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January 3, 2022

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VIA E-FILING

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 3, 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 Final 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

FINAL BRIEF OF NATIONAL RAILROAD PASSENGER CORPORATION

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Dated: January 3, 2022

TABLE OF CONTENTS

	Page
A. AMTRAK’S REQUESTED CONDITIONS ARE NECESSARY TO EFFECTUATE FEDERAL PUBLIC POLICY REGARDING IMPROVEMENT AND ENHANCEMENT OF PASSENGER RAIL.....	1
1. Conditions intended to mitigate the harmful impact of the Proposed Transaction on the performance of passenger trains on the affected lines by, among other things, protecting Amtrak’s statutory right to preference and protecting federal, state and local investments for passenger rail on the affected lines.....	2
2. Conditions relating to improvements in passenger service in the region.....	2
B. CSXT HAS REFUSED TO COMMIT TO THE MAJORITY OF SPECIFIC CONDITIONS DESIGNED TO PROTECT AND PROMOTE INTERCITY PASSENGER RAIL.	5
C. THE BOARD SHOULD ORDER CSXT TO ABIDE WITH ITS REPRESENTATIONS AND COMMITMENTS, AS WELL AS THE SPECIFIC CONDITIONS REQUESTED BY AMTRAK AND ENDORSED BY THE DEPARTMENT OF TRANSPORTATION, AS A CONDITION OF ANY APPROVAL OF THE PROPOSED TRANSACTION.	8

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

FINAL BRIEF OF NATIONAL RAILROAD PASSENGER CORPORATION

In accordance with Decision No. 4 (filed July 30, 2021), and Decision No. 6 (filed December 10, 2021), National Passenger Railroad Corporation (“Amtrak”) hereby submits its final brief constituting a concise summary of Amtrak’s position as set forth more fully in its Comments In Opposition To The Proposed Transaction, filed on August 27, 2021 (“Comments”).

**A. AMTRAK’S REQUESTED CONDITIONS ARE NECESSARY TO EFFECTUATE
FEDERAL PUBLIC POLICY REGARDING IMPROVEMENT AND
ENHANCEMENT OF PASSENGER RAIL.**

In its Comments, Amtrak proposed seven conditions to the Board’s approval of the Proposed Transaction. Amtrak demonstrated why those conditions are necessitated by elements of the Proposed Transaction, as informed by Amtrak’s extensive experience with CSXT’s positions and actions regarding 49 U.S.C. § 24308 and the operation and expansion of passenger service on CSXT rail lines, including the very lines proposed to be acquired by CSXT in the Proposed Transaction. Amtrak’s proposed conditions can be grouped into two broad categories:

1. Conditions intended to mitigate the harmful impact of the Proposed Transaction on the performance of passenger trains on the affected lines by, among other things, protecting Amtrak's statutory right to preference and protecting federal, state and local investments for passenger rail on the affected lines:

- a. Condition No. 1 (operations of daily round trip double-stack train by NSR, and operations of B&E trains so as not to conflict with Amtrak's *Lake Shore Limited*, *Valley Flyer*, and *Vermont* services);
- b. Condition No. 4 (conditions necessary to prevent or mitigate degradation in customer on-time performance on the Pan Am and *Albany-Worcester* routes);
- c. Condition No. 5 (avoidance of non-emergency maintenance of way activities that would interfere with peak passenger travel periods).

2. Conditions relating to improvements in passenger service in the region:

- a. Condition No. 2 (cooperate in good faith with respect to addition, expansion or modification of intercity passenger rail services, and share all inputs and assumptions with respect to any analysis or modeling, if such is required, with Amtrak and the Board);
- b. Condition No. 3 (cooperation in identifying improvements if any required for accelerated speeds on the Pan Am and *Albany-Worcester* routes);
- c. Condition No. 6 (commitment to permit operation of seasonal passenger service between Albany, NY and Pittsfield, MA (the *Berkshire Flyer* service)).

