

August 27, 2021

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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Office of Proceedings
AUGUST 27, 2021
Part of
Public Record

Submitted via e-filing

Re: STB Finance Docket No. 36472, *CSX Corporation and CSX Transportation, Inc., et al.—Control and Merger—Pan Am Systems, Inc., et. al.*

Dear Ms. Brown:

I am attaching for e-filing in the above-captioned proceedings the Comments of the State of Vermont in Opposition to the Application.

Please do not hesitate to contact me with any questions.

Yours very truly,



Charles A. Spitulnik
Counsel for the State of Vermont

Enclosure

Cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36472

**CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., ET AL.**

COMMENTS OF THE STATE OF VERMONT IN OPPOSITION TO THE APPLICATION

*Communications with respect to this pleading
should be addressed to:*

Dated: August 27, 2021

STATE OF VERMONT

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., ET AL.**

COMMENTS OF THE STATE OF VERMONT IN OPPOSITION TO THE APPLICATION

The State of Vermont, acting through its Agency of Transportation (“VTrans”), hereby files these Comments in opposition to the Application and the transactions described in this and related proceedings. In addition to the main control application, VTrans also expresses its opposition to the transaction described in Docket No. F.D. 36472 (Sub-No. 5), *Pittsburgh & Shawmut RR, LLC d/b/a/ Berkshire & Eastern R. – Operation of Property of Rail Carrier Pan Am Southern LLC Pan Am Southern LLC and Springfield Terminal Ry. Co.* (the “B&E Petition”). Taken either separately or together, the main control transaction and the B&E Petition are not consistent with the public interest because, if implemented, they will lead to a reduction in competitive alternatives for rail shippers in Vermont. Under the Board’s rules and well-established case law, the Board cannot approve a transaction that harms competition rather than promoting it. VTrans hereby asks this Board to deny the Application and the B&E Transaction as proposed.

However, there is a way for this Board and for the Applicants CSX Corporation and CSX Transportation, Inc. (hereinafter, “CSX” or “Applicants”) to save the transaction. The Board could address the anti-competitive effects the transaction will have on Vermont by imposing a condition to protect competition at gateways and corridors that are key to the movement of traffic to and from Vermont by requiring a carrier that is completely independent of both Applicants and their corporate affiliates, and of Genesee & Wyoming, Inc. (“GWI”) and its numerous corporate affiliates, to have the right and ability to serve those

gateways and corridors. Any such carrier would have to have demonstrated capacity (e.g., adequate equipment, trackage rights, and crews) to handle the traffic that moves through the gateways and on the corridors described further in these Comments. In addition to a carrier needing that capacity, it must also receive the operating rights necessary to fulfill this pro-competitive objective and receive the necessary authorization from this Board to conduct these operations. Only once these items are in place can the Board approve the Application.

I. INTRODUCTION

This proceeding has already endured a rocky history since the filing of the initial applications for the main transaction and a series of related transactions on February 25, 2021. That history is fully described in the Board’s *Decision No. 3* (Service Date May 26, 2021) (rejecting the Application for the main transaction and related applications as incomplete due to failure “to include the information needed to satisfy the Market Analysis requirement for a ‘significant’ transaction application under 49 C.F.R § 1180.7. Accordingly, the Board will reject the Application as incomplete. 49 U.S.C. § 11325(a).”) and *Decision No. 4* (Service Date July 20, 2021, (accepting the revised application the Applicants had filed on July 1, 2021, and setting a procedural schedule). VTrans will not burden the record with a repetition of the specific defects the Board noted in *Decision No. 3* or with a description of the actions the actions the Board required.

However, by filing these Comments and request for conditions, VTrans wishes to emphasize that the defects the Board noted in the Application and in one of the Related Transactions¹, the B&E Petition, have not been addressed. The B&E Petition proposes that a

¹ See, *Decision No. 4* (served on July 1, 2021), at page 2, where the Board stated: “...there are several filings for transactions related to the Merger Transaction, including: four notices of exemption for Norfolk Southern Railway Company (NSR) to acquire trackage rights over existing lines owned by four separate railroads; a petition for exemption to allow Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad (B&E), to replace Springfield Terminal as the operator of Pan Am Southern LLC (PAS); and a notice of exemption to allow SMS Rail Lines of New York, LLC (SMS) to discontinue service and terminate its lease of a rail line known as the Voorheesville Running Track. These transactions will be referred to as the Related Transactions.”

subsidiary of GWI would operate the Pan Am Southern, one of the family of railroads for which control would pass to CSX. VTrans stated its concerns about the proposed series of transactions in its Opposition to Application and Preliminary Comments, filed on March 17, 2021, and in its Reply to Applicants' March 18, 2021 Response to Initial Comments, filed on March 22, 2021. In the March 22 filing, VTrans underscored its concerns, summarizing the key issues that the Applicants and other parties to the related transactions had created and not taken any steps to address:

1. Applicants' voluntary agreements failed to address the 2-to-1 reduction in competitive services the transaction would have in Vermont (March 22 Reply, at 3-4); and,
2. Applicants' voluntary agreements alone do not overcome a 2-to-1 reduction and the factors that make such agreements acceptable do not exist here; and,
3. Applicants have not acknowledged or addressed the recent attempts by GWI subsidiary New England Central Railroad ("NECR") to render the existing trackage rights held by Pan Am Southern over NECR uneconomic, which if successful would have effectively reduced competitive services from 2--to-1 in the Connecticut River Line corridor. March 22 Reply at 4-5. By giving a GWI subsidiary operating rights here, GWI would find itself in a position where it could once again attempt to eliminate viable competition along this corridor.

