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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35147

**NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS INC., *ET AL.*
- JOINT CONTROL AND OPERATING/POOLING AGREEMENTS -
PAN AM SOUTHERN LLC**

**COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS' EXECUTIVE
OFFICE OF TRANSPORTATION AND PUBLIC WORKS**

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Dated: August 11, 2008

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Pursuant to the procedural schedule prescribed by the Board in a decision served in this proceeding on June 26, 2008, the Executive Office of Transportation and Public Works ("EOTPW"), on behalf of the Commonwealth of Massachusetts (the "Commonwealth"), hereby submits its Comments in response to the Application¹ filed in this proceeding on May 30, 2008. As is set forth below, EOTPW does not object to the Transaction proposed in the Application, provided the Board appropriately conditions its approval of the Application to address certain specific concerns of the Commonwealth, and provided further that the Applicants are denied the unfettered right that they have requested to be able to invoke 49 U.S.C. 11321(a) to override assignment-restrictive provisions contained in agreements among certain of the Applicants and either EOTPW or the Massachusetts Bay Transportation Authority ("MBTA").² EOTPW

¹ EOTPW hereby adopts and uses in its Comments the acronyms and abbreviations as contained in the Table of Abbreviations at pages vi-vii of the Application.

² For purposes of this proceeding, MBTA has authorized EOTPW to represent its position and interests. Accordingly, the Comments reflect the position of the Commonwealth generally, and of EOTPW and MBTA specifically.

submits that provided that the Board acts affirmatively on EOTPW's concerns as set forth herein, the Transaction encompassed by the Application should be approved.

EOTPW serves as the Commonwealth's principal executive agency for developing and implementing state transportation policy, planning and programs. The MBTA provides public transportation services in the Commonwealth, including all of the Commonwealth's passenger rail service, and is included among the agencies and authorities that comprise EOTPW. The Secretary of EOTPW serves as Chairman of the MBTA's Board of Directors

EOTPW (either alone or through the MBTA) owns rail property, and the MBTA manages extensive commuter rail operations that will be significantly affected by the proposed Transaction. Those commuter rail operations include the Fitchburg commuter rail line and other rail properties, as further discussed below. EOTPW is committed to a coordinated approach to passenger and freight rail service. Toward that end, EOTPW believes that the enhanced rail infrastructure, operations and services contemplated by the proposed Transaction will – if properly implemented - benefit the Commonwealth, and welcomes Norfolk Southern's proposed investment to transportation infrastructure and economic activity in Massachusetts.

EOTPW's expects that it will be able to work in a mutually beneficial partnership with each of the private rail carriers which are party to the proposed Transaction, including the newly created Pan Am Southern Railroad, to advance key rail transportation and related goals. Regrettably, however, EOTPW cannot support the Application or the proposed Transaction in its current form. As is more fully set forth in the comments below, EOTPW believes that the public interest is not served by STB approval of the Transaction as currently proposed. Specifically, EOTPW requests that the Board (1) deny the Applicants' request for authority to invoke 49 U.S.C. 11321(a) to override assignment-restrictive provisions in existing agreements between

Springfield Terminal and MBTA and between B&M and EOTPW, (2) require the Applicants collectively to assure that unpaid arrearages owed to MBTA and to EOTPW stemming from unpaid trackage rights and other negotiated fee arrangements, will be paid in full on or before the closing of the proposed Transaction, and further require that the Applicants and the new rail carrier to be established pursuant to this transaction, PAS, commit to regular and timely payment of future amounts due to MBTA and EOTPW for use of the subject rail properties; (3) require the Applicants to provide written assurance of their commitment to negotiate in good faith with respect to the conveyance of passenger trackage rights over, and/or the sale of, certain rail lines owned by rail carrier subsidiaries of Pan AM Railways, Inc., as further described below; and (4) evaluate the environmental concerns raised in the Commonwealth's letter filed with the Board on July 7, 2008 to the fullest extent of the Board's environmental responsibility

BACKGROUND

The MBTA is a body politic and a political subdivision of the Commonwealth of Massachusetts which operates the nation's 5th largest mass transit system. The MBTA serves a population of more than 4.5 million in 175 cities and towns within an area of more than 3,000 square miles. The MBTA's commuter rail operations transport about 38 million passengers per year on 13 commuter rail lines located throughout central and eastern Massachusetts. In its 2008 fiscal year, the MBTA provided nearly 375 million passenger trips, 21 million more trips than in 2007, a 6 percent leap and the highest ridership total in the agency's 44-year history.

The MBTA owns and operates more than 350 route miles -- about 30% of all railroad right-of-way within the Commonwealth -- as part of its commuter rail system. The MBTA invested more than \$2.0 billion in capital expenditures to maintain and improve its commuter rail system

between 1996 and 2006, and has programmed an additional \$900 million for capital improvements to the commuter rail system over the next three to five years.

The MBTA commuter rail system includes 270 miles of railroad right-of-way and related rail properties acquired from the Boston and Maine Railroad in 1976 for \$36.5 million. These rail properties were conveyed subject to an exclusive easement to provide rail freight transportation service benefiting the B&M, and are operated pursuant to an agreement that governs the relative rights and obligations of the MBTA and the B&M with respect operation and maintenance of freight only, passenger only and shared use lines. The governing agreement (the "1976 Deed") has served the parties well over the past 30 years: the balanced relationship framed by the 1976 Deed has allowed them to operate the subject lines, which comprise virtually all of the commuter system north of Boston, in a remarkably cooperative and effective fashion.

