

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CSX CORPORATION AND CSX TRANSPORTATION, INC.

– CONTROL AND MERGER –

**PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN
RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY,
SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD
COMPANY, AND VERMONT & MASSACHUSETTS RAILROAD COMPANY**

BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

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Attorneys for Norfolk Southern Railway Company

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BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

Pursuant to the procedural schedule set by the Board’s decision served on July 30, 2021, Norfolk Southern Railway Company (“NS”) hereby offers its brief (“Brief”) in support of the above-captioned acquisition and operation by CSX Transportation Inc. (“CSXT”) and the related transactions (the “Merger and Related Transactions”) and in response to the previously filed comments, protests, requests for conditions, and other opposition.¹ NS files its Brief under the understanding that “new evidence introduced on brief is not permitted and [if introduced] will be subject to motions to strike and other appropriate sanctions.” See West Texas Utilities Co. v. Burlington Northern R.R. Co., No. 41191 (I.C.C. served Sept. 8, 1995), 1995 ICC LEXIS 236 at *4; see also id. at *3 (holding that “[a] brief, as the name implies, is a short summary of the evidence of the record and is not a vehicle for the introduction of additional or different evidence that that which is already of record. The purpose of a brief is not to give either side a tactical

¹ Unless otherwise specified, the capitalized words, terms, and acronyms employed in this Brief are the same as those used and defined in NS’s Reply, filed October 18, 2021.

advantage by allowing it the ‘last word;’ it is to assist the Commission in evaluating the record...so that it can make a fair and informed decision”). In keeping with the purpose of briefs in Board proceedings, NS will summarize its interest in this proceeding and reasons it requests the Board approve the Merger and Related Transactions without conditions, other than standard labor protective conditions and those commitments voluntarily agreed to by NS, CSXT, or B&E.

OVERVIEW

On July 30, 2021, the Board accepted CSXT’s Amended Application for a significant transaction under the regulations and adopted a procedural schedule. Comments on the Amended Application and requests for conditions were due on August 27, 2021. No party submitting concerns about the Merger and Related Transactions met the required burden to show that the Merger and Related Transactions, considered as a whole, will result in an anticompetitive effect that is both “likely” and “substantial” to warrant the imposition of a condition. See CSX Transp., Inc. – Acquisition of Operating Easement – Grand Trunk W. R.R. Co., FD No. 35522, Decision No. 5, at *5 (STB served Feb. 8, 2013); see also E.I. Dupont de Nemours and Co. v. CSX Transp., Inc., 2008 STB LEXIS 361, at *10 (STB served June 30, 2008) (finding that a “substantial” harm is not small or merely transitory); Wis. Cent. Transp. Corp., et al. – Continuance in Control – Fox Valley & W. Ltd., FD No. 32036, 1992 ICC LEXIS 279, at *10 (I.C.C. served Dec. 4, 1992) (“A showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition.”). Likewise, no party expressing concerns has established that the Merger and Related Transactions, considered as a whole, will result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. As a result, the Merger and Related Transactions should be approved without conditions,

other than standard labor protective conditions and those commitments voluntarily agreed to by NS, CSXT, or B&E.²

Responses to comments, protests, requests for conditions, or other oppositions were due on October 18, 2021. NS filed a reply in support of the Merger and Related Transactions at that time (“NS Reply”). In that filing, NS explained that PAS has been instrumental in maintaining a competitive balance in the Northeast United States, and the NS-CSXT Settlement Agreement and Related Agreements maintain that competitive balance. Further, NS anticipates that, with B&E as the operator, PAS operations will improve and, overall, competition will be enhanced.

In support of these arguments, NS provided detailed evidence, including a verified statement from John Edwards, NS’s General Director Passenger Policy. Mr. Edwards’ statement reached several conclusions: First, the settlement agreement between NS and CSXT, and the Term Sheet Agreement among NS, CSXT, and GWI under which B&E would become the contract operator, will preserve the founding purpose of PAS—to act as a vehicle to permit rail competition in the greater Boston marketplace. Second, NS is confident that the settlement agreement between NS and CSXT, which was the result of extensive and thoughtful negotiations, not only maintains but enhances the purpose for which PAS was created and permits PAS to even more effectively contribute to a robust competitive landscape. Third, alternatives to the Merger and Related Transactions and the NS-CSXT settlement agreement