Amtrak also requested two more general conditions, necessary to ensure that the specific performance and improvement conditions listed above are met; *i.e.*, that CSXT be ordered to fulfill all of the representations made in the proceeding regarding the effect of the Proposed Transaction

on present and future services (Condition No. 1); and that the Board retain jurisdiction to oversee compliance with the conditions imposed (Condition No. 7).¹

Amtrak's proposed conditions are congruent with, and necessary to fulfill, the policy objectives of this Administration in favor of much-needed and much-delayed expansion of passenger rail and the expeditious operation of passenger service, embodied in part in the following:

- The President's July 9, 2021 Executive Order 14036, recognizing the importance of the role played by the Board in ensuring compliance with "the required preference for passenger rail" and encouraging 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 proposed merger is consistent with the public interest. Amtrak's statutory rights under 49 U.S.C. § 24308 include the right to preference over freight transportation (§ 24308(a)) and the right to operate additional trains provided certain conditions are met (§ 24308(e)).²
- The Infrastructure Investment and Jobs Act of 2021 ("IIJA") provides transformative levels of federal funding for expansion of intercity passenger rail service, and directs the Federal Railroad Administration ("FRA") to develop, in consultation with Amtrak, a prioritized list of corridors that will receive investments under those funding program. Access to host railroad lines for new and expanded service on reasonable terms, and without lengthy delays or exorbitant demands for capital investments, is an essential prerequisite to using the funding provided by the IIJA to grow Amtrak's network.

¹ The full text of Amtrak's requested conditions is enumerated at the end of this brief.

² See Amtrak's Comments at pp. 4-5 for a fuller discussion of the July 9 Executive Order.

- The Department of Transportation has affirmed that “[t]he restoration, enhancement, expansion and on-time performance of passenger rail service is a key priority for DOT and for the Biden Administration, and should also be an important component of the Board’s review of the public interest in this transaction.” DOT Opening Comments (filed August 27, 2021) at p. 8.
- More specifically, the Department of Transportation noted that the Proposed Transaction has “important implications for passenger rail in the Northeast,” and that “passenger service in the region has been made possible through significant investments of public funds ... over the past two decades.”³ DOT Opening Comments at pp. 6, 7-8. The DOT therefore recommended that the Board “consider imposing conditions upon the applicants to ensure that existing passenger service is appropriately maintained,” consistent with the statutory preference afforded to passenger rail under 49 U.S.C. § 24308 and the goals set forth in the Executive Order cited above, showing “a special sensitivity toward passenger rail concerns, and to alleviate passenger service disruptions.” *Id.* at p. 8.
- In its Additional Comments (filed October 18, 2021) (at p. 2), the DOT noted the heavy public investment in the northeast railroad network, including the affected rail lines, largely for the benefit of passenger rail operations, stating that it was “imperative that the benefits of these investments are not unduly compromised by any operational or other changes that may occur as a result of the proposed merger.” The DOT asked the Board (at p. 2) to “carefully consider and address Amtrak’s comments in opposition to the proposal regarding the applicants’ commitments to fulfilling their statutory responsibilities,

³ See Amtrak’s Comments at pp. 7-8 and the Verified Statement of Richard G. Slattery (“Slattery VS”) attached thereto at pp. 9-11 for major federal and/or state-funded investments in Pan Am infrastructure.

particularly regarding the development and expansion of intercity passenger rail service through the operation of additional trains.”⁴

In rejecting CSXT’s Amended Application (filed April 26, 2021), the Board noted that CSXT had provided “no support for their assertion that there would not be any impact on passenger or commuter trains operated on the [affected lines], as required by 49 C.F.R. § 1180.8(b)(2).”⁵ CSXT’s Revised Application (filed July 1, 2021) contained additional discussion of how it predicted passenger rail would “benefit” from a “more consistent and reliable network” if the Proposed Transaction were approved. And CSXT added certain general commitments regarding its intention to adhere to its statutory and contractual obligations, and to improve service, reliability, and efficiency. *See generally* Revised Application Ex. 13-C, Verified Statement of Andy Daly (“Daly VS”), at pp. 7-18, APP-373 to 384.