The rail properties acquired by the MBTA in 1976 included the following line segments that constitute a part of the proposed PAS Transaction: the Fitchburg Main Line between Littleton and Ayer (2.3 miles) and between Ayer and Fitchburg (15.8 miles), as well as the Greenville Branch (a/k/a Groton Industrial Track) between Ayer and Groton (5.0 miles). The MBTA has invested more than \$40 million in the Fitchburg Main Line to date (including \$10.9 million for station and parking improvements in Fitchburg), and expects to invest an additional \$150 million for improvements to that line in the next few years. The proposed \$150 million investment, funded with a combination of state bonds (authorized by the Massachusetts legislature as of July 30, 2008) and a Small Starts grant from the US Department of Transportation's Federal Transit Administration, would modernize the signal system, double-track key segments of the line, and upgrade other track elements in order to improve service safety, reliability and capacity along the line – allowing more trains and faster commutes

between Boston and the service areas in central Massachusetts. The Fitchburg service presently serves about 9,900 passengers per day on 34 trains each weekday, and 2,600 passengers on 16 trains per day on weekends. Ridership is expected to increase in the coming years, as the proposed improvements and new rolling stock (which could require an additional investment of more than \$100 million) allow the MBTA to deliver more frequent, faster and more reliable service to and from the Boston metropolitan area. (See attached letter.)

The agreement governing the operation and maintenance of the above lines requires PARI or the appropriate subsidiary obtain the MBTA's written agreement to the type of assignment contemplated by the proposed Transaction. To date, neither Pan Am nor any subsidiary or affiliate has sought the MBTA's formal agreement to assignment of such rights and obligations, even though the Application contemplates that the subject interests will be "contributed" to PAS as part of the overall Transaction. The MBTA would be unlikely to object to such an assignment in principle, if it were asked to do so, subject to receipt of adequate information pertaining to the proposed assignee, and adequate assurances that (a) the subject properties will be operated and maintained by the assignee in a safe, secure and environmentally responsible manner, consistent with passenger rail requirements, (b) current financial obligations are satisfied prior to the assignment, and (c) financial obligations will be met (payments made on time and in full) by any assignee going forward.

PARI and its subsidiary railroads operate a railroad yard in East Deerfield, Massachusetts that is owned by the Commonwealth of Massachusetts (through EOTPW), subject to a perpetual easement for railroad purposes reserved by the Boston and Maine Railroad. EOTPW purchased 64 acres of land at East Deerfield Yard from the B&M between 1985 and 1987. As part of a series of transactions, EOTPW agreed to fund improvements to the railroad's East Deerfield

Yard and a related locomotive maintenance facility, and the B&M agreed to make payments to the Commonwealth in consideration of the public funding and the retained easement rights. The conveyance documents associated with the transactions require that the B&M obtain EOTPW's written agreement to any transfer of the B&M's rights or obligations. To date, neither the B&M nor any affiliate has sought EOTPW's agreement to assignment of such rights and obligations, even though the Application contemplates that the subject interests will be "contributed" to PAS as part of the overall Transaction. The Commonwealth would be unlikely to object to such an assignment in principle, if it were asked to do so, subject to receipt of adequate information pertaining to the proposed assignee, and adequate assurances that (a) the subject properties will be operated and maintained by the assignee in a safe, secure and environmentally responsible manner, and (b) current financial obligations are satisfied prior to the assignment, and (c) financial obligations will be met (payments made on time and in full) by the assignee going forward.

The 1976 Deed contains provisions governing cost allocation and payment of trackage rights fees to be paid by each party to the other, under circumstances described in the 1976 Deed. As of July 2008, PARI and its subsidiary railroads owed the MBTA an amount in excess of \$4.5 million. As of August 6, 2008, none of the Applicants had agreed to make the MBTA whole, or had committed to pay future amounts due in a timely fashion in accordance with the terms of the 1976 Deed. As the proposed Transaction is likely to result in increased freight rail traffic on and over the lines owned and managed by the MBTA, the operations and the finances of the MBTA will almost certainly suffer as a result of the Transaction if this state of affairs is allowed to continue.

As stated above, the Commonwealth is entitled to certain annual payments in connection with the ongoing use and operation of the East Deerfield Yard. EOTPW has experienced difficulty in obtaining the payments from the railroad over the past several years, and has, from time to time, resorted to "self-help" in order to recoup delinquent payments. Nevertheless, a balance of more than \$25,000 remains due to the Commonwealth as of August 2008, against a December 2007 invoice for this obligation. Certain additional concerns with respect to the ongoing use and operation of the East Deerfield Yard have been addressed in the Commonwealth's letter filed with the Board on July 7, 2008.

The Commonwealth has reached out to both NS and Pan Am (individually and together) since the May 30 filing, in an effort to resolve outstanding issues and concerns in a cooperative fashion, but has yet to receive any written response to our proposals, nor have we received any substantive verbal response. Thus far, our efforts have not been fruitful. While we are committed to good faith negotiations going forward, we are fearful that the Applicants may be relying on the Board's willingness to issue a Declaratory Order in order to cement their rights, before they have even begun to seek or negotiate those rights in accordance with existing, fully negotiated, contractual agreements.

The Commonwealth's public interest in maintaining a balanced transportation system would be harmed as a result of the PAS Transaction, if the Applicants are able to demand terms that will impact passenger rail operations, will have the effect of delaying or derailing projects or making them not financially or operationally viable. The Commonwealth is seeking to preserve the well-established mutually understandings and contractual agreements as a framework for the future relationship of the parties.