² See also, e.g., Bessemer and Lake Erie R.R. Co.—Acquisition and Operation—Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y. (BLE/CSXT), 2021 STB Lexis 46, at *39-40 (Feb. 24, 2021) (Before imposing conditions under 49 U.S.C. § 11324(d), “the Board must not only satisfy subsection (d)(1) by finding there is likely to be a substantial lessening of competition, monopoly, or restraint of trade, it also must satisfy subsection (d)(2) by finding that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.” (Fuchs, Schultz, dissenting)).

would be disruptive, create uncertainty, and are opposed by NS. Such alternatives ignore the remedies available to NS that are already inherent in the settlement agreement. See NS Reply, Verified Statement of John Edwards (“V.S. Edwards”), at 2. Together, NS’s arguments and evidence established that the Merger and Related Transactions, when considered as a whole, should be approved as a significant transaction without conditions, other than standard labor protective conditions and those commitments voluntarily agreed to by NS, CSXT, or B&E.

STANDARD

In its July 30 Decision, the Board found the Merger and Related Transactions to be a “significant” transaction. As such, Board review of the Merger (when considered with the Related Transactions) is governed by the standards of 49 U.S.C. § 11324(d), which provides as follows:

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Under this standard, the Board must approve the Merger and Related Transactions unless other parties show that the Merger and Related Transactions will substantially lessen competition, create a monopoly, or restrain trade in freight transportation. As discussed below, no party has made such a showing. Accordingly, the Board need not even consider whether the Merger and Related Transactions, considered as a whole, benefit the public interest and simply must approve the Merger and Related Transactions without conditions, other than standard labor

protective conditions and those commitments voluntarily agreed to by NS, CSXT, or B&E. See also, e.g., BLE/CSXT, 2021 STB Lexis 46, at *39-40.

Even if the Board concluded that some anticompetitive effects may result from the Merger and Related Transactions when considered as a whole, the Board must still approve the Merger and Related Transactions unless it finds that the projected competitive harms outweigh the Merger and Related Transactions' benefits to the public interest and that such harms cannot be sufficiently ameliorated by conditions. See Ill. Cent. Corp. And Ill. Cent. R.R. Co. – Control – CCP Holdings, Inc., Chicago, Cent. & Pac. R.R. Co. And Cedar River R.R. Co., FD No. 32858, 1996 STB LEXIS 157, at *7-8 (STB served May 14, 1996). In this case, no party has challenged credibly the notion that the Merger and Related Transactions will produce substantial public interest benefits, and many parties have acknowledged such benefits. Accordingly, even if all of the alleged competitive harms were true, which they are not, those harms would not outweigh the unchallenged public interest benefits of the Merger and Related Transactions. As such, the Board is required to approve the Merger and Related Transactions.

ARGUMENT

The record establishes that the Merger and Related Transactions should be approved as a significant transaction without conditions, except for the standard labor protective conditions and those commitments voluntarily made by NS and CSXT.

I. PAS HAS BEEN INSTRUMENTAL IN MAINTAINING A COMPETITIVE BALANCE IN THE NORTHEAST UNITED STATES.

Since its founding more than a decade ago, PAS has been an essential component in maintaining a competitive balance in the Northeast United States. Indeed, the intention behind PAS was created primarily to enhance NS's ability to compete with CSX in the greater Boston market. See NS Reply, at 6. As stated in the original PAS application, the PAS system was

created to “provide customers with enhanced service options linking PAS’ regional network and...three short lines VTR, NECR, and PW with points served by Norfolk Southern in eastern and southern United States.” See 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, Application filed May 30, 2008, Verified Statement of John Williams at 67 (“V.S. Williams”).

Further, as was noted at that time, the “[a]pplicants’ ability to provide new and improved single system service, and the greater financial strength brought to PAS under Norfolk Southern’s and Pan Am’s joint ownership, will enhance head-to-head rail competition within the New England Region with other Class I railroads, particularly CSX Transportation, Inc. (CSXT).” Id., at page 68 (V.S. Williams) (internal quotation marks omitted); see also STB Finance Docket No. 35147, 2009 NS/Pan Am Proceeding, slip op. at 5 (STB served Mar. 10, 2009) (finding that the deal “would significantly increase competition between railroads by providing an upgraded east-west mainline route to compete with a parallel mainline route operated by CSXT”).