Amtrak filed its Comments to the Revised Application, including its proposed conditions, on August 27, 2021, and CSXT filed its rebuttal on October 18, 2021 (“CSXT Rebuttal”).

B. CSXT HAS REFUSED TO COMMIT TO THE MAJORITY OF SPECIFIC CONDITIONS DESIGNED TO PROTECT AND PROMOTE INTERCITY PASSENGER RAIL.

In its Rebuttal, CSXT characterized Amtrak’s Comments as “largely focused on matters unrelated to the Merger and Related Transactions,” and proceeded to reject the substance of Amtrak’s proposed conditions (other than Amtrak’s proposed Condition No. 1, which included a

⁴ *See also* Federal Railroad Administration (“FRA”) Comments (filed December 21, 2021) (at p. 2) (“FRA continues to urge the Board to carefully consider the comments submitted by Amtrak and other passenger rail stakeholders, and requests that the Board impose appropriate conditions to ensure that the applicants are held to their commitments regarding the continuation and enhancement of passenger rail.”)

⁵ Decision No. 3 (May 26, 2021), at p. 7 & n.16.

requirement that CSXT adhere to the representations made in the course of the proceeding). CSXT Rebuttal at 71-74.⁶

With respect to the impact of the Proposed Transaction on Amtrak's existing passenger service, CSXT simply reiterated its belief that any impact would be "minimal". *Id.* at 73. Similarly, with respect to expanded passenger service, CSXT stated that it was "always willing to cooperate in good faith" to discuss modification of passenger service, and cited various commitments made to NNEPRA regarding the Downeaster service. *Id.* at 74. But CSXT simply ignored the additional requested condition regarding the sharing of inputs and assumptions in any analysis or modelling of such modifications. Moreover, CSXT asserted that it is not "appropriate" for the Board to impose a requirement to "cooperate" regarding expansion or modification of passenger service, when Amtrak's recent attempts to work with CSXT specifically in this region has not reflected the promised willingness or good faith. *Id.* at 75.

CSXT similarly rejected all other specific conditions that would require CSXT, for example, to forego changes in operations on the affected lines if those changes would reasonably be expected to result in less than 80% customer on-time performance; to schedule non-emergency maintenance of way activities during non-peak passenger travel periods; or to agree to the operation of up to four weekend trips on a seasonal basis between Albany, NY and Pittsfield, MA

⁶ The claim that Amtrak's proposed conditions should be rejected because the matters dealt with are allegedly "unrelated to" the Proposed Transaction is mistaken both factually and legally. A number of Amtrak's proposed conditions relate directly to operations on, and protecting federal and state investment in, the affected lines. Moreover, the Board's conditioning authority is "extraordinarily broad," *Village of Barrington v. Surface Transportation Bd.*, 636 F.3d 650, 653, 664 (D.C. Cir. 2011), and may properly be applied "to mitigate various concerns and protect the public interest." *Bessemer and Lake Erie Railroad Co – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc.*, STB Financial Docket No. FD 36347, Decision served Feb. 25, 2021, at p. 7.

(the seasonal *Berkshire Flyer* service). CSXT Rebuttal at pp. 71-78. In each case CSXT claimed that the proposed condition was “entirely unrelated to” the Proposed Transaction. *Id.*

In claiming that Amtrak’s proposed conditions are inappropriate or unrelated to the Proposed Transaction, CSXT has ignored both the underlying law and its own past behavior.

First, as discussed more fully in Amtrak’s Comments at pp. 3-4, 49 U.S.C. § 11324(c) provides that the Board shall approve and authorize a proposed transaction that it finds is “consistent with the public interest,” and that the Board “may impose conditions governing the transaction.” *See Village of Barrington v. Surface Transportation Bd.*, 636 F.3d 650, 653, 664 (D.C. Cir. 2011) (Board may impose conditions “unrelated to competition concerns” to “mitigate the effects of the transaction,” constrained only by the statute’s “broad public interest standard.”).