ARGUMENT

Although EOTPW has been in preliminary discussions with the Applicants focusing in large part on the issues discussed herein, those negotiations have not yet reached a point of settlement. Unless or until EOTPW and the Applicants can resolve the Commonwealth's concerns, EOTPW must urge that the Board: (1) deny the Applicants' request for authority to invoke 49 U.S.C. 11321(a) to override existing assignment-restrictive provisions in agreements between Springfield Terminal and MBTA and between B&M and EOTPW; (2) require the Applicants collectively to assure that unpaid arrearages owed to MBTA and to EOTPW stemming from Springfield Terminal's use of rail properties owned by MBTA and EOTPW will be paid in full on or before the closing of the proposed Transaction, and further require that the Applicants and the new rail carrier to be established pursuant to this Transaction – PAS – commit to regular and timely payment for future charges owed to MBTA and EOTPW for use of the subject rail properties; (3) require the Applicants to provide written assurance of their commitment to negotiate the conveyance of passenger trackage rights over, and the sale of, certain rail lines owned by rail carrier subsidiaries of PARI, as further specified below; and (4) evaluate the environmental concerns raised in the Commonwealth's letter filed with the Board on July 7, 2008 to the fullest extent of the Board's environmental responsibility.

I. THE APPLICANTS' REQUEST FOR SECTION 11321(a) AUTHORITY TO OVERRIDE MBTA AND EOTPW CONTRACTS IS UNJUSTIFIED

A. Invocation of Section 11321(a) Requires a Showing of Necessity and Must Be Balanced Against Competing Public Interests

As indicated above, EOTPW fully anticipates that good faith negotiations could resolve the Commonwealth's concerns and questions regarding the potential impact of the proposed

Transaction on regional passenger rail operations. Moreover, EOTPW strongly objects to the Applicants premature and unnecessary threatened invocation of section 11321(a) to force the assignment, respectively, of Springfield Terminal's operating rights (in this case, operating easements) over MBTA-owned lines³ and B&M's interest in EOTPW-owned property.

EOTPW's objection arises specifically because the Applicants have not attempted first to negotiate with the Commonwealth to resolve the assignment issue in accordance with the MBTA and EOTPW agreements themselves. Instead, the Applicants have filed a unilateral request to invoke section 11321(a) prior to any attempt to enter into good faith negotiations with EOTPW and the MBTA. For these reasons, EOTPW strongly objects to the Applicants' request for a "declaratory order pursuant to 49 U.S.C. 11321(a) that PAS and any contract operator of PAS Lines will have the authority to conduct operations over the trackage rights lines as fully and to the same extent as Springfield Terminal could, notwithstanding any clauses in any such trackage rights agreement limiting or prohibiting Springfield Terminal's unilateral assignment of its operating rights to another person."⁴ Application at 38. Applicants' potential employment of the so-called "immunity" or "cram down" provision of section 11321(a) in connection with existing MBTA-Springfield Terminal and EOTPW-B&M contracts is unnecessary, would nullify without adequate justification bargained-for contractual rights held by the Commonwealth, and would conflict with Board policies favoring negotiated resolution of matters where the competing

³ In the interest of accuracy, the "trackage rights" that Springfield Terminal possesses over MBTA's lines are actually freight easement rights. Like trackage rights, however, Springfield Terminal's freight easement rights over MBTA are governed by agreements dating back to MBTA's acquisition of the subject rail lines in 1976

⁴ The Applicants use of the term "declaratory order" is confusing, because it is a term of art which generally is identified with agency proceedings under 5 U S C 554(e) and 49 U S C 72 to eliminate a controversy or remove uncertainty MBTA presumes that the Applicants are not requesting a "declaratory order" as that term is most commonly used, but rather that the Applicants are requesting a Board order (to be contained in a decision granting the Application) permitting the Applicants to invoke section 11321(a) to override assignment-restricting provisions that would prohibit Springfield Terminal and B&M from unilaterally assigning easement and similar rights to PAS.

interests of commuter and freight rail transportation must be balanced and properly accommodated.

The section 11321(a) immunity/cram-down authority that Applicants have requested ostensibly for the right to permit the assignment of trackage rights (and similar operating rights) from Springfield Terminal and/or B&M to PAS or to another entity as a result of the proposed Transaction should be available to the Applicants only to the extent such authority is truly necessary. 49 U.S.C. 11321(a) reads in relevant part as follows (emphasis added):

A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

In short, a declaration here that Applicants are to be granted unfettered section 11321(a) authority to override EOTPW and MBTA contract terms would only be justified upon adequate showing (which the Applicants have not made here) that exercise of such authority is essential to carry out the proposed Transaction. See, e.g., Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (STB served Dec. 31, 1996), 1996 STB LEXIS 356, *21 (the section 11321(a)⁵ authority to override restrictive provisions in existing agreements cannot be considered necessary, and thus will not be granted, if other remedies remain available); CSX

⁵ This decision actually applies the immunity/cram-down provision as it was codified before the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) Prior to ICCTA, the immunity/cram-down provision at issue here was codified at 49 U.S.C. 11341(a). The relevant pre-ICCTA and post-ICCTA immunity/cram-down language, however, has not changed.

Corp. – Control – Chessie System, Inc., et al., 3 S.T.B. 701, 711 (1998) (“[b]y its terms, the [section 11321(a)] exemption applies only when necessary to carry out an approved transaction”) (quoting Norfolk & W. R. Co. v. Am. Train Dispatchers’ Ass’n, 499 U.S. 117, 127 (1991)).

