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January 21, 2022

VIA E-FILING

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Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E. Street, S.W., Room 1034
Washington, D.C. 20024

ENTERED
Office of Proceedings
January 21, 2022
Part of
Public Record

Re: 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:

We represent National Railroad Passenger Corporation (“Amtrak”) in the above-referenced proceeding. Enclosed please find the Post-Hearing Brief of National Railroad Passenger Corporation.

Thank you for your attention to this matter. Should you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ Sophia Ree

Sophia Ree

Enclosure

cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**POST-HEARING BRIEF OF
NATIONAL RAILROAD PASSENGER CORPORATION**

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**POST-HEARING BRIEF OF
NATIONAL RAILROAD PASSENGER CORPORATION**

In accordance with Decision No. 8 (served January 18, 2022), the National Railroad Passenger Corporation (“Amtrak”) hereby submits its post-hearing brief to supplement the testimony of Amtrak’s panelist, Dennis Newman, Executive Vice President for Planning and Asset Development, who testified before the Board on January 14, 2022.

Status of Amtrak-Requested Conditions

On January 12, 2022, CSXT filed a letter with the Board (CSXT/PAR-51) advising that it has agreed to “Condition Nos. 1-5 and 7 as requested by Amtrak in the final brief filed by Amtrak in this proceeding on January 3, 2022, as the conditions relate to the PAR System and the existing CSXT network.” Amtrak is gratified by CSXT’s agreement to these conditions and respectfully joins in CSXT’s request for the STB to “impose as conditions to the STB’s approval of the Merger Transaction” those conditions.

Amtrak's requested Condition No. 6 pertains to the operation of the seasonal weekend *Berkshire Flyer* service between Albany, New York and Pittsfield, Massachusetts. Since the hearing, Amtrak and CSXT have reached an agreement that will allow for operation of the *Berkshire Flyer* in 2022 and 2023. Therefore, there is no longer a need for the Board to resolve this issue.

The only remaining issue with respect to Amtrak's requested conditions is whether the conditions CSX has asked the Board to impose – Condition Nos. 1-5 and 7 – should apply to Pan Am Southern ("PAS") and to CSXT rail lines that are not part of "the existing CSXT network," both of which CSXT excluded in its January 12 letter. At the hearing, CSXT and NS advised the Board that, since NS is a 50% owner of PAS, NS's consent would be required with respect to imposing conditions on PAS. In discussions since the hearing, NS has not been willing to agree to imposition on PAS of all of the conditions to which CSXT has agreed.

Amtrak therefore renews its request that, if the Board approves the Pan Am acquisition, Conditions No.1-5 and 7¹ be made applicable to PAS, and that there be no exclusion for CSXT rail lines that are not part of "the existing CSXT network." Amtrak sees no reason to have two different sets of conditions applicable to a single Board-approved control transaction. Neither CSXT nor NS has offered any reason for excluding PAS, the operator of rail lines significantly impacted by the acquisition over which Amtrak operates and a party to this proceeding, from the conditions to which CSXT has agreed. Nor has CSXT offered a justification for limiting conditions applicable to its lines to its existing network.

¹ These conditions are set forth at pages 8-11 of Amtrak's Final Brief dated January 3, 2022.

The Board's Conditioning Power

During the hearing, the issue of whether the Board has authority to impose passenger rail-related conditions on a transaction being reviewed under 49 U.S.C. § 11324(d) was raised. Amtrak believes that the language of the statute and Board and judicial precedents make clear that the Board has such authority.

Since the proposed transaction does not involve the merger or control of two or more Class I railroads, it is governed by 49 U.S.C. § 11324(d) rather than 49 U.S.C. § 11324(b), which applies to major transactions. The Board has stated that under Section 11324(d) its “primary focus is on the anticipated competitive effects.”² However, 49 U.S.C. § 11324(c), which states that the Board “shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest,” also provides that the Board “may impose conditions governing the transaction.”

In *Village of Barrington v. Surface Transp. Bd.*,³ the Court of Appeals relied upon Section 11324(c) to uphold a Board decision to impose environmental conditions “unrelated to competition concerns” on a proposed acquisition governed by Section 11324(d).⁴ The court rejected the applicants’ argument that the Board was prohibited from imposing conditions other than those related to competition in an 11324(d) acquisition. It found that the Board reasonably interpreted subsection (c), which gave the Board “extraordinarily broad conditioning authority,”⁵ as applying to all proposed merger and control transactions, and stated that:

² *Soo Line Corporation—Control—Central Maine & Quebec Railway US Inc.*, STB Finance Docket No. 36368 at 4 (served May 4, 2020).