The attached Verified Statements of Daniel Delabruere ("VS Delabruere") and of James C. (Charlie) Cunningham of R. L. Banks & Associates ("VS Cunningham") confirm and elaborate upon the continuing threat to the viability of competitive rail options in Vermont. This Board cannot allow the Applicants to undercut the efforts the State of Vermont is continuously making to renew the traffic base in the State and ensure that shippers have access to competitive rail service in order to allow for reasonable rates and service options

that will allow businesses to thrive and will promote a flourishing economy in the State.

Unless the Board imposes a condition that protects competition in the State, the Application and all of the Related Transactions must be denied.

II. COMMENTS

A. The Board may not approve the transactions as proposed without imposing conditions to ameliorate the reductions in competition at key interchange points in Vermont.

The Board may not approve the proposed transactions, including the proposed B&E Transaction. The statute specifies that in a transaction that does not involve the merger of two class one carriers the Board may not approve the proposed transaction if it will harm competition. 49 U.S.C. § 11324(d). The combination of transactions presented here will do precisely that.

49 U.S.C. § 11324(d) is specific, stating:

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.

49 C.F.R. § 11324(d) (emphasis supplied). As Vermont has consistently stated ever since the Applicants first presented any information about CSX's proposal to expand its presence in New England and to re-arrange the railroad map to its advantage and that of its co-applicants, the shipping public in Vermont will not only not see the advantages of the myriad proposals but will be distinctly harmed by the reduction in competition.

The General Policy Statement in 49 C.F.R. § 1180.1 governs the merger of two or more Class I carriers, a circumstance not present here. However, the statutory emphasis on avoiding reduction in competition on Section 11324(d) suggests that 49 C.F.R. 1180.2's

description of the reasons that preventing reduction in competition is a key part of the Board's consideration of mergers is instructive. According to that Policy Statement, 49 C.F.R. 1180.2(c)(i):

Prevent reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping regions merge. Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. *Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.*

49 C.F.R. 1180.2(c)(i) (emphasis supplied).

VTrans will be providing a full argument on the legal issues in its Brief to be filed on January 3, 2022². However, a summary of the Board's prior view of circumstances where competitive alternatives were being reduced from 2-to-1, or where one carrier was going to have control over competition in a corridor where there had previously been at least 2, confirms that the Board's precedent supports action to protect Vermont shippers from the adverse impacts of the proposed combination of transactions.

As part of its responsibility to scrutinize mergers for their anticompetitive effects pursuant to 49 U.S.C. § 11324 and 49 C.F.R. Part 1180, it is the Board's practice to consider so-called "2-to-1" situations, where a shipper or a corridor that is currently served exclusively by the two merging railroads will, as a result of the merger, only be served by one railroad.

² In *Decision No. 4*, the Board directs parties to file "[c]omments, protests, requests for conditions, and any other evidence and argument in opposition to the Revised Application or Related Transactions" by August 27, 2021, and to file final briefs by January 3, 2022. VTrans will provide its final argument on the issues related to 2-to-1 reductions in competition in that final brief.

See, e.g., Union Pacific Corp. et al. - Control and Merger - Southern Pacific Rail Corp et al., 1 S.T.B. 233, 390-393 (1996). Similarly, the Board also considers “3-to-2” situations, where only one other railroad serves a shipper or corridor in addition to the two merging railroads. *Id.* It is the longstanding practice of the Board and its predecessor, the Interstate Commerce Commission (“I.C.C.”), to impose conditions or otherwise seek solutions to preserve at least two-railroad service where it exists, and to impose remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis. *See Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), slip op. at 19 (Service Date June 11, 2001).

Where a commenting party to a proposed merger presents a cogent argument that a 2-to-1 situation exists and that the Board can remedy the situation, the Board will weigh the competing interests of the parties and may impose conditions on the merger to avoid such anticompetitive effects. *See, e.g., CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated R. Corp.*, 3 S.T.B. 196, 282-83 (1998).

The evidence VTrans has presented previously in this proceeding, confirmed by Messrs. Delabruere and Cunningham’s testimony today, confirms that this situation is present here. Without a significant change in the competitive picture, change that can be accomplished through the Board’s exercise of its authority to impose conditions to ameliorate harms to competition, the Board cannot approve the Application.