In evaluating whether exercise of section 11321(a) is necessary, the Board has considered such factors as alternative procedures that merging carriers may invoke to accomplish the same objectives,⁶ and the Board has made clear its preference for negotiated settlements of such issues rather than the exercise of section 11321(a) authority.⁷ The Board’s approach to section 11321(a) indicates that the override authority of that provision should be extended to merging railroads on the basis of necessity and generally as a matter of last resort. Moreover, invocation of section 11321(a) generally serves to bypass the negotiated resolution of contractual matters, and is thus at odds with the Board’s long-standing preference for negotiated settlements,⁸

⁶ See CSX Corp. et al – Control – Conrail Inc. et al., 3 S T B. 196, 301-302 (1998) (Decision No. 89) (“CSX/NS/Conrail”), aff’d sub nom. Erie-Niagara Rail Steering Committee v. S.T.B., 247 F 3d 437 (2d Cir. 2001) (discussing Board denial of rail merger applicants’ request to use section 11321(a) to override assignment restrictions in Conrail-Gateway Western trackage rights agreement), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (STB served Dec 4, 1996), 1996 STB LEXIS 308, *16-*17 (before seeking recourse to section 11321(a), parties should exhaust other available remedies to contractual restrictions, such as arbitration and a request for Board-imposed terminal trackage rights)

⁷ Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail holdings, Inc – Control – Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178, slip op at 2 (STB served July 9, 2003) (“DM&E/IC&E”) (reflecting the Board’s preference for negotiated settlement of contractual matters over the exercise of the override authority of section 11321(a)), cf Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges, STB Finance Docket No 42102, et al (STB served Feb. 29, 2008) (“[t]he Board has a longstanding preference for private-sector negotiation and resolution of disputes”), Canadian National Railway Company and Grand Trunk Corporation – Control – Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company, STB Finance Docket No. 34424 (Decision No. 9) (STB served Aug. 25, 2004) (same).

⁸ Railroad merger applicants in past cases have adhered to the general Board policy favoring the negotiated resolution of contract-related disputes, and have avoided resort to section 11321(a) where there existed the prospect of a negotiated settlement of the underlying contract issues. See, e.g., DM&E/IC&E, slip op at 2 (merging railroads and a third party railroad negotiated a settlement of trackage rights issues that rendered moot a pending section 11321(a) request); Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc., ___ S T B ___, STB Finance Docket No. 34495 (Decision No. 6), slip op at 11 (STB served Nov 5, 2004) (parties to transaction filed

particularly in instances where the competing interests of commuter rail service and freight rail service must be balanced. See, e.g., DM&E/IC&E slip op. at 2 (noting the “Board’s longstanding policy to promote private-sector resolutions of disputes” in connection with negotiations that ultimately led to an agreement that resulted in the merging railroads rescinding their request for section 11321(a) contract override authority); CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation [General Oversight], STB Finance Docket No. 33388 (Sub-No. 91), slip op. at 21 (STB served Feb. 2, 2001) (“Conrail-Oversight”) (“[w]e continue to believe that the sharing of tracks between the freight railroads and the various commuter railroads requires a delicate balance of competing interests that can best be accomplished by negotiation between the parties”).

B. The Applicants Have Not Satisfied the Standard for a Grant of Section 11321(a) Authority

Ultimately, Board precedent reflects the agency’s willingness carefully to control and abridge merging railroads’ rights to invoke section 11321(a) to ensure that the measure is applied only to the extent necessary.⁹ Precedent also establishes that the immunity/cram-down provision is a poor substitute for negotiated agreement where, as here, the Applicants’ use of 11321(a) could unfairly skew the balancing of freight rail and commuter rail interests. The Commonwealth is keenly interested in ensuring that the proposed Transaction does not adversely affect its ability to

under 49 U.S.C. 11321, et seq., opted not to raise 11321(a) immunity/cram-down, but instead agreed to resolve contract issues with a third party rail carrier via negotiation, and, if necessary, arbitration)

⁹ See CSX/NS/Conrail, 3 S.T.B. at 272 (in permitting railroad merger applicants to invoke section 11321(a) to override antiassignment or similar clauses in rail service contracts, the Board imposed a six-month limit on the merging carriers’ right to override such clauses, rather than the permanent right they had requested, and, in so doing, the Board stated that it agreed with the shippers who opposed use of such an override that there must be a compelling reason for the exercise of section 11321(a) authority to undercut specifically bargained-for contractual rights).

safely and effectively meet commuter rail service requirements¹⁰ or MBTA's ability to expand such services in the future,¹¹ and the Commonwealth would prefer to have its concerns addressed via further negotiations with the Applicants rather than through a request for Board-imposed conditions. Granting Applicants the unlimited right to invoke section 11321(a) to override assignment restrictions (such as those contained in agreements governing Springfield Terminal's freight operations over MBTA-owned lines) would prematurely and unfairly undercut MBTA's ability and the Applicants' incentive to reach an accord, and would permit the Applicants' interests in the proposed Transaction to trump MBTA's interests – and indeed the public interest – in assuring adequate, safe and sustainable commuter rail service to meet the expanding needs of its riders.¹²

¹⁰ The proposed Transaction will result in increased freight traffic activity over certain MBTA lines concurrently with mounting demand for commuter rail service. See, e.g., "Riders Flock to T in Record Numbers," Keith O'Brien (Boston Globe staff), July 28, 2008, available at: http://www.mbtacom/about_the_mbtanews_events/?id=15517&month=&year=, "MBTA joins parade of transit agencies posting record ridership," Progressive Railroading Daily News, July 30, 2008, available at: <http://www.progressiverailroading.com/prdailynews/news.asp?id=17454>

¹¹ As indicated above, PAS would operate, and would increase freight train activity over, the MBTA-owned Fitchburg Line, which MBTA has plans to expand and enhance capacity. See "Fitchburg Commuter Rail Improvements on Track" (May 1, 2008), available at: http://www.eot.state.ma.us/default.asp?pgid=content/releases/pr050108_FitchCommuter&sid=release. These plans will now have to account for increased freight train use of the line, and, thus, the Transaction will necessitate further discussions with the Applicants to ascertain if elements of the project should be modified, and, if so, to what extent the Applicants should share in the expense.