³ *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650 (D.C. Cir. 2011).

⁴ *Ibid.* at 653.

⁵ *Ibid.* at 661.

Congress obviously knew how to limit the Board's authority to either one or the other since it did so in subsections (b) and (d). Subsection (b) applies to all mergers 'which involve[] the merger or control of at least two Class I railroads,' while subsection (d) applies to all mergers 'which do [] not involve the merger or control of at least two Class 1 railroads.' By contrast, subsection (c) applies to all 'transaction[s] under this section' and 'this section,' i.e., section 11324, covers all mergers both 'major' and 'minor.'⁶

The Court of Appeals also rejected arguments that Congress had implicitly repealed or amended subsection (c) when it later enacted subsection (d).⁷ It concluded that, under the Board's statutory interpretation it upheld, the only "constrain[t]" on the Board's "conditioning authority" in a subsection 11324(d) transaction was "subsection (c)'s broad 'public interest' standard."⁸

In accord with the D.C. Circuit's ruling, the Board has recently reaffirmed that its "subsection (c) conditioning authority" is not limited to "the criteria for approval/disapproval under section (d)."⁹ In *Bessemer and Lake Erie Railroad – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc.*, the Board stated that:

[Section 11324(d)] requires that the Board 'shall approve' an application 'unless' both (d)(1) and (d)(2) hold true, but it does not require that such approval be without conditions or subject only to certain types of conditions. 49 U.S.C. § 11324(d). Under the plain language of the statute, therefore, it is only the Board's authority to *deny* approval that is constrained by both (d)(1) and (d)(2); there is no such constraint on its authority to *approve with conditions*.¹⁰

If the Board was required to rubber stamp 11324(d) transactions harmful to the public interest without imposing conditions, the implications would not be limited to passenger rail.

⁶ *Ibid.*

⁷ *Ibid.* at 661-62.

⁸ *Ibid.* at 664.

⁹ *Bessemer and Lake Erie Railroad – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc.*, STB Finance Docket No. 36347, Decision served Feb. 25, 2021 (*B&LE*) at 8.

¹⁰ *Ibid.* at 9 (emphasis in original).

The Board would also be barred from imposing conditions necessary to ensure safe operation of the rail lines affected by the transaction, since 11324(c) provides the only statutory authority for the Board to do so. That would make unlawful the provision in the Board’s Safety Integration Plan Regulations, 49 C.F.R. § 1106.4(b)(4), specifying that the Board will require compliance with Safety Integration Plans “as a condition to its approval” in transactions, such as CSXT-Pan Am, that involve the amalgamation of operations of a Class I and a Class II railroad. Adopting a strained interpretation of the pertinent statutory language in a way that produced such a result would be unfathomable.

With respect to Amtrak, the holdings in *Barrington* and *B&LE* that the Board has broad authority to impose conditions to protect the “public interest” is consistent with the Biden-Harris Administration’s Executive Order EO 14036 issued on July 9, 2021.¹¹ That Executive Order urged the Board “to ensure that passenger rail service is not subject to unwarranted delays and interruptions in service due to host railroads’ failure to comply with the required preference for passenger rail.” It also encouraged the Board to “consider a carrier’s fulfillment of its responsibility under 49 U.S.C. 24308 (relating to Amtrak’s statutory rights)” in “determining whether a merger, acquisition, or other transaction involving rail carriers is consistent with the public interest under 49 U.S.C. 11323-25.”¹²

Taken together, these authorities authorize and encourage the Board to impose conditions on the proposed transaction to protect the public interest in Amtrak’s services. For these reasons and the reasons set forth in Amtrak’s Comment dated August 27, 2021 and its Final Brief dated

¹¹ Executive Order, 86 Fed. Reg. 36987.

¹² *Ibid.* at 36996.

January 3, 2022, Amtrak respectfully requests that the proposed transaction, if approved, be made subject to Condition Nos. 1-5 and 7 as proposed by Amtrak.

Dated: January 21, 2022

Respectfully submitted:

/s/ *Mark S. Landman*

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CERTIFICATE OF SERVICE

I, Sophia Ree, declare under penalty of perjury that the foregoing is true and correct.

Pursuant to 49 § 1104.12, I hereby certify that on the 21st day of January, 2022 I have caused to be served a copy of the foregoing Post-Hearing Brief of National Railroad Passenger Corporation upon all parties of record via electronic mail.

Executed on: January 21, 2022

By: /s/ Sophia Ree
Sophia Ree