional expense, NSR has negotiated with CSX an arrangement whereby NSR double-stacked domestic container trains would be diverted to CSX’s Southern Route. While providing a financial benefit to NSR by enabling it to avoid the “filet and toupee” operation at Mechanicville, NY, this diversion of freight traffic also provides substantial financial benefits to CSX, as CSX would garner 100% of the revenue by having the trains run on its Southern Route instead of having to split revenue 50/50 with NSR (this revenue shift referred

to herein as the “CSX Revenue Shift”). This therefore provides a substantial disincentive for CSX to proactively support The Patriot Corridor Double-Stack Clearance Initiative Project.

There are three aspects here for the Board to follow-up on.

The first aspect is the concern is that of the Board essentially codifying what would be a significant disincentive for CSX to support tunnel clearance and “Patriot Corridor Double-Stack Initiative Project”. Should the Board approve the CSX application in its current form, CSX would have a significant long-term disincentive to pay for tunnel clearance work, because of the “CSX Revenue Shift”³.

Under the current application, since CSX could opt to not pay for its share of the tunnel clearance work, or to drag out the time period for that work to be completed, CSX effectively would have veto power to block that work, killing or at least substantially delaying the Project, thereby blocking a major opportunity to open up rail competition for shippers, and blocking the opportunity to shift a substantial additional amount of freight onto rail from trucks.

It is notable that whenever Board Chairman Oberman attempted to get an answer from the CSX side about the extent of CSX’s intention to support resolving the tunnel clearance issues, the CSX side deflected and never addressed the issue – see ATTACHMENT 2.

So if the Board were to approve the application in its current form, it essentially would be codifying a significant disincentive for CSX to support any tunnel clearance and the “Patriot Corridor Double-Stack Initiative Project”.

The second aspect is that, even assuming the Board addresses the aspect just discussed by putting in a condition to help ensure that CSX⁴ through B&E provides the capital to finance the tunnel height increase and completes that work in time to coincide with completion of the remainder of the “Patriot Corridor Double-Stack Initiative Project”, there is the question of what will be left of the Northern Route, the current Pan Am Southern route, prior to completion of the Project.

Despite the fact that in the first day of the hearing CSX and B&E repeatedly stated that they intend to keep what is now the Pan Am Southern as a “viable” railroad, the revised CSX application⁵ shows traffic on the Northern Route under the new ownership declining anywhere from 24% to 48%, with a significant part of the decline being accounted for by the Diverted Traffic.

While representatives of B&E in the hearings also essentially said that B&E would make every effort to increase the number of freight cars shipped on the Northern Route by adding shippers along that route, in reality it does not seem likely that this will result in any significant increase in freight traffic.

³ It is much more likely that NSR would be willing to pay its share of the tunnel clearance work, since NSR could then move its substantial container traffic back from the Southern Route, where it collects 0% of the revenue, to the Northern Route, where it collects 50% of the revenue.

⁴ and NSR, if the Board has the authority to make requirements of NSR

⁵ dated July 1, 2021, Attachment 2, page 218 of 1262

One can count on two hands the number of potential new shippers across that 155 mile long line route, and that count is probably a stretch. Further, it is questionable whether any potential new shippers would provide a meaningful additional number of cars per day, or per week, for with perhaps the exception of a one or two potential distributors near the intermodal facility in Ayer, MA, there are essentially no major manufacturers or distributors along the Northern Route, nor are there expected to be any. This is known by anyone who has even remotely followed Pan Am Southern over the last several years.

And while in its filing CSX indicates that for some undefined “transitional period” after the transaction, which could be a couple of years or a couple of months, it will reroute some general merchandise traffic to the Northern Route from the Southern Route and the Worcester Main, it seems highly likely that after that “transitional period”, much of this traffic would be returned to the Worcester Main because of the CSX Revenue Shift discussed above, further reducing freight traffic on the B&E.