The proposed Merger and Related Transactions will not only maintain the current competitive states in the Northeast United States but, as discussed below, will create several pro-competitive efficiencies. See, e.g., STB FD 36472, CSX Corporation and CSX Transportation, Inc.—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 Support Statement of Hub Group (“Proposed Transaction Amended Application”), Amended Verified Statement of Sean Pelkey

(“Amended V.S. Pelkey”), at 8; see also Proposed Transaction Amended Application, Verified Reply Statement of David Reishus (“Reply V.S. Reishus”), at ¶ 13 (finding that “the Merger and Related Transactions represent a pro-competitive rationalization of the New England rail network,” which “will generate widespread benefits to shippers across New England and will not result in any substantial reduction in competition”). These efficiencies will ultimately benefit both producers and consumers. See id.

II. THE PROPOSED STRUCTURE OF PAS PRESERVES THE CURRENT COMPETITIVE BALANCE.

PAS is critical to the competitive rail environment generally, and for multiple reasons, critical for NS’s involvement in that environment as well. In addition to having been an important—and significant—investment for NS,³ PAS was created to “preserve” NS’s ability to compete with CSXT. See Proposed Transaction Amended Application, at 1 (“According to the application submitted by CSX, the Proposed Transaction will preserve critical access for Norfolk Southern to New England.”); NS Reply, V.S. Edwards, at 3-4; Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (same).

Because of PAS’s importance to NS, NS’s goal in this proceeding—both in its roles as a member of PAS and one of PAS’s most prolific interchange partner—is, at a minimum, to maintain that competitive state. See NS Reply, V.S. Edwards, at 5. In support of that goal, the NS-CSXT Settlement Agreement and Related Agreements are designed to provide protections and approaches to ensure that PAS has a competent, independent operator that can maintain the viability of PAS in a manner that does not favor CSXT, NS, or the operator’s owner. Id. at 5.

³ “[A]s a result of the 2009 transaction forming PAS, Norfolk Southern invested millions of dollars to strengthen the east-west Patriot Corridor as a competitive option to the parallel CSXT route.” NS Reply, at 5.

NS is satisfied that the terms of the negotiated restructuring of PAS will preserve PAS as a competitive route into and out of New England. Indeed, the Merger and Related Transactions, when considered as a whole, will enhance competition in the Northeast United States.

The presence of B&E will ensure that a neutral party will be operating, maintaining, and dispatching PAS for the benefit of PAS. See NS Reply, at 6. B&E will be required to set PAS rates exclusively in the interest of PAS as an independent rail carrier and in a manner that does not favor any other railroad (including any railroad in the GWI family) or in a manner that discriminates between CSX and NS. See id.; see also CSXT Response to Comments and Requests for Conditions and Rebuttal in Support of Application (“CSXT Response”), at 28 (“It would be a direct violation of the terms under which B&E will be retained for B&E to make decisions regarding PAS operations in the interests of an affiliated rail carrier. Were B&E to do so, they would be removed as the contract operator of PAS.”).⁴ To further ensure that PAS is competitively neutral, CSXT agreed to transitional restrictions on the rates it will charge for future movements originating or terminating on the existing PAR System lines to and from PAS. See Proposed Transaction Amended Application, Amended V.S. Pelkey, at 11. These rate restrictions will support the continued viability of PAS as an alternative to CSXT for access to New England rail shippers by carriers other than CSXT. See id.

Shippers understand the value of PAS and the improvements that could come with B&E’s presence as its operator. Accordingly, there has been significant shipper support for the Merger and Related Transactions. See, e.g., NS Reply, at 6-7; see also CSXT Response, at 8-14

⁴ The Operating Agreement also provides that B&E will receive an annual operating bonus that both incentivizes and rewards strong PAS performance and serves to fully align B&E with PAS’s owners. Further, the B&E management team will receive their performance bonuses based on the financial and safety performance of B&E, thereby fully aligning and incentivizing them to operate B&E solely in the best interest of PAS.