¹² A recently-reported freight railroad story sharply contrasts with the Applicant's seemingly instinctive resort here to a request for section 11321(a) authority to override state contracts, particularly where the Applicants have not first attempted to negotiate with the Commonwealth. Specifically, short line and regional railroad holding company, Genesee & Wyoming, Inc. ("GWI"), very recently announced that it has reached an agreement to acquire the Ohio Railroad System ("OCR") which controls 9 short line railroads. In that announcement, GWI stated that the proposed transaction is subject to GWI obtaining permission from the State of Ohio to transfer an operating agreement over a state-owned line. See, "Genesee & Wyoming to Acquire Nine Ohio Central Railroad System Short Lines," Progressive Railroading Daily News (August 4, 2008), available at <http://www.progressiverailroading.com/prdailynews/news.asp?id=17486>. GWI's commitment at the outset to negotiate such a transfer of operating rights with Ohio is completely at odds with the Commonwealth's experience in this proceeding, and merely underscores again how unnecessary and premature the Applicants section 11321(a) request is with respect to MBTA and EOTPW agreements.

In addition to misrepresenting the facts surrounding the proposed assignment of Springfield Terminal's freight easement interests over MBTA's lines (discussed below), the Applicants have failed to offer a compelling case for overriding assignment-restricting provisions contained in MBTA-Springfield Terminal and EOTPW-B&M agreements.¹³ It appears that the Applicants expect to obtain MBTA's and EOTPW's voluntary concurrence to the assignments associated with implementation of the proposed Transaction, and this is reflected by the Applicants' incorrect assertion that such matters have already been resolved with the Commonwealth. In fact, discussions between the Commonwealth and the Applicants have only very recently begun (it is unclear why the Applicants failed to attempt to secure the Commonwealth's concurrence in the subject assignments prior to filing with the STB and seeking the 11321(a) order). Such discussions may yet prove fruitful, but such matters have not yet been resolved. Thus, EOTPW submits that the Board should, consistent with past statements of agency policy in such cases as IC&E/DM&E and Conrail-Oversight, promote a negotiated arrangement between the Commonwealth and the Applicants that best serves the public interest by adequately addressing and balancing the interests of freight rail and commuter rail service

The Applicants contend, without any supporting evidence, that the Transaction will have no adverse impact on commuter rail service in the Commonwealth, and, in so doing, the Application makes only the most passing and superficial case for the requested 11321(a) declaratory order – a case that, with respect to the Commonwealth's interest in the proposed Transaction, is extremely casual, inadequately supported, and factually incorrect. In an effort to bolster their request for a “declaratory order,” the Applicants merely cite an ordering paragraph in CSX/NS/Conrail, in which the Board granted railroad merger applicants the authority pursuant

¹³ Canadian National, et al. – Control – Illinois Central, et al., 4 S.T.B. 122, 233 (1999) (“DOT notes, however, that we have previously indicated that a 49 U.S.C. 11321(a) override of contractual terms requires ‘a compelling reason’”) (citing CSX/NS/Conrail, 196 S.T.B. at 272)

to section 11321(a), "except as otherwise provided" in that decision, to override assignment-restrictive contractual provisions that could bar the merger applicants' assumption of such rights for purposes of implementing the proposed transaction.¹⁴ The CSX/NS/Conrail decision and the facts upon which the 11321(a) authority was granted in that proceeding, do not by themselves warrant stripping MBTA and EOTPW of their contract rights here.

For the record, MBTA and EOTPW do not object categorically to the proposed assignment to PAS of Springfield Terminal's freight easement rights over MBTA-owned and operated lines and B&M's assignment of its interest in EOTPW property at East Deerfield Yard. In fact, EOTPW and MBTA anticipate that good faith negotiations would promptly lead to approval for such assignment. But, without the bargaining leverage that they enjoy by virtue of the assignment-restrictive provisions in their agreements with Springfield Terminal, MBTA and EOTPW are not likely to be able to negotiate satisfactorily with the Applicants, and the Board would, by stripping MBTA and EOTPW of the rights they have each previously negotiated for, empower the Applicants effectively to dictate terms to the Commonwealth, notwithstanding the Commonwealth's legitimate concerns over the potential impacts of the Transaction. In sum, to properly balance the interests of MBTA (which owns and operates over rail lines that would be affected by the Transaction) and EOTPW on the one hand and those of the Applicants (which claim their Transaction would provide public benefits to the shipping public) on the other, the Commonwealth and the Applicants should be afforded a full and fair opportunity to negotiate and amicably resolve their issues without undue and premature Board intervention. Providing

¹⁴ The Applicants specifically rely on CSX/NS/Conrail Ordering Paragraph 8 as support for its request here. Although one may infer support for the Applicants' request for a "declaratory order" based on Ordering Paragraph 8 (which dealt with proposed assignment of Conrail's interest in assets), EOTPW suspects that the Applicants either intended also to rely on Ordering Paragraph 9 (which deals with assignment of operating rights, such as trackage rights and leases), and that the phrase "Ordering Paragraph 8," as it appears at page 38 of the Application is a typographical error.

the Applicants with the means to force the Commonwealth's hand, without an adequate showing of need, would bias the process against commuter rail service and would create harmful negative precedent where none currently exists.