So given that (1) rail traffic along B&E’s Northern Route is expected to decline by up to 48%, (2) B&E has minimal opportunity to increase rail traffic from businesses along the Northern Route, (3) B&E will have to meet certain financial and metrics in order to maximize its profitability, and (4) railroads routinely remove track and convert double track lines to single track lines when traffic declines significantly so as to maximize profitability, the question is what will be left of the Northern Route several years from now when the “Patriot Corridor Double-Stack Initiative Project” is completed?

Rail infrastructure required for a “viable” rail line with one level of traffic can be quite different than the rail infrastructure required for a “viable” rail line with half that level of traffic. Will sufficient rail infrastructure be left on the Northern Route to handle the increased freight traffic expected once the “Patriot Corridor Double-Stack Initiative Project” is completed?

The Board needs to ensure that the Northern Route will have sufficient rail infrastructure in place to handle these volumes once the “Patriot Corridor Double-Stack Initiative Project” is completed.

The third aspect is the question future capacity limitations on the “Worcester Main” the portion of the Southern Route between Ayer, MA and Worcester, MA. This line is only single track almost the entire way, except for a small siding of less than 4,000 feet in Clinton, MA which is not adequate to handle any of the 9,000 foot trains CSX says it plans to run on that line. Its roadbed was built to handle only single track, not double track, and the line crosses the Wachusett Reservoir. This line in recent years has handled only one general merchandise train each way per day. Granted, CSX has stated that it plans to upgrade the Worcester Main to 25 mph, but it still will be a single track on a single track roadbed with no significant passing siding. What are the ramifications of this line’s capacity being maxed out in the future?

In its July 1, 2021 filing, CSX states it will add one NSR train each way per day handling the Diverted Traffic of intermodal and autorack freight cars, so traffic on the Worcester Main will increase. CSX also indicates that after some undefined “transitional period”, which could be a couple of years or a couple of months, general merchandise traffic that it will initially reroute to the Northern Route from the Worcester Main would be returned to the Worcester Main. So one can expect more traffic on the Worcester Main from that source.

And then there is the consideration of how many trains CSX might add to the Worcester Main per day assuming its various growth initiatives in Northern New England pan out. In its presentation of January 13, CSX stated that it expects growth in forest product traffic, such as printing paper and lumber, moving south from Maine to the New York area (see [STB Hearing – January 13-14, 2022 – Day 1](#) , 3:06:30 / 8:47:12). It also expects growth in LPG traffic and other energy traffic between Maine and locations south of Massachusetts, both northbound and southbound (see [STB Hearing – January 13-14, 2022 – Day 1](#) , 3:17:12 / 8:47:12). It also expects growth municipal and construction solid waste (see [STB Hearing – January 13-14, 2022 – Day 1](#) , 3:20:59 / 8:47:12) moving out of Massachusetts⁶. So here again, much more traffic can be expected on the Worcester Main line in the future.

Further, given that approx. 50% of the traffic on the entire CSX system is container traffic⁷ and CSX’s focus on container and intermodal traffic, it is highly likely that CSX will, given its marketing expertise and extensive rail system, seek to substantially grow its container/intermodal traffic in New England. For example, it might convert a portion of Pan Am Railroad’s significantly underutilized rail yard in S. Portland, ME into an intermodal terminal. What route would be used to move that incremental container/intermodal traffic into and out of Massachusetts? Clearance issues aside, it seems clear that CSX would direct that traffic to the Southern Route, due to the CSX Revenue Shift, which would take up even more capacity of the Worcester Main.

And this does not even consider potential future passenger traffic on that line – see below.

So with all of this future traffic on the Worcester Main, at what point does it reach capacity resulting in a bottleneck? And once that bottleneck occurs, how will CSX react? It seems that given the CSX Revenue Shift, CSX would be inclined to expand capacity on the Worcester Main, by extending and/or installing new sidings and/or by expanding the roadbed and adding a second track on a line where the roadbed was only built for single track. This undoubtedly would result in opposition from communities along the track, as well as increased concern about the Wachusett Reservoir.

Another alternative, of course, is to start putting more traffic onto the Northern Route, which gets back to the previous aspect of the level of rail infrastructure kept on that route.