As Mr. Delabruere explains, Vermont’s economy presents a scenario of an ever-changing rail customer base created by a constantly developing economy. VS Delabruere at 3, para. 5. Competitive rail service offerings present a vital part of the State’s ability to attract, grow and retain new participants in that economy. One of the reasons that the State has been as successful as it has in responding to the changing customer and economic

landscape is because its current short-line operator, Vermont Rail System including its operating affiliates (“VRS”), has been willing to be creative with its own service offerings. *Id.*, para.6. However, with the reduction in competitive alternatives due to the control of the interchange points by members of the same corporate family where the leadership of the individual companies reports to and is governed by a unitary regional office, VRS may be hamstrung from developing and implementing the creative alternatives that have been the hallmark of the State’s and VRS’s ability to attract increasing traffic. *Id.*, para. 7. The impact would extend beyond VRS and directly affect Vermonters who would either not receive shipments of critical commodities or bear additional costs to get them.

Strengthening the operation of PAS, which Applicants assert will occur as a result of the introduction of B&E as the operator, or improving operations on the lines in Massachusetts, two of the primary benefits described by Applicants, do not address the anticompetitive effects that the transaction would have on freight coming into Vermont. Mr. Cunningham’s Verified Statement clarifies the issue. He states the following:

33. The applicants and witness statements in this filing have made two arguments in an attempt to relieve the concerns VTrans has with GWI operating PAS. The first is that the voluntary conditions agreed to between GWI, CSX and NS (“The Parties”) will preserve competition for Vermont shippers and VRS. The second is that the 3 parties have a vested interest in preserving the viability of the PAS as their operations depend on the line and the Class I’s collectively own the line.

34. These conditions may seem compelling on their face but in practice I see several issues with their ability to preserve competition and optionality. First, the conditions in the Term Sheet governing GWI’s operation of PAS independently are circumvented by Section V.(6) which discusses GWI’s and the Class I’s acknowledgement and acceptance of GWI’s ability to intertwine PAS’s operations with those of GWI’s other railroads in the region. This leaves the door open for GWI to combine operations between PAS and NECR for instance (absent conditions imposed on them by the STB).

35. In another commitment made to appease shippers and connecting carriers of GWI and PAS, conditions requiring GWI to set rates in an indiscriminate manner are caveated with the ability for GWI to discriminate based on, “mileage, density and similar operating characteristics.”*[footnote omitted]* Should VRS “density” or volume not adhere to GWI’s metrics (or the metrics CSX and NS impose on them), GWI will have the ability to change rates or levels of service. If this happened today, VRS would have a third-party competitor to rely on in the alternative but should the transaction take

place as proposed, VRS's recourse is only to turn to another GWI subsidiary or an inefficient and more costly route via CP. In other words, the delicate competitive balance that has been established and is working well is now destroyed beyond redemption.

36. The Parties also have committed to allow B&E to establish rates on existing lanes for customers at current levels as of the date of the proposed transaction. *[footnote omitted]* It's unclear to me how this will be established from the descriptions filed but in interviews with VRS management they discussed how volumes have been depressed over the last several months as interchange frequency has dwindled on the PAS, presumably due to resignations accompanying the news of the pending takeover. In addition, the Covid-19 pandemic has taken a toll on various commodities over the last year and a half. Taking a snapshot of commodities and volumes at the time of the transaction hardly seems like a fair way to ensure pricing competition between two railroads operated by the same owner. Will artificially lowered volumes over the last year and a half cause artificially high rates that VRS is stuck with going forward? How will GWI ensure pricing competition on new lanes or volumes over and above those captured at the time of the transaction? And what incentive does GWI have to compete with itself on the Patriot Corridor and, in particular, along the Conn River line where VRS enjoys two interchange carrier today? These issues illustrate the incomplete and/or inadequate remedies proposed to alleviate the competitive concerns of VTrans and its operator.

37. Regarding the vested interests of the Parties to keep PAS viable, data shown in Tables 14 and 15 of Dr. Reishus' statement show that the majority of traffic operated on PAS today is haulage service on behalf of NS. Since that proffered volume of traffic alone is sufficient to make PAS viable, even absent any revenue derived from adequate service to connecting carriers like VRS, it is pretty apparent that the applicants could care less about the competitive framework established as a result of the transaction and whether or not VRS can remain viable given the unlevel playing field that is its inevitable result.

38. The proposing parties make no attempt to address the competitive issues related to GWI enjoying a near monopoly on interchange with VRS in contrast to the status quo that their proposed transaction would create. Today, VRS has the ability to route traffic to/from Hoosick Jct. to connect with PAS for furtherance to/from NS and CSX. The competitive status quo gives VRS the ability route commodities that it competes with NECR on through channels that don't allow direct competitors to see volumes and, in some cases, rates. In contrast, if GWI takes over the operations of PAS, it leaves VRS with only less efficient routings via CP to prevent GWI from exploiting its access to competitive information. This is particularly concerning as the best predictor of the future is the past. As I mentioned above, GWI attempted to gain competitive information on interchanged volumes to/from VRS when re-negotiating its trackage rights agreement with PAS in 2014. This seems akin to NS having to interchange all of its traffic with CSX to get to BNSF or UP in the west. In this hypothetical, CSX would not know the rates under which NS traffic was moving but it would see the commodities and volumes to obtain a much better picture of the overall market. NS would never tolerate that commercial disadvantage and neither can VRS. But, in fact, VRS is being asked to tolerate an even less competitive commercial marketplace, one in which its competitor will have access to its rates. That combination of market disadvantages,

which will be inevitable if the proposed transaction is consummated as proposed, is highly detrimental to competition and the vital piece of Vermont's economy dependent on its state-supported rail infrastructure.