(detailing some of the 79 shipper statements submitted in support of the Proposed Transaction⁵). For example, the Hub Group, a North American transportation management company providing intermodal, truck brokerage, and logistics services, submitted a statement in support of the transaction, writing that their “understanding is the agreement reached between CSX and Norfolk Southern will preserve competitive rail options and will increase the fluidity of rail operations in New England. We anticipate these competitive options would be a key benefit of the proposed transaction.” Proposed Transaction, Statement of Hub Group, at 1. Other shippers have submitted similar statements. See, e.g., Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (“The agreement reached between CSX and NS will preserve competitive rail options and will increase the fluidity of rail operations in New England. Having these competitive options is a key benefit of this transaction.”). Not a single shipper has expressed concern that the transaction reduces their competitive options or that the NS-CSXT Settlement Agreement and Related Agreements would not preserve NS’s ability to compete against CSXT, and no shipper or shipper group has requested to speak at the hearing in opposition to the transaction. In contrast, numerous shippers, including Hub, have requested time at the hearing to express their support for the transaction and related agreements.

A few third parties—but with no shipper support—have expressed concerns about the competitive effects of CSXT acquiring Systems’ 50% interest in PAS. These comments express concern over the effects of replacing the current PAS operator with a subsidiary of GWI. Their concerns are baseless (for reasons explained below) and their proposed solutions would only create problems. See NS Reply, at 12.

⁵ The number of shipper statements submitted in support of the Proposed Transaction has since grown.

For example, the DOJ has suggested that CSXT be required to divest its stake in PAS and proposed that B&E should not be permitted to act as the operator for PAS.⁶ These suggestions by the DOJ, which would create disruption and uncertainty, are made without the support of NS or a single customer. See id. In addition to being disfavored by the parties that actually would be impacted by the Proposed Transaction, the DOJ's requests do not meet the applicable legal standard because they are not first predicated on a finding that the transaction would result in a substantial lessening of competition, create a monopoly, or restrain trade in freight transportation. Having failed to meet this statutory test, there is no basis for imposing any conditions.

Even if there were a basis for the imposition of conditions—and, again, there is not—the conditions suggested by DOJ are not narrowly tailored to resolve significant competitive harm. See, e.g., NS Reply, at 5-6 (citing Union Pac. Corp., Union Pac. R.R. Co., And Mo. Pac. R.R. Co. – Control And Merger – S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry. Co., SPCSL Corp., And The Denver And Rio Grande W. R.R. Co., FD 32760, Decision No. 44, 1 STB 233, 241, 1996 STB LEXIS 220, *418-419 (STB served Aug. 6, 1996)); CSXT Response, at 49-50 (discussing other instances in which the STB has rejected the extreme remedy of

⁶ Originally, VRS/VTrans also objected to B&E acting as the PAS operator. However, the competitive issues raised by commenters have been addressed by the negotiated arrangements and additional commitments made by the parties, including commitments by NS and CSXT to ensure that VRS's access to the west and east of PAS will be preserved, for as long as B&E operates PAS. This involves rate commitments to preserve current PAS rate levels with reasonable cost escalation for (1) VRS movements to the east, through Ayer, and (2) to the west, through Hoosick Junction and connecting to CSXT. As such, VRS/VTrans have since withdrawn any objection, and a copy of the Vermont Settlement was filed by CSXT with the Board on December 31, 2021. The transaction instituting B&E as the contract operator of the PAS Lines will result in PAS continuing as an independent railroad, providing service to all shippers that are currently able to be served by and from the PAS Lines and maintaining open gateways with all carriers that connect directly and indirectly with the PAS Lines.

divestiture); see also BLE/CSXT, 2021 STB Lexis 46, at *57n.46 (noting that the record must support findings); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 STB 233, 368 (1996) (rejecting DOJ’s request for a divestiture, finding that it was unnecessary and not in the public interest). Not being narrowly tailored, the suggested conditions should be rejected.

Further, these suggestions neglect the fact that, if for some unforeseen reason, the negotiated solution proves ineffective and the theoretical and hypothetical concerns raised by DOJ somehow become a reality, the very remedies these parties seek to impose now will become a reality. See NS Reply, at 20. This is true because NS has the option to force a more orderly and structured divestiture of CSXT’s interest in PAS or the replacement of B&E as the operator. See id.