CSX may respond that it is not necessary for the Board to investigate this issue further now because there is sufficient capacity on the Worcester Main for the “foreseeable future”, however that may be defined, but as has been said repeatedly in the hearings, this transaction is a “hundred year” transaction. Therefore, the Board should consider the needs of all stakeholders of that line for not just the next two or three years but for 10 years, 20 years and more into the future.

⁶ Note that the CSX filing states that the gross ton-miles per year on the Worcester Main segment of the Southern Route will increase 67% on a net basis as a result of the addition of the pair of NSR intermodal/ automotive trains and the reduction of carloads that CSXT moves today on that line segment that will be moved post-transaction on the Northern, and this excludes any traffic growth mentioned above.

⁷ See https://s2.q4cdn.com/859568992/files/doc_downloads/volume_trends/2022-Week-2-AAR.pdf

2. The second issue is preventing CSX from blocking passenger service on the rail line between Ayer, MA and Worcester, MA in the future

In the 1990s, local passenger service in Massachusetts was at or near its all-time low as the only such service was commuter service to the Boston suburbs within about 40 miles of Boston. No longer was the Worcester Main used for local passenger traffic as had been the case years before. No longer was the Worcester Main used for long distance passenger traffic for (seasonal) passenger trains with direct service between New York City and the State of Maine as it had been decades earlier. The primary form of passenger transportation outside of the Boston area was the automobile. Interstate rail transportation was extremely limited; in the 1990s, the Downeaster train between Boston had not been initiated.

Times have changed. Because of traffic congestion on the roads, among other things, over time commuter train service from Boston has been expanded to towns approx. 60 miles from Boston, the Downeaster was initiated in 2001, and it has just been announced that passenger service will begin this summer on the Berkshire Flyer route between New York City and Pittsfield, MA⁸.

More and more, passenger service options in Massachusetts are being pursued, e.g., service from the western Massachusetts towns of North Adams and Greenfield to Boston⁹, service to Pittsfield, MA from Boston¹⁰, and service between New Hampshire and Boston¹¹.

Another route that has been seriously considered in the past, and undoubtedly will be again in the future, is a passenger route between Ayer, MA and Worcester, MA. This would be the only north/south commuter route in central or western Massachusetts. Indeed, the MBTA started to pursue the ability to use this line for passenger traffic in the past, but put off pursuing it at the time due to other priorities¹².

Currently, if an individual wants to make the 30 mile trip from Ayer to Worcester, or vice versa, by rail instead of by automobile, one would have to take a 103 mile trip taking a minimum of 3 hours¹³. Given the travel time, travel distance and cost of taking that circuitous rail route via Boston, and the increased interest of using rail transportation as a substitute for the automobile, it is highly likely that a direct passenger route between Ayer and Worcester will be proposed again at some point as it would be a substantially shorter trip in mileage and time (and a lot less costly) and finally provide a north/south passenger route in central Massachusetts.

Under the current CSX proposal, it is possible that at some point in the next few years that freight traffic growth on the Worcester Main would max out the line's capacity, in which

⁸ See https://www.berkshireeagle.com/news/local/railroad-oks-new-york-city-to-pittsfield-passenger-service/article_a0c65e3a-748e-11ec-859a-dbc03e87fce7.html

⁹ See <https://www.mass.gov/northern-tier-passenger-rail-study>

¹⁰ See https://www.berkshireeagle.com/news/local/infrastructure-bill-mass-dot-study-could-help-massachusetts-with-east-west-rail/article_2b90361c-4bc7-11ec-ad34-2bc8bdeb8477.html

¹¹ See <http://indepthnh.org/2021/01/04/commuter-rail-plan-to-connect-southern-nh-with-boston-chugging-along/>