VS Cunningham at 14-18.

With the failure to address the transactions' anticompetitive effects in Vermont, the Application and the related transactions are fatally flawed. In view of these fatal flaws, the Board cannot approve the Application without imposing conditions that will designate an independent carrier to meet the objective of preserving competitive alternatives for freight originating in or destined for Vermont. As Mr. Cunningham concludes:

39. In the applicants' Statements, much is made of the end-to-end nature of the transaction and the competitive benefits of the proposed merger supposedly flowing from single line service. While my focus was specific to the "Related Transactions," in reviewing the documentation I can see several advantages associated with the merger to go forward. Much like the prior transaction, facilitating joint operation of PAS between NS and B&M several years ago, I can see many aspects over the overall transaction benefiting the New England region and increasing competition. CSX's concession to find a third-party operator I see as a sound remedy to preserve competition between NS and CSX. They've addressed 2-1 shipper concerns in the Boston area and they've given GWI another railroad to operate in the New England area (should the related transaction be completed).

40. In short, they've addressed the concerns of interested/concerned parties in many/most cases. However, they have not done anything to preserve competition in connection with the State of Vermont, VTrans or its contract operator, VRS. In fact, the opposite. The proposed transaction would not only reduce competition throughout Vermont, rail competition would be worse post-transaction than it was before ever NS invested in the PAS. Choosing GWI as the third party is the wrong choice. It gives the world's largest shortline and regional railroad holding company another puzzle piece in the New England area where its presence is already one of, if not the, largest. Other shortlines and shortline holding companies that have the ability and credentials in the industry to operate the PAS in a truly independent manner. By choosing GWI, CSX and NS have solved one problem by choosing the course of least resistance but creating another which can only be fixed by selecting another operator of PAS.

VS Cunningham at 17-18.

Remedies available to avoid 2-to-1 reductions include imposing conditions requiring the merging railroads to grant trackage rights to a viable competitor or, less commonly, ordering divestiture of parallel tracks owned by one of the two merging railroads. See STB Ex Parte No. 581 (Sub-No. 1), slip op. at 19. For example, in the acquisition proceedings in

1998 in which CSX Corporation and Norfolk Southern Railway Company acquired portions of Consolidated Rail Corporation's system, the Board imposed a condition requiring CSX to negotiate an agreement with the Canadian Pacific Railway permitting "either haulage rights, not restricted as to commodity or geographic scope, or similar unrestricted trackage rights, over the east-of-the Hudson line . . . under terms agreeable to the parties, taking into account the investment that continues to be required for the line." *CSX Transp.*, 3 S.T.B. at 283, 388-89. To avoid the harms that the transactions as proposed would work on the shipping public in Vermont, this Board should exercise its authority to require the Applicants to come forward with a solution that involves allowing an independent carrier that has no ties to other carriers serving the same gateways and corridors and that has the capacity to independently rise to the occasion of presenting a viable competitive alternative for interchange with the Vermont Rail System carriers to move traffic to and from Vermont.

Where conditions or other remedies cannot be fashioned in a manner satisfactory to both the Board and the merging railroads to resolve the anti-competitive effects of 2-to-1 reductions, the Board will decline the approval of the transaction. *Union Pacific*, 1 S.T.B. at 368 (comparing approval in that decision with disapproval in *Santa Fe Southern Pacific Corp. – Control – SPT Co.*, 2 I.C.C.2d 709 (1986) and 3 I.C.C.2d 926 (1987)). Thus, the choice for Applicants is clear – present a truly competitive alternative, or face rejection of the application.

B. Vermont's interest in preserving and enhancing passenger operations requires the Board to focus on the impact of the proposed transactions on Amtrak as well.

This Board cannot review this transaction without addressing the potential impacts of the proposed merger on Amtrak and on the capacity to further develop passenger rail service in Vermont. VTrans promotes both passenger and freight service alternatives and has seen success in preservation of passenger service statewide. The proposed transactions cannot

place the State in a position where reduced capacity or other changes in the operating scenarios foreclose the opportunity for enhancement of intercity passenger rail traffic. The Board should require the Applicants and the other railroads involved in the Related Transactions that, subject to the obligation to reach agreements with Amtrak and comply with the statutory mandates, they should work cooperatively with the State and with Amtrak to promote and enhance passenger opportunities that serve the State.

Vermont promotes competitive freight service and enhanced passenger service through numerous mechanisms. Final Vermont Rail Plan, May 2021, available at: <https://vtrans.vermont.gov/sites/aot/files/planning/documents/Vermont%20Rail%20Plan%205-20-2021%20Final.pdf> (“VT Rail Plan”).