Second, as discussed in Amtrak’s Comments at pp. 9-12 and the Slattery Verified Statement at pp. 4-11, past experience with the disastrous effects of mergers on passenger rail - in particular, with the acquisition of Conrail by CSXT and NSR (Conrail Acquisition) - shows that the conditions imposed must be specific enough to achieve the desired outcome, and that general assurances that “all will be well” by those seeking merger approval will not suffice. *Third*, CSXT ignores the recognition by this Administration, discussed above, that it is absolutely appropriate for 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 proposed merger is consistent with the public interest. As detailed in Amtrak’s Comments (at pp. 15-19) and the accompanying Verified Statement of Kyle Montgomery (at pp. 1-4), CSXT has often refused to honor Amtrak’s statutory rights resulting in protracted disagreements, threats of litigation, and litigation.

C. THE BOARD SHOULD ORDER CSXT TO ABIDE WITH ITS REPRESENTATIONS AND COMMITMENTS, AS WELL AS THE SPECIFIC CONDITIONS REQUESTED BY AMTRAK AND ENDORSED BY THE DEPARTMENT OF TRANSPORTATION, AS A CONDITION OF ANY APPROVAL OF THE PROPOSED TRANSACTION.

CSXT's promises that "all will be well" if the Proposed Transaction is approved - the same promises that CSXT made, and then failed to fulfill, when it asked the Board to approve the Conrail Acquisition - are not sufficient to protect the interests of intercity passenger rail service and its state sponsors. Therefore, Amtrak continues to oppose the Proposed Transaction unless the following conditions are imposed, which include not only the undertakings CSXT has already agreed to, but also the more specific conditions necessary to support present and future passenger rail operations (*see* DOT Additional Comments at p. 1):

- **Condition No. 1**⁷ - CSXT should be ordered to adhere to and fulfill the representations it has made in this proceeding regarding its undertakings and obligations if the Proposed Transaction is approved, and to make regular and data-supported reporting to the Board to confirm its compliance with those representations. Specifically, CSXT should be ordered:
 - o To "comply[] with its statutory and contractual responsibilities with respect to Amtrak services." CSXT Rebuttal at 76; Revised App. Ex. 13-C, Daly VS at p. 10, APP-376.
 - o To "maintain or improve existing passenger service," maintain a "consistent and reliable network," and create a "dedicated Passenger Operations team." Daly VS at p. 4, APP-370.

⁷ CSXT did not dispute or oppose Amtrak's proposed Condition No. 1. *See* CSXT Rebuttal at pp. 71-72. Amtrak's Condition 1 proposed, among other things, that CSXT be required to adhere to and fulfill all representations made in the proceeding without enumerating those representations. CSXT's representations relating to Amtrak service are enumerated herein.

- o Prior to initiating additional NSR intermodal/automotive service, to engage with NSR and Amtrak in “formal joint planning and joint preparation”; schedule the additional NSR service to “operate outside the current Amtrak operating windows” between the Albany area and Worcester (2:00p.m.-7:00p.m.); and “make sure that the passenger service requirements will be protected.” CSXT Rebuttal at p. 74; Daly VS at p. 13-14, APP-379-380.
- o To ensure that proposed traffic shifts have no “impact on any passenger service on the Southern Route or the Northern Route.” Daly VS at p. 12, APP-378.
- o To ensure that NSR intermodal/automotive service will “be scheduled to operate at a time when no Amtrak trains are scheduled to run over the Knowledge Corridor.” Daly VS at p. 17, APP-383.
- o To “prioritize passenger train movements at” CP 98 (milepost QB 98.5) in Springfield, MA. Daly VS at p. 17, APP-383.
- o To ensure that “all passenger trains are handled efficiently by dispatchers on the CSXT network.” Daly VS at p. 18, APP-384.
- o To “participate in good faith discussions with NNEPRA and Amtrak regarding improvements to, or expansion of, the Downeaster service.” See CSXT Rebuttal at p. 74; CSXT/NNEPRA Settlement Agreement 2, filed August 5, 2021. To the extent not included in the above, to cooperate with any effort to increase maximum speeds for *Downeaster* trains and increasing *Downeaster* service frequencies. Daly VS at p. 15, APP-381.
- o To install Positive Train Control (“PTC”) on the PAR System line segment north of the Massachusetts/New Hampshire State line to Brunswick, ME, which hosts the