¹² See <https://www.ble-t.org/pr/news/headline.asp?id=30505>

¹³ Currently, if an individual wants to make the 30 mile trip from Ayer to Worcester, or vice versa, by rail instead of by automobile, one would have to take a 103 mile trip taking a minimum of 3 hours (excluding transfer time between train and subway stations and costing \$26.90 in total) instead of 30 miles trip which would likely be closer to half an hour assuming CSX upgrades the line to 25 mph as it plans to do. In particular, it would require a 1 hour commuter train ride to travel 30 miles from Ayer, MA east to Porter Square in Boston, MA (at a cost of \$12.25), then a ½ hour subway ride to travel another 30 miles to South Station in Boston, MA (at a cost of \$2.40), and then a 1 hour and 40 minute commuter train ride to travel 43 miles from South Station to Worcester, MA (at a cost of \$12.25).

case CSX would probably argue at that point that there is no capacity on that line for passenger traffic.

CSX has repeatedly said in the hearings that it is willing to work with various passenger organizations to enable passenger traffic on its system. Given the critical route the Worcester Main will be for passenger service in the future, the Board should consider putting in a condition preventing CSX from blocking passenger service on this line in the future.

3. Recommendations

None of the recommendations herein would require structural changes to the proposed transaction. What these recommendations would accomplish is helping CSX to avoid provisions of their current application which are, in the long-term, both anti-competitive and against the public's best interest.

As is widely agreed, the proposed transaction should bring significant benefits through capital investment, more modern management practices, more dependable service, etc. Shippers roundly support the transaction because of the obvious short-term benefits.

But if shippers were to become aware that this transaction currently has baked into it a disincentive for CSX to support getting the Project and associated tunnel work completed as soon as possible, resulting in shippers having to incur larger shipping costs than necessary in the long-term, their support would probably be less strong. Completion of this Project is clearly in the public interest and will benefit shippers moving freight into and out of New England.

Recall also, as mentioned above, CSX Executive Vice President of Operations Jamie Boychuk stated that the Northern Route has a better grade and less mileage compared to the Southern Route, and is more cost-effective than the CSX Southern Route (including the Worcester Main) which requires extra locomotives and another crew.

If CSX were to decide not to support the Project or decide not to provide funding for its share of the cost, the Project probably will not happen. CSX has mentioned multiple times during the hearings that this transaction is a "hundred year transaction", and that whatever transactions is approved will be in essence for perpetuity. This means that the Board has only one opportunity to resolve this issue.

The Board should seriously consider adding a condition which requires CSX to commit to working with the relevant government agencies to ensure that all tunnel clearance work for the two tunnels is completed by the time that the other aspects of the "Patriot Corridor Double-Stack Initiative Project", i.e., work on road bridge clearance, is completed, and to fund its share of the tunnel clearance cost. Doing this would be in the public interest, shippers would benefit over the long-term and it would be a key factor in helping to shift freight to rail from trucks over the long-term.

Similarly, if passenger rail groups, commuter and regional/long-distance, were to become aware that this transaction has baked into it measures that significantly reduce or eliminate the future possibility of using the Worcester Main for local commuter traffic between Ayer, MA and Worcester, MA, or for direct long distance (perhaps seasonal) passenger traffic from New

York City to Maine bypassing Boston, as was the case years ago, these groups would probably be less supportive of the transaction.

Thus, with respect to Worcester Main line between Ayer, MA and Worcester, MA, the Board should seriously consider adding a condition preventing CSX from blocking use of this line for passenger service in the future. Doing this would be in the public interest and would be a key factor in helping to shift passenger traffic to rail from automobiles over the long-term. It would also help prevent the Board in the future from having to deal with a dispute similar to the current dispute it now has to deal with between Amtrak and both CSX and NSR in New Orleans.

Finally, the Board may want to consider what conditions, if any, need to be added to help ensure that the Northern Route will be capable of handling the increased level of freight traffic expected once the "Patriot Corridor Double-Stack Initiative Project" is completed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Bruce P. Fogwell, Jr.", with a stylized flourish at the end.

Bruce P. Fogwell, Jr.
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ATTACHMENT 1

Which of the two following routes look like the most capable of being a railroad gateway for traffic to and from northern New England, i.e., northeastern Massachusetts, New Hampshire and Maine?