As of July 19, 2021, the Vermonter, a passenger service between Washington, D.C., and St. Albans, Vermont, and the Ethan Allen Express, a passenger service between New York City and Rutland, operate seven days a week. Both services had been suspended since March 16, 2020, as the result of the COVID-19 pandemic. VT Rail Plan, at 6. The Vermonter runs along the NECR line between E. Northfield, MA, and St. Albans. The Ethan Allen Express accesses Rutland via Whitehall, NY via a line owned in part by Canadian Pacific (CP owns the line from points south and west to Whitehall) and in part by the Clarendon and Pittsford, a VRS subsidiary, which owns the line from Whitehall to Rutland. The Ethan Allen Express is planned to extend to Burlington, VT in 2022 (VT Rail Plan at 6). The 2011 Vermont Comprehensive Energy Plan anticipates a fourfold increase in passenger rail traffic within Vermont, from 100,000 to 400,000 annual trips, between 2011 and 2030. VT Rail Plan at 11-12.

Vermont projects investments of \$15 million in its passenger rail program in the next five years, and an additional \$99 million over the following fifteen years to support service expansion, station enhancements, and safety upgrades. VT Rail Plan at 11-49. Options for

expansion include doubling the frequency of the Vermonter to twice-daily service, along with extending the Vermonter route to Montreal. VT Rail Plan, Technical Memo 4, at 20.

Consistent with the State's objective of promoting growth in passenger service as well as optimizing freight service options, the Board should require all of the railroads participating in the proposed transactions to work with the State to continue enhancing passenger services.

III. CONCLUSION

In view of all of the foregoing, VTrans respectfully requests the Board to deny the Application as proposed. CSX and its partners have presented a web of transactions that will compromise Vermont's existing position, in which it benefits from true competition among rail providers. In accordance with the Board's precedent, if an applicant fails to propose a means of mitigating the effects of a 2-to-1 reduction in service, the proposed merger transaction must be rejected. Alternatively, the Board should impose a condition to protect competition at gateways and corridors that are key to the movement of traffic to and from Vermont by requiring a carrier that is completely independent of both Applicants and their corporate affiliates, and of GWI and its numerous corporate affiliates, to have the right and ability to serve those gateways and corridors.

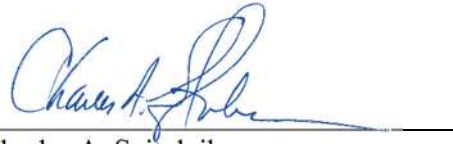
August 27, 2021

Respectfully submitted,

STATE OF VERMONT

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**VERIFIED STATEMENT
OF DANIEL DELABRUERE**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36472

**CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., ET AL.**

VERIFIED STATEMENT OF DANIEL DELABRUERE

1. I am Daniel Delabruere. I have been employed by the State of Vermont's Agency of Transportation ("VTrans") since July 2010. I currently serve as VTrans' Rail & Aviation Bureau Director. I am responsible for developing programs, policies and procedures to achieve the goals and objectives of the State's railroad programs. My duties include oversight of State-owned railroad properties and facilities, managing leases with operating railroad companies, and oversight of the State's railroad projects from conceptual phase through completion. I am responsible for communication and coordination with federal agencies, other state and provincial agencies, the State's congressional delegation, the directors of rail programs in other states, the American Association of State Highway and Transportation Officials ("AASHTO"), and many other groups. I maintain a high level of contact with operating railroads, Amtrak, municipal officials, consulting firms, and the general public. I directly engage with Vermont rail shippers regarding their transportation needs. I represent VTrans as a member of different in-state and out-of-state committees such as the Vermont Rail Advisory Council and the AASHTO Standing

Committee on Rail. I represent VTrans in negotiations with freight railroads, Amtrak, and neighboring states.

2. I have previously submitted a Verified Statement in this proceeding as part of VTrans' *Opposition to Application and Petition and Preliminary Comments*, filed on March 17, 2021. I am incorporating that Verified Statement and the contents of the State's *Opposition* here, because the issues raised there remain in play.

Notwithstanding VTrans' consistent efforts to identify and seek a way to address those issues, the railroads that are proposing the merger and the series of Related Transactions¹ have remained unwilling to propose or find a solution to them.

3. As a result, the State of Vermont must oppose the main transaction and the multiple "Related Transactions", in particular the petition submitted by Berkshire and Eastern Railroad, a subsidiary of Genesee & Wyoming Industries, for an exemption to operate over the tracks and property of Pan Am Southern LLC and Springfield Terminal Ry. Co. (collectively, "PAS") (the "B&E Petition"). The impact of this Board granting the authority described in the B&E Petition, coupled with the other impacts of the transactions proposed in the main application here will be detrimental to competition in the State and the opposition to this proposed series of transactions that we have consistently expressed remains unchanged.

¹ This proceeding is multi-faceted and involves not only the transaction proposed in the main Application by which CSX Corporation and CSX Transportation, Inc. ("CSX") will acquire control over and merge with Pan Am Systems, Inc. and its family of railroads. In addition, and as this Board has stated in its *Decision No. 4* (served on July 1, 2021), at page 2, "there are several filings for transactions related to the Merger Transaction, including: four notices of exemption for Norfolk Southern Railway Company (NSR) to acquire trackage rights over existing lines owned by four separate railroads; a petition for exemption to allow Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad (B&E), to replace Springfield Terminal as the operator of Pan Am Southern LLC (PAS); and a notice of exemption to allow SMS Rail Lines of New York, LLC (SMS) to discontinue service and terminate its lease of a rail line known as the Voorheesville Running Track. These transactions will be referred to as the Related Transactions." I am using that same terminology here.