The Applicant's sole reliance on an ordering paragraph in the CSX/NS/Conrail is noteworthy, because it indicates that the Board has rarely, if ever, been faced with a dispute among interested parties over the application of section 11321(a) to assignment-restricting conditions which pitted commuter rail interests against freight rail interests. At most, the CSX/NS/Conrail decision reflects the Board's willingness to permit rail merger applicants to invoke section 11321(a) to override assignment-restrictive provisions in trackage rights and similar operating rights agreements where the result of assignment would have no affect the other party to the contract who might otherwise rely upon (and invoke) the assignment restrictions. It is not clear that any of the entities who otherwise could have objected to the proposed assignment of trackage rights or other operating rights in that proceeding objected or threatened to object to the applicants' potential use of section 11321(a).

The Board did not appear in CSX/NS/Conrail to address or resolve a state's and/or a regional passenger railroad's assertions that, if the Board were to bar the state's or commuter railroad's ability to frame negotiations by relying on assignment-restricting provisions in its contract(s) with the would-be freight railroad assignor, the state or commuter railroad could be harmed by operating changes that would result from the proposed transaction. In fact, neither the CSX/NS/Conrail decision, nor any other that EOTPW is aware of, has directly balanced one railroad's request to exercise 11321(a) authority to override assignment-restrictive provisions in a contract in the face of another railroad's insistence that such an override would prevent the other railroad from negotiating a resolution to concerns over the potential adverse impacts of the

proposed transaction. Accordingly, under the circumstances present here, the Applicants have not shown that invocation of section 11321(a) is appropriate to force the Commonwealth's hand. In addition to the policy considerations that do not support the Applicants' section 11321(a) request, the Applicants factual assertions also do not support their request. Applicants state that – (1) they have consulted with MBTA regarding the proposed Transaction; (2) they have discussed with the Commonwealth the Applicants' plans to have Springfield Terminal convey its freight easement rights over MBTA-controlled and dispatched lines to PAS; and (3) MBTA has advised that it does not object to the Transaction, including the conveyance of Springfield Terminal's freight easement rights. See Application at 25 n.22, 27 n 23, Exhibit 15 (Operating Plan/Minor) at 11.

Although the Applicants have approached MBTA prior to the filing of the Application, and have done so again since the filing, the Applicants did not present an operating plan with which the Commonwealth could evaluate the Transaction's potential impacts on commuter rail service. Moreover, at no time prior to the filing of the Application did MBTA consent to, or did Applicants ask MBTA to consent to, Springfield Terminal's contemplated assignment of its freight easement to PAS or to any other party. Thus, although the Application repeatedly implies that a declaration permitting a section 11321(a) override of assignment-restrictive provisions governing Springfield Terminal's freight easement rights over MBTA is of no consequence (due to MBTA's alleged concurrence in such assignment), the Applicants' requested declaration is actually quite relevant and of considerable concern to the Commonwealth.

There will be Transaction-related changes in freight traffic density over certain lines (including the MBTA-owned Fitchburg-Ayer, MA line over which PAS would operate), but the Applicants state that they anticipate no adverse effects on commuter rail operations See id. at

44, Exhibit 15 (Operating Plan/Minor) at 14.¹⁵ The Applicants' position is based upon pure opinion and speculation, not upon direct consultation with the Commonwealth. It appears that the increased freight train activity from the proposed Transaction could compromise planned improvements to, and expansion of the reliability, safety, and speed of, MBTA's commuter rail service, unless proper arrangements are entered into. Because the Applicants' statements about the proposed Transaction's potential impact on passenger rail service are inaccurate and are based upon highly incomplete and incorrect information, the Applicants have no basis reasonably to assert that the assignment of Springfield Terminal's operating rights would have no impact on passenger rail service. Because it is based upon an unsubstantiated claim that the Transaction will not, or is unlikely to, have an adverse impact on commuter rail operations, the Applicants' request for a declaration that they may invoke 11321(a) in connection with MBTA contracts must be denied.

II. APPLICANTS MUST COMMIT TO RESOLVING OUTSTANDING ARREARAGE ISSUES AND TO REMAIN CURRENT ON PROPERTY-USE PAYMENTS GOING FORWARD

The agreement under which Springfield Terminal provides freight rail service over MBTA-owned lines pursuant to a freight easement requires that Springfield Terminal pay for the use of MBTA's tracks in accordance with a prescribed fee arrangement. Similarly, the agreement whereby B&M makes use of EOTPW-owned property at East Deerfield Yard provides for the regular, recurring payment of fees by Springfield Terminal to EOTPW.

¹⁵ In Table 2 on page 14 of the Applicants' Operating Plan/Minor, the Applicants indicate that MBTA operates 22 commuter trains per day on the MBTA-owned line segment between Fitchburg and Ayer, MA. That number, even if presumed to be a daily average that accounts for weekday and weekend commuter train activity on this line, is incorrect. MBTA operates 34 commuter trains per weekday on the Fitchburg-Ayer line segment (a portion of the larger Fitchburg Line) and 16 trains per weekend day. That amounts to a daily average of just under 29 trains, not 22. Also, in note 2 of that same table, the Applicants deny any knowledge of 5-year projections for passenger rail traffic increases on MBTA lines. The Applicants evidently did not inquire about any such traffic level increases with MBTA, and publicly-available information would have revealed that such increases are likely and, indeed, are being planned for at this time.