Route 1: Timetable East to West, Direction North to South

Harvard, MA

<https://www.youtube.com/watch?v=6QxWBbOeDgQ>

Lancaster, MA

<https://www.youtube.com/watch?v=F4s-3ny9apQ&t=66s>

Clinton, MA

https://www.youtube.com/watch?v=mC5_T4EmT3Y&t=117s

Northern Worcester, MA

<https://www.youtube.com/watch?v=abvckOh7snc&t=60s>

Route 2: Timetable East to West, Direction East to West

Fitchburg, MA

<https://www.youtube.com/watch?v=iMz2WYtMce4&t=42s>

Wachusett, MA

<https://www.youtube.com/watch?v=spndEKHJ0g>

Eastern Westminster, MA

<https://www.youtube.com/watch?v=gubZ33ufcUI>

Western Westminster, MA

<https://www.youtube.com/watch?v=yVibAjMwmNQ>

Gardner, MA

<https://www.youtube.com/watch?v=K26krBHWGxQ&t=30s>

Parker's, West of Gardner, MA

<https://www.youtube.com/watch?v=Du8t-Ny3Cig&t=193s>

Royalston, MA

<https://www.youtube.com/watch?v=G8FKMHDNRal&t=75s>

Athol, MA

<https://www.youtube.com/watch?v=jbJl6InYbfc&t=1s>

Orange, MA

<https://www.youtube.com/watch?v=rPOT-Mm8nd0>

Erving, MA

<https://www.youtube.com/watch?v=lqLHWaIU4A0&t=76s>

East Deerfield, MA – the East Deerfield Rail Yard, a major rail yard on Pan Am Southern which is much larger than the yard at Ayer, MA. While some may dismiss it as a “flat switching” yard, it in fact has a natural geographic downward slope for gravity switching instead of an artificially built “hump” as at the CSX yard in Selkirk, NY. CSX essentially ignored discussing the East Deerfield Rail Yard in the hearings.

<https://www.youtube.com/watch?v=YeOnfFbBr2E>

ATTACHMENT 2

The following is an unofficial transcript of a portion of the discussion between the Board and CSX relating to potential investment by CSX into B&E. It is interesting to note how every time Surface Transportation Board Chairman Oberman attempted to have CSX address the possibility of CSX supporting an increase in tunnel height on the Northern Route to enable double-stack domestic container trains, the CSX side deflected the discussion away from that topic by (1) redirecting the discussion to generally how B&E would make investment decisions with available B&E capital, (2) conflating the question with a new topic that had not been raised, i.e., the risk that CSX would act irrationally (the “Non-Issue”), or (3) by redirecting the discussion to the question of a need for a fiduciary.

[STB Hearing – January 13-14, 2022 – Day 1](#) , 4:36:00 / 8:47:12

Board Chairman Oberman asks the following question about CSX’s willingness to invest in projects for the Northern Route, which anyone knowledgeable about the situation should know implicitly includes the question of whether CSX would support funding its share of the aforementioned tunnel clearance.

Board Chairman Oberman: “(The B&E) LLC agreement provides that both CSX and NS will have representatives on the PAS management committee ‘responsible for amending PAS’s investment policy, setting the budget, incurring indebtedness and making capital calls.’ ...If the occasion were to arise where it was in CSX’s interest to devote resources to the Southern Route and to let the Northern Route deteriorate, if CSX has got veto rights over budgets and capital expenditures and so forth, how are we protected, we being the public from such an outcome two, three years from now when the world will change, or ten years from now?”

Sean Pelkey, CSX Vice President and Acting Chief Financial Officer responds, but clearly does not address the question of whether CSX will provide the funding to B&E for tunnel clearance. Presumably this is because under the current application, without tunnel clearance work, a substantial amount of rail traffic will be diverted from the Northern Route (the “Diverted Traffic”) to the Southern Route, which, as discussed above, provides CSX with a clear disincentive as it relates to providing the funding (the CSX Revenue Shift).

Instead, he deflects the discussion by talking generally about how capital investment decisions would be made by using capital already available to B&E.