4. VTrans explained the bases for its opposition in the Comments that it filed on March 17, 2021, to which my previous Verified Statement was attached, and in the Reply to Applicants' March 18, 2021, Response to Initial Comments and Certificate of Service that VTrans filed on March 22, 2021.²
5. Let me explain the impacts of the transaction on the State. Vermont's economy presents a scenario of an ever-changing rail customer base created by a constantly developing economy. Competitive rail service offerings present a vital part of the State's ability to attract, grow and retain new participants in that economy.
6. One of the reasons that the State has been as successful as it has in responding to its changing customer and economic landscape is because its current short-line operator, the Vermont Rail System and its subsidiary railroads, have been willing to be creative with the services they provide, and are able to nimbly respond to their customers, on lines throughout the State.
7. However, with the reduction in competitive alternatives due to the proposed control of the interchange points by members of the same corporate family, where the leadership of the individual companies reports to and is governed by a unitary regional office, VRS may be hamstrung from developing and implementing the creative alternatives that have been the hallmark of the State's and VRS's ability to attract increasing traffic.
8. As I explained in my Verified Statement dated March 17, 2021, the necessity of competitive alternatives for rail traffic in order to continue driving the State's

² I am also incorporating the contents of the State's March 22 *Response to Initial Comments* here because, again, the issues that motivated the State to express its opposition to the Application and the Related Transactions from the outset remain unaddressed.

economy leads me to have three basic issues with the transactions proposed in the

Application and in all of the Related Transactions:

- a. Applicants' voluntary agreements failed to address the 2-to-1 reduction in competitive services the transaction would create in Vermont (*see*, March 22 Reply, at 3-4);
- b. Applicants' voluntary agreements alone do not overcome the impacts of a 2-to-1 reduction and the factors that would make such agreements acceptable do not exist here (*see*, March 22 Reply at 4); and,
- c. Applicants have not acknowledged or addressed the recent attempts by GWI subsidiary New England Central Railroad ("NECR") to render the existing trackage rights held by Pan Am Southern over NECR uneconomic, which if successful would have effectively reduced competitive services from 2-to-1 in the Connecticut River Line corridor. March 22 Reply at 4-5.

9. With respect to the third concern (item c, above) it is important to understand that the Connecticut River Line is a vital artery for the State's rail shippers, one that has played an increasingly important role in the State's rail network since the State participated in the acquisition of the line to improve both passenger and freight service in the early 1990's. Having seen GWI's recent attempts to increase the cost of using the Conn River Line, an attempt that was thwarted only because of the STB's intervention that stopped GWI from proceeding, I fear that the potential for granting an additional GWI subsidiary operating rights over that line would place GWI in a position where it could once again attempt to eliminate viable competition along this corridor. The STB decision in which GWI's attempts were stopped was

New England Central R.R., Inc.—Trackage Rights Order—Pan Am Southern, LLC,

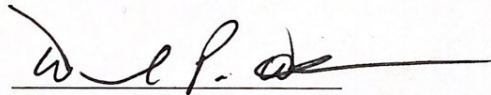
FD 35842 (Service Date Oct. 31, 2017),

10. Further, Affiant sayeth not.

I, Daniel Delabruere, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on August 27, 2021.



Daniel Delabruere

VERIFIED STATEMENT OF JAMES C. CUNNINGHAM

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36472

**CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., ET AL.**

VERIFIED STATEMENT OF JAMES C. CUNNINGHAM

I. Introduction and Qualifications

1. My name is James C. Cunningham (Charlie). I am a Manager at R.L. Banks & Associates, Inc. (“RLBA”), a consulting firm specializing exclusively in railroad related matters, with offices in Washington, DC, New York, Atlanta, Colorado and California.
2. I have been in the railroad industry for over 15 years, including in railroad operations and Joint Facilities at a Class I railroad and business development at the 3rd largest Port in the United States. My expertise includes operations, joint facilities and service planning and analysis.
3. During my time with BNSF Railway I served in multiple roles of increasing responsibility in the Operating Department, initially handling the day-to-day logistics of train movements from and to the San Francisco Bay Area and escalating to a management role for the Northern California region with responsibility over carload freight and intermodal traffic at numerous rail yards and facilities in that region.
4. After serving in Operations, I moved to BNSF Joint Facilities, a group that handles interactions between BNSF and other railroads, ports and government entities. My territory included the eleven states constituting BNSF’s Southern and Eastern regions where the focus was on interactions with Union Pacific Railroad and, in particular, the operating rights granted by the STB resulting from the merger of Union Pacific and Southern Pacific in the mid-1990’s. Many of

those rights were granted to BNSF due to the lack of service options and service issues created by the merger of Union Pacific and Southern Pacific. Those issues remain today as access to certain locations and customers are contested and, in some cases, go back before the STB. In one such instance, I participated in an STB mediation between the parties over customer access in the Gulf region.