The comments submitted by Canadian Pacific (“CP”) concentrate on the need to ensure that PAS remains a long-term viable rail carrier for competitive rail service in New England. What CP doesn’t fully acknowledge is that NS shares that goal. CP expresses concern that the rerouting of NS’s intermodal traffic will leave PAS financially harmed and the two future owners of PAS may not keep PAS viable over the long term. Based on its stated concerns regarding “the continued operational and competitive viability of the [PAS] route,” CP asks the STB to impose a veritable laundry list of so-called “narrowly-tailored conditions” to ensure the continued viability of PAS. See Canadian Pacific Comments, filed Aug. 27, 2021, at 11, 21-22); see also CSXT Response, at 55 (listing just some of CP’s demands).

However, like those concerns stated by the DOJ, CP’s concerns are misplaced. First, NS is the last party who would want to see an erosion of PAS’s viability. NS does not have the option to route traffic away from an NS/PAS routing except for the one intermodal train on CSX’s east-west line. As such, NS must maintain PAS’s viability if NS is to remain a

competitive balance to CSXT. See CSXT Response, Reply V.S. Pelkey, at 4 (“The PAS traffic data is described by CSXT’s economist, Dr. Reishus, who shows that PAS movements connecting to CSXT and NS together account for the vast majority of traffic on PAS. A. As major users of PAS, both carriers have a strong incentive to keep PAS viable to support these traffic movements.”); see also CSXT Response, Reply V.S. Reishus, at at ¶16 (“The PAS owners retain a strong incentive to maintain the PAS line as a viable rail alternative.”). It is important to recall that when the CSX/Pan Am transaction was announced, NS was very concerned about losing its ability to utilize PAS as an interchange partner. The entire point of the NS-CSXT Settlement Agreement and Related Agreements was, and is, to maintain PAS as a viable entity so that NS can remain a competitive balance to CSXT. NS has every economic incentive to ensure that PAS provides a strong and vibrant interchange partner for CP.

Second, CP’s view that PAS would be financially weakened by the rerouting of a single NS intermodal train over CSXT’s east/west line is incorrect. The rerouting of NS’s intermodal traffic, which is marginal to begin with, will be substantially replaced by the contribution that will be generated by the traffic that CSXT has agreed to move over PAS. See CSXT Response, at 56; see also CSXT Response, Reply V.S. Reishus, at ¶16. Further, the rerouting of NS’s intermodal traffic will free up capacity on PAS and thereby allow the future PAS operator to expand PAS business with more profitable traffic. See id.

Finally, as noted above, NS and CSXT, the two future owners of PAS, have incentives to keep PAS viable over the long term. NS has the largest share of merchandise traffic moving on PAS, with some of that traffic moving to PAS locations and other traffic moving overhead to PAR System locations or to interchange with other carriers connecting with PAS. NS will continue to have a strong incentive to keep PAS viable to ensure NS’s continued access to this

traffic. See id. “CSXT is the second largest interchange partner of PAS. Together, CSXT and NSR are involved in the majority of PAS movements. Moreover, CSXT has made routing commitments in its Settlement Agreement with NSR to interchange traffic to and from western locations with PAS at Rotterdam Jct. for movement over PAS. These routing commitments will generate substantial revenue for PAS.” CSXT Response, at 56-60 (further detailing CSXT’s and GW’s commitment to PAS, in contradiction of CP’s arguments).

As a result of these economic incentives and the NS-CSXT Settlement Agreement and Related Agreements, CP’s concerns are misplaced and there is no basis to impose any conditions for the protection of CP/NS routings over PAS. Shippers, communities, and the railroads are much better off allowing the NS-CSXT Settlement Agreement and Related Agreements to take effect as proposed. If, after a few years of operations and monitoring by NS (and/or the STB) NS does not believe the NS-CSXT Settlement Agreement is providing the level of desired competitiveness, NS will have no hesitation invoking its right to obtain full control of the PAS east/west line or to seek to replace B&E as the operator. See NS Reply, at 20.

III. PAS WILL BE STRONGER WITH B&E AS THE OPERATOR.

Concerns about the viability of PAS are also misplaced because NS expects that PAS operations will improve with B&E as operator. B&E will be able to focus exclusively on PAS operations, PAS competitiveness, and PAS viability, as opposed to the current situation in which ST has conflicting interests in maintaining its own, separate operations.