Sean Pelkey, CSX VP & Acting CFO: “...in terms of capital expenditures specifically, on Pan Am Southern, while we do have a 50% vote and while I do envision that reasonable parties across that management committee will come to a good agreement about what capital to invest in the line, we’ve agreed that in the event that there is any dispute that lingers over our view versus Norfolk Southern’s, that we would submit it to accelerated arbitration and that arbitration would be using the standard of an independent investor in that line who wanted to maximize its return. We’d be subject to whatever that arbitration came out with and that would be the capital budget that would be set.”

The Board Chairman Oberman then tries to return the discussion to the question of whether CSX is prepared to promptly fund its share of the tunnel clearance costs.

Board Chairman Oberman: "...Obviously, right now, NS has an interest, for example, in raising the height of that Hoosac Tunnel. CSX has a completely different motivation. I don't think that you can change that. The day could come, could be a P-3 with the State of Massachusetts or some other interest in investing in that Hoosac Tunnel and CSXT may have no interest at all in spending money on that, and everything has to stop while it goes into arbitration."

Mr. Pelkey again avoids addressing the issue. He talks about "the best interest of Pan Am Southern", but if CSX is a 50% owner of what is now Pan Am Southern and is against financing the tunnel increase, CSX is essentially dictating what is the best interest of B&E. A CSX veto any such investment would not be in the best interest of shippers shipping freight into and out of New England.

Sean Pelkey, CSX VP & Acting CFO: "We have agreed to support any kind of public funding proposal that Pan Am Southern agrees is in the best interest of Pan Am Southern to put forward to that specific point."

Then a CSX Attorney continues the deflection.

Peter Denton, CSX Attorney: "...I think we've set out in the record how CSX is incentivized to keep the PAS Patriot Corridor viable. So when you said that CSX wouldn't have an incentive to repair the Tunnel or to..."

Board Chairman Oberman again tries to return the discussion to the issue of CSX supporting increasing the tunnel clearance.

Board Chairman Oberman: "Not to repair it, but to make it available for double stacks. It doesn't need it, its got the Southern Route."

Anthony LaRocca, CSX Attorney, then enters the conversation and deflects the conversation again by focusing on the short-term, i.e., the period before the period before the "Patriot Corridor Double-Stack Initiative Project" is completed, not the long-term after the Project is completed. He deflects the discussion away from the long-term public benefits of increased competition which would result from the Project. He also suggests that the cost of increasing the tunnel clearance would be entirely borne by the public, by taxpayers, which is not true. Railroads paid for a substantial portion of the cost of increasing Hoosac Tunnel height clearance in the past¹.

Anthony LaRocca, CSX Attorney: "NS doesn't need it (the increased tunnel height clearance) either now. That's really the beauty of this. When you think about it from the social policy economic perspective, would it make sense to spend the magnitude of millions of dollars, double stack that several mile long tunnel, or to run those double stack trains over trackage rights? I think from a perspective of the public who ends up having to pay for all of these costs, the solution that we have come up with is a far more efficient one and one that is going to benefit competition and the public far more than just spending more money on something that isn't not needed."

Board Chairman Oberman again attempts to return the discussion to the question of whether CSX is prepared to promptly fund its share of the tunnel clearance costs.

Board Chairman Oberman: "Well, for the moment it's not needed, but NS is topped out at one 9,000 foot train each way, and if intermodal grows, the day may come when they

may need more. If the funds were available they may well find it to their business advantage to keeping the Hoosac Tunnel and not have to rely on trackage rights because they own half the railroad. So I just don't know in the long-term you can assume that the motivations will be the same and that is the reason I think that the DOJ has urged divestiture to avoid ever having to be put into that conflict and I am trying to ferret out here how you come if not equal to the incentives in a divestiture at least close enough to satisfy the public interest, that's what I am trying to explore here."