5. As a Business Development Manager at the Port Authority of New York and New Jersey, I interacted with CSX and NS to grow intermodal volumes leaving the Port to various locations including Worcester, MA and Ayer, MA, which has given me a keen awareness of the rail infrastructure and interworkings in the New England area.

6. I earned a BS in Economics from Texas A&M University in College Station with a minor in Business. Please see Appendix A which contains a list of my prior experience and qualifications.

II. Duty of an Expert

7. I have been retained to advise the State of Vermont's Agency of Transportation ("VTrans"), through its counsel, Kaplan Kirsch & Rockwell LLP, to provide an Expert Opinion on the transactions proposed in 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 Railways Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company, STB Docket No. FD 36472, and Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad – Operation of Property of Another Rail Carrier – Pan Am Southern, LLC and Springfield Terminal Railway Company, STB Docket No. FD 36472 (Sub-No. 5).

8. I understand that my duties as an expert are to provide a fair and objective opinion and I declare my independence in relation to all Parties in this dispute. I have relied on my colleagues at RLBA to prepare parts of this Statement but the opinions expressed herein are my own. My compensation does not depend on the outcome of this proceeding.

III. Nature of Retainer/Executive Summary

9. I have been asked by VTrans legal counsel to review and comment on Pittsburg & Shawmut d/b/a Berkshire & Eastern's ("B&E") takeover of the operating rights of the Pan Am Southern Railway (PAS) and how that takeover might affect the shippers and citizens of the State of Vermont who rely on fair and competitive service from their operator, Vermont Railway System ("VRS"), in the context of the merger transaction proposed by CSX Transportation ("CSXT").

10. The above-mentioned takeover is an integral part of a proposed merger between CSXT and Pan Am Systems, Inc. ("Systems") including its subsidiaries. One subsidiary, the Boston & Maine Railroad ("B&M") is a 50% owner of Pan Am Southern Railway ("PAS") along with Norfolk Southern Railroad ("NS") which owns the remaining 50%. Under the proposed transaction, CSX would take over the 50% ownership in PAS now owned by B&M.

11. Pan Am Southern is currently operated by a contractor, Springfield Terminal ("ST") which is another subsidiary of Systems. If the proposed transaction were approved, CSX would own the contract operator of PAS and 50% of PAS itself, with NS owning the remaining 50% of PAS. When the proposed transaction initially was announced, NS objected due to the fact that its connection with PAS was its only access to the Boston, MA, region and PAS's operator would be owned by its main competitor, CSX. This led to a proposed settlement agreement between CSX and NS that called for a third party to operate the PAS on behalf of both railroads in addition to other concessions from CSX including NS trackage rights on CSX's line between Selkirk, NY, and Worcester, MA. The third party chosen by CSX and NS to operate PAS was B&E, a wholly owned subsidiary of Genesee & Wyoming (GWI) which owns several other shortline railroads in the New England area, the most pertinent of which to this discussion is the New England Central Railroad, ("NECR").

12. The selection of a GWI railroad subsidiary to operate PAS raises several concerns at VTrans and its contract operator, VRS. The first is that the number of VRS interchange options will be reduced from 2 to 1 at Bellows Falls, VT and White River Jct., VT. Second, the history of interactions between GWI subsidiaries and VRS is fraught with examples of poor service and anti-competitive actions on the part of GWI companies, including as recently as 2017, when GWI tried

to raise its trackage rights fees on PAS to make it cost prohibitive to operate to/from Bellows Falls and White River Jct. Third, GWI's visibility to traffic volumes and commodities traveling between PAS and VRS will give it strategic, commercial, and intelligence advantages to capture business on others of its owned lines. Fourth, the re-routing of traffic between the CSX east-west line (parts of the Berkshire, Boston and Worcester Subdivisions) and the PAS east- west Line ("Patriot Corridor") could lead to longer transit times experienced by VRS customers.

13. I have found VTrans' concerns to be warranted from both commercial and operations perspectives. I will describe in more detail in the body of this statement the need for optionality and competition in the rail industry and why GWI operating PAS, even with certain conditions imposed on it by CSX and NS to appear to act like a neutral carrier, is concerning because of the limitations such an arrangement would impose on true competition.

14. In preparing this Statement, I have reviewed various STB filings by CSX, VRS and VTrans. I also have participated in interviews with VRS staff and relied on other publicly available documents.

IV. Summary of Parties Involved

15. The State of Vermont's Agency of Transportation ("VTrans") – The Vermont Agency of Transportation is responsible for planning, development, implementation and maintenance of a variety of transportation infrastructure including roads, bridges, state-owned railroads, airports and public transportation facilities among other obligations. Its stated mission is to provide safe and efficient movement of people and goods. Specific to railroads, as shown in Figure 1, VTrans oversees approximately 580 active miles of railroad infrastructure in the State, of which it owns 305 miles, making it one of the largest State owners of railroad infrastructure in the country¹. Today, Vermont enjoys freight rail service from 10 freight rail companies including two Class I Railroads, Canadian National and Canadian Pacific. Access to two others currently can be reached at interchange points to reach two other Class I railroads, Norfolk Southern and CSX, not far from Vermont's borders. All four of those railroads connect the State to the national rail network to facilitate the importing and exporting of goods in and out of the State.