Further, B&E will have a more efficient cost structure and financial incentives to grow PAS’s business. The transaction that gave rise to PAS was, in part, a means of permitting NS to infuse substantial funding into the system to improve infrastructure, remove long-term slow orders, and add capacity on the lines, which had suffered under the sole operation of ST. While

the PAS transaction resolved many of the concerns of shippers and shortline connections regarding ST's service, this hampered NS's ability to fully utilize the PAS system. See NS Reply, at 11. Substituting CSXT for Pan Am creates a strong financial partner and operator with substantial resources. "For years, Pan Am has lacked the resources to invest in its network, but CSX has committed to injecting the necessary capital to make modernization a reality." SouthCoast Chamber Comments, at 1; see also id. ("Whether it is a business shipping goods over rail or passengers commuting by train, everyone stands to benefit from the merger."); CSXT Response, at 9 (same), 14 (describing how the former lieutenant governor of Massachusetts, and mayor of and city council member in Worcester, MA, "express support for the merger because it 'would bring the substantial investment capital, operational expertise, and innovation prowess of one of the best railroad operators in the business into our back yard'"). This improved financial status is further bolstered by the addition of B&E as the independent operator of PAS. See NS Reply, at 11.

In addition, B&E will be able to draw upon GWI's experience in safe and efficient short-line railroad operations. See id. at 12. B&E, as a subsidiary of GWI, will have access to greater corporate resources, including GWI's safety and training programs. Such savings not only will improve the financial viability of B&E, but also will permit NS and CSXT to create and implement an improved maintenance schedule that is more in sync with the flow of traffic over the lines. Id.

IV. COMPETITION WILL BE ENHANCED AS A RESULT OF THE PROPOSED TRANSACTION.

In addition to protecting the viability of PAS as a competitive entity (and, in turn, protecting NS's ability to compete with CSXT), the Merger and Related Transactions will result in significant pro-competitive efficiencies. See NS Reply, at 9-10. For example, the Proposed

Transactions will substantially improve rail service and operations in the Northeast by unifying two already interconnected rail networks to produce an efficient single-line service. Shippers on both the PAR System and on CSXT will see expanded market opportunities as the efficiencies of a unified system and the benefits of improved infrastructure are felt. Id.

An especially important example of the efficiencies that will be gained by the Merger and Related Transactions is the ability for NS to provide double-stack intermodal service into the Boston area.⁷ NS Reply, at 10. At present, NS intermodal trains moving over the PAS's east-west Patriot Corridor line between Mechanicville, New York, and Ayer, Massachusetts, experience height limitations at the Hoosac Tunnel, which is a bottleneck that prevents double-stack intermodal operations over the PAS Patriot Corridor. Before reaching the Hoosac Tunnel, a double-stack train approaching from the west must be stopped and "fileted," meaning that the top row of containers and trailers must be removed from the intermodal rail cars and loaded onto other intermodal rail cars, resulting in a longer train. Meanwhile, trains approaching from the east must be single-stacked through the tunnel, and, if further operations are to be double-stacked as the train travels west, cars must be "toupeed," meaning that the rail cars must be stopped and double-stacked in Mechanicville. As such, existing operations require more intermodal rail cars, more work, and longer transit times as the train must stop in Mechanicville while the toupee/filet operations occur. The result is that many shippers have never fully benefitted from double-stack intermodal service that NS was hoping to institute in competition to CSXT.

The trackage rights that NS will acquire over CSX's Southern Route will substantially improve NS's ability to compete with trucks for intermodal traffic because NS will now be able

⁷ The largest and most important rail traffic flows into and out of New England involves intermodal traffic.

to avoid height restrictions on PAS that prevented the use of double-stack intermodal trains. At the same time, competition for other traffic moving in over PAS will be enhanced by freeing up capacity on the East-West Patriot Corridor for other, more PAS-remunerative, traffic. NS Reply, at 11.

CONCLUSION

When viewed in its entirety, the Merger and Related Transactions clearly will not result in a substantial lessening of competition, creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States. No shipper has filed a request for a condition asserting that its competitive options will be reduced. Further, no third party has shown that a condition is required. And, even if a condition is warranted, which it is not, any suggested condition fails to meet the standard that it be narrowly tailored. Accordingly, the Board should approve the Merger and Related Transactions without conditions, other than standard labor protective conditions and those commitments voluntarily agreed to by NS, CSXT, or B&E.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Norfolk Southern Railway Company in STB Finance Docket No. 36472, by first class mail, properly addressed with postage prepaid, or other more expeditious means upon all parties of record.

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