Anthony LaRocca, CSX Attorney, once again diverts the conversation away from the question of whether CSX would support increasing tunnel clearance, this time by conflating it with an answer to an issue that heretofore had not been asked, i.e., what if CSX were to act irrationally against its own interest (the "Non-Issue"). Clearly, Mr. Oberman is not concerned about CSX acting irrationally, he is concerned about CSX acting rationally by vetoing investment to increase tunnel height clearance in order to protect traffic that under the CSX application would be diverted to its Southern Route from the Northern Route (the CSX Revenue Shift).

Anthony LaRocca, CSX Attorney: "In a balance, Mr. Chairman, think of the risks that you are contemplating here, and compare the risks. The risk here of an inappropriate decision by CSX to not fund an investment that would otherwise make sense, that's one risk on one hand. On the risk on the other hand is that the whole deal goes away and all of the modernization that we have been talking about goes away. You have to be considering the relative risks here. On the first risk, I don't even think that that's much of a risk, but if it were, that is if CSX would do something that is not economically rationale, but if it were, the point is we have established a backstop, we have established a remedy that is not perfect but it would be effective and it would be a way of addressing that risk, and so I think it's important to weigh the relative benefits that you get by divestiture or the relative risks that you would get if you were to require divestiture compared to the relative risk that CSX who uses this line for a substantial amount of traffic is going to make an uneconomic decision and I don't think that there is really much of a comparison there between those two concerns."

Once again, the Board Chairman tries to get the conversation back to the subject at hand.

Board Chairman Oberman: "Tony, I think the question is, that I'm focused on, is given the fact that CSX has a parallel line which it owns 100% of, the day may come when it may well make economic sense for CSX to not want to invest further in PAS and that is what we are focused on here, so yes I don't assume that CSX will shoot itself in the foot someday but it may well be in CSX's selfish interest to not make the same commitment that NS might, or some other independent owner, that's what I am trying to get at, and the solutions, the structural solutions that have been proposed strike me as being somewhat awkward, either to stop what you are doing and go into arbitration, or the ones you've suggested that you don't like, and that is to have a fiduciary come in and make these decisions. I for one am trying to figure out how you put a fiduciary in the same, how you instill in a fiduciary the same incentives to make business decisions as an actual owner and entrepreneur would be. And contrary to popular belief, I believe in the entrepreneurial system and the free market, and I think there is nothing like having an ownership interest in it that motivates you to make the best economic decisions and so we're, but yet we're trying to leave CSX in kind of a dual position, an owner but the

person who is gonna to make the decisions isn't an owner. I just find it problematic to figure out how this is actually going to protect the public interest in the long run. I'm not saying it can't, I'm trying to explore it."

And once again, CSX Attorney LaRocca deflects the conversation by conflating with the "Non-Issue" and talking about a fiduciary.

Anthony LaRocca, CSX Attorney: "That's why we favor the, we don't favor the fiduciary. We think it would be a way of dealing with, if you really believe that the risk was untakeable, that CSX will do something irrational, then that's a solution. We don't like it. We don't think it's necessary. We think as an owner, CSX is going to make decisions in the interest of an owner of this line. And while you are absolutely right, we do have the Southern line, most of the traffic that we use, that we run on PAS, is local PAS. We don't serve, most of that traffic is not served, cannot be served directly from the Southern line. So we will have the same incentives that an owner, an independent owner would have to keep this line viable. And that's why we don't favor the fiduciary approach. It's one that we put out there if you really don't believe we are capable of acting rationally but we don't think that that's the right approach either. We think that we have the correct incentives to keep his line operational, viable and indeed better served than it is today."

Then the other CSX Attorney continues the deflection.

Peter Denton, CSX Attorney: "Mr. Chairman, there is a reason why CSX traffic runs on PAS today. And that reason will remain post transaction. This traffic isn't, we're not just moving it on PAS because it is good for PAS right now, we're doing it because it is the most efficient way to run this traffic and that's not going to change after the transaction. The traffic flows will remain the same."

With the Mr. Oberman's question successfully deflected, i.e., CSX not having addressed the Chairman's question of whether CSX is prepared to back the tunnel clearance increase, the conversation moves on to other issues.