¹ <https://vtrans.vermont.gov/about/history>

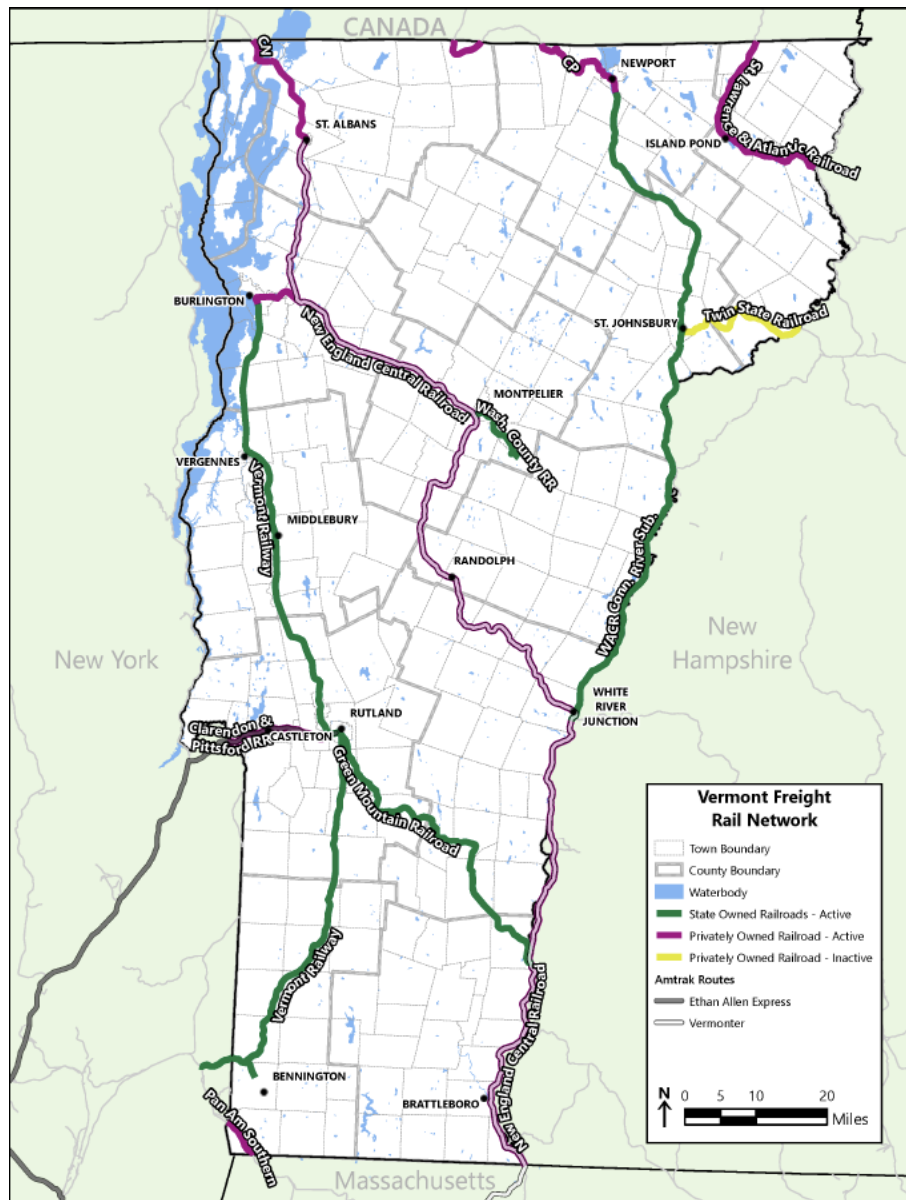
Figure 1

Active Rail Line	Class	Ownership	Track Mileage
New England Central Railroad (NECR)	III	Private	190.9
Vermont Railway (VTR)	III	Public-State	139.8
Connecticut River Division (WACR)	III	Public-State	102.2
Green Mountain Railroad Corp (GMRC)	III	Public-State	50
St. Lawrence & Atlantic Railroad (SLR)	III	Private	30.7
Canadian Pacific (CP)	I	Private	24.4
Clarendon & Pittsford (CLP)	III	Private	17.9
Washington County Railroad (WACR)	III	Public-State	13.1
Pan Am Southern (PAS)	II	Private	6.3
Canadian National (CN)	I	Private	3.0
Total Active Mileage			578.3
Total Active Mileage Public-State Owned			305.1

Source: Vermont Rail Plan 5-20-2021

16. The 305.1 miles of Vermont-owned track are operated by Vermont Rail System (“VRS”), a privately owned holding company operating five shortline railroads. Three of the railroads, Vermont Railway (“VTR”), Washington County Railroad (“WACR”) and Green Mountain Railroad Corp. (“GMRC”) operate the four segments of State-owned track in Vermont as illustrated in Figure 2 below.

Figure 2