Springfield Terminal and B&M are in arrears under both agreements. The outstanding obligation to the MBTA exceeds \$4 5 million.¹⁶

The Applicants have provided general assurances in the Application that PAS will make for a stronger, better-capitalized competitor for freight traffic in New England. But the Applicants have not extended to the Commonwealth the sort of fundamental commitments necessary to fully persuade the Commonwealth of this claim, because they have declined in negotiations with the Commonwealth to commit to the prompt repayment by a date certain of the arrearages under the MBTA and EOTPW agreements or to explain how they will avoid incurring such arrearages post-Transaction. In short, the Applicants propose a new freight operating regime which will make use of substantial Commonwealth-owned assets, but they have done nothing to ensure that this regime will be any better able than Springfield Terminal and B&M to abide by its financial obligations to the Commonwealth.

Furthermore, despite the Commonwealth's requests in discussions, the Applicants and the Commonwealth have failed to record an agreement that provides sufficient assurance to the Commonwealth regarding prompt payment of property usage fees following implementation of the proposed Transaction.

The public interest here would be best promoted by Applicants' demonstration that the proposed transaction will result in immediate benefit to the Commonwealth's taxpayers, who ultimately bear the burden of Springfield Terminal's and B&M's current, and PAS's future potential, non-payment of property usage fees associated with their respective railroad operations. For this reason, the Commonwealth respectfully requests that the Board, as a condition to approval of the Application, require the Applicants collectively to assure that unpaid

¹⁶ The EOTPW payments are much lower at this point, because the Commonwealth has been able to employ self-help to divert Springfield Terminal funds from other sources to pay off otherwise unpaid invoices

arrearages owed to MBTA and to EOTPW stemming from Springfield Terminal's/B&M's use of Commonwealth-owned and/or MBTA-owned rail properties will be paid in full on or before the closing of the proposed Transaction, and further require that the Applicants and the new rail carrier to be established pursuant to this Transaction – PAS – commit to regular and timely payment for future charges owed to MBTA and EOTPW for use of the subject rail properties.

III. THE APPLICANTS MUST ABIDE BY PARI'S ONGOING COMMITMENT WITH THE COMMONWEALTH TO NEGOTIATE THE CONVEYANCE OF PASSENGER RIGHTS OVER, OR THE SALE OF CERTAIN RAIL LINES CURRENTLY OWNED BY PARI OR ITS RAILROAD SUBSIDIARIES

For the past several years, the Commonwealth has been engaged in extensive conversations with PARI regarding certain rail lines (owned by PARI's rail carrier subsidiaries)¹⁷ regarding the Commonwealth obtaining sufficient rights to conduct passenger train operations over them. The proposed Transaction, however, has introduced new uncertainties into this discussion process.

The Applicants surely were aware of the Commonwealth's keen interest in concluding these discussions when they initiated this proceeding, yet they say nothing in their Application of the Transaction's potential impact on future development of passenger rail service – an issue that is very central to the Commonwealth's long-term transportation planning. It appears to the Commonwealth that the Transaction may pit the Applicants' concealed nearer-term and longer term strategic freight plans for these lines against the passenger rail interests of the Commonwealth. In the interest of assuring an appropriate balancing of such interests, the Board should condition its approval of the Application upon the Applicants' written assurance to continue to negotiate the conveyance of passenger trackage rights over, and the sale of, the

¹⁷ Generally, the subject rail lines are the "Worcester Main Line" between Ayer and Worcester, MA, the "Connecticut River Main Line" between Springfield and East Northfield, MA; and various segments of the "Fitchburg Main Line," "Freight Main Line" and other lines, between Andover (Lowell Junction) and Lowell, MA, North Chelmsford and Ayer, MA, Fitchburg and Wachusett Station, MA, and Wachusett Station and Gardner, MA

above-described rail lines owned by rail carrier subsidiaries of PARI. In keeping with such a condition, the Board should also provide for post-Transaction oversight to ensure that the Applicants adhere to such a condition and negotiate in good faith.

IV. THE ENVIRONMENTAL ISSUES RAISED BY THE COMMONWEALTH AND SEVERAL OF ITS COMMUNITIES SHOULD BE FULLY EVALUATED

In its separate filing with the Section of Environmental Analysis ("SEA") the Commonwealth noted that the proposed transaction is likely to result in increased activity that will exceed the threshold in 49 CFR 1105.7 (e) (5) and urged that several other issues including prospective impact on present and future passenger rail service and the specific issues raised by the communities of Ayer and Deerfield warrant careful consideration. Since there has been no indication as to what action maybe forthcoming from SEA, the Commonwealth again urges thorough evaluation of the issues that have been raised to the full extent of the Boards environmental responsibilities.

CONCLUSION

The Application presents a railroad Transaction that has significant benefit and, subject to revisions, is worthy of support. However, in the view of the Commonwealth, it raises significant unanswered questions about its potential for adverse non-freight rail impacts. In short, the Application seems to take for granted that the proposed Transaction would have little or no adverse impact on passenger rail transportation and would not impair or undermine the Commonwealth's long-term transportation plans, including, most notably here, the Commonwealth's strong commitment to passenger rail transportation. It is unfortunate at this point that the Applicants and the Commonwealth have been unable to reach an accord on matters of particular concern to the Commonwealth, which would enable the Commonwealth to support

the proposed Transaction without conditions. Negotiations may yet progress that far, and may result in an amicable balancing of private freight rail and public transportation interests here, but that is only possible if Commonwealth is not foreclosed from negotiating for such balance. The Commonwealth is committed to continuing to work with the Applicants toward this objective.

The conditions requested herein by the Commonwealth are generally designed to permit a continuing fair and balanced negotiating playing field. In particular, the Commonwealth's opposition to the Applicants' section 11321(a) request stems from a concern that the grant of such authority to the Applicants would represent an unfair bias toward, and agency preference for, promoting the interests of rail freight transportation at the potential expense of the public interest in expanded (indeed, preserved) rail passenger service. Moreover, the Commonwealth's position here relates to matters that, in retrospect, the Applicants can and should have addressed much earlier and more aggressively and thoroughly than they did when they planned this Transaction and prepared their Application. To the extent that the Commonwealth's interests in this proceeding (indeed, the so-called "Patriot Corridor" that would be created by this transaction predominantly is located in Massachusetts) appear to have been an afterthought, the Board has both a public interest basis and the ability to rectify that situation.

Accordingly, and for the reasons set forth above, the Board must: (1) deny the Applicants' request for authority to invoke the immunity/override provision of 49 U.S.C. 11321(a) to override existing assignment-restrictive provisions in agreements between Springfield Terminal and MBTA and between Springfield Terminal and EOTPW, (2) require the Applicants collectively to assure that unpaid arrearages owed to MBTA and to EOTPW stemming from Springfield Terminal's use of rail properties owned by MBTA and EOTPW will be paid in full on or before the closing of the proposed Transaction, and further require that the

Applicants and the new rail carrier to be established pursuant to this Transaction – PAS –
commit to regular and timely payment for future charges owed to MBTA and EOTPW for use of
the subject rail properties; (3) require the Applicants to provide written assurance of their
commitment to negotiate the conveyance of passenger trackage rights over, and the sale of,
certain rail lines owned by rail carrier subsidiaries of PARI, as specified more fully above; and
(4) evaluate the environmental concerns raised in the Commonwealth's letter filed with the
Board on July 7, 2008 to the fullest extent of the Board's environmental responsibility.

Respectfully submitted,


for → Jeffrey B. Mullan,
Undersecretary and General Counsel
Daniel P. Collins, Senior Counsel
Executive Office of Transportation and
Public Works
Ten Park Plaza
Boston, MA 02116-3969
(617) 973-7800

Dated: August 11, 2008

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Comments upon all parties of record by depositing a copy in the U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: August 11, 2008


for → Jeffrey B. Mullan
Undersecretary and General Counsel
Executive Office of Transportation and
Public Works



The Commonwealth of Massachusetts

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August 7, 2008

The Honorable Charles D. Nottingham, Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No 35147, *Norfolk Southern Ry, Pan Am Railways, et al*
– *Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC*

Dear Chairman Nottingham;

Please accept this correspondence in regards to the proposed Norfolk Southern/
Pan Am Railways joint venture to be known as Pan Am Southern. As you are aware,
the Commonwealth has recently passed a Bond Authorization including \$75 million
dollar appropriation, which represents a 50% match to a federal authorization for
upgrades to the Fitchburg/South Acton Commuter Rail Line.

This project is essential to the further development of North Central
Massachusetts and has long been at the top of our priority lists for more than a decade.
Currently, the Fitchburg/South Acton Commuter Rail Line has the oldest infrastructure
of all the MBTA Commuter Rail Lines and there has been no significant investment to
the line in 30 years. Travel time from Fitchburg to Porter Square is approximately 1
hour and 35 minutes; this \$150 million dollar improvement project aims to reduce travel
time by up to 35 minutes; a top priority for all constituents in this area.

The proposed transaction between Norfolk Southern and Pan Am Railways
represents an opportunity to improve freight rail capacity and competition in New York
and New England. However, it is imperative that the Fitchburg/South Acton
Improvement Project stay on schedule, as negotiations of the joint venture proceed. We
have worked with federal and local officials for the past ten years on this project; the

authorization of the Commonwealth's funding represents a huge win to our constituencies. We look forward to working together as the negotiations of the joint venture continue. If we can be of assistance, do not hesitate to contact us

Respectfully,



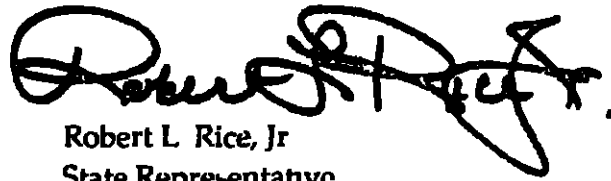
Jennifer L. Flanagan
State Representative
4th Worcester District



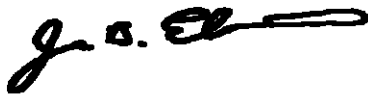
Robert A. Antonioni
State Senator
Worcester & Middlesex District



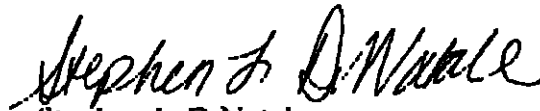
Pamela P. Resor
State Senator
Middlesex & Worcester District



Robert L. Rice, Jr
State Representative
2nd Worcester District



James B. Eldridge
State Representative
37th Worcester District



Stephen L. DiNatale
State Representative
3rd Worcester District



Robert S. Hargraves
State Representative
1st Middlesex District