Amtrak *Downeaster* service, and to work with Amtrak and NNEPRA on coordinating installation of PTC. Daly VS at p. 15, APP-381.

- **Condition No. 2** - CSXT should be ordered to fully cooperate in good faith with Amtrak and third party public agencies for addition, expansion or modification of existing intercity passenger rail services, operation of seasonal service or “extra sections” of existing regularly scheduled Amtrak trains, and/or development of new intercity passenger rail service, including but not limited to service over on the Pan Am routes and CSXT’s Albany-Worcester route; with respect to any such request by Amtrak, all inputs and assumptions will be shared with the parties participating in any analysis or modelling (if such is required), and with the Board in any subsequent proceeding, subject to appropriate confidentiality undertakings; and with respect to the Pan Am routes and CSXT’s Albany-Worcester route, the level and composition of freight traffic used in any analysis or modelling (if such is required), will be no greater than the level forecast by CSXT in their Application.
- **Condition No. 3** - CSXT should be ordered to cooperate with Amtrak and third party public agencies to identify improvements if any that would be required to make accelerated speeds on the Pan Am routes and CSXT’s Albany-Worcester route safe and practicable, and upon agreement or an order to implement such accelerated speeds, work in good faith to make such improvements as promptly as practicable.
- **Condition No. 4** - CSXT should be ordered to not make changes in operations on the Pan Am routes and/or CSXT’s Albany-Worcester route, including but not limited to changes in freight traffic volumes, scheduling, infrastructure, and dispatching, that would reasonably be expected to result in the Customer On-Time Performance (“Customer OTP”)

of Amtrak trains operating on the Pan Am routes and CSXT's Albany-Worcester route falling below the minimum standard as defined in the FRA Final Rule published November 16, 2019, and that in the event CSXT changes inadvertently result in an Amtrak train or Amtrak route falling below such minimum standard, CSXT will be required to take such actions as may be necessary to restore the performance of such Amtrak train or Amtrak route performance to at least the minimum standard.

- **Condition No. 5** - CSXT should be ordered to perform all non-emergency maintenance of way activities on the Pan Am routes and CSXT's Albany-Worcester route during non-peak passenger travel periods.
- **Condition No. 6** - CSXT should be ordered to provide for the operation of up to four weekend trips (two on Friday and two on Sunday), on a seasonal basis (summer) only, between Albany, NY (Post Road Crossing) and Pittsfield, MA (the *Berkshire Flyer* service), commencing on a date ninety (90) days following written notice from Amtrak, at maximum authorized passenger train speeds, with no required capital contribution from Amtrak for capacity related improvements, and permitting such Amtrak trains to change ends in Pittsfield on Track 1.
- **Condition No. 7** - The Board should retain jurisdiction to oversee compliance with these conditions.

Dated: January 3, 2022

Respectfully submitted,

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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 3rd day of January, 2022 I have caused to be served a copy of the foregoing Final Brief of National Railroad Passenger Corporation upon all parties of record via electronic mail.

Executed on: January 3, 2022

By: */s/ Sophia Ree*
Sophia Ree

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 3rd day of January, 2022 I have caused to be served a copy of the foregoing Final Brief of National Railroad Passenger Corporation upon the following parties of record in this proceeding via mail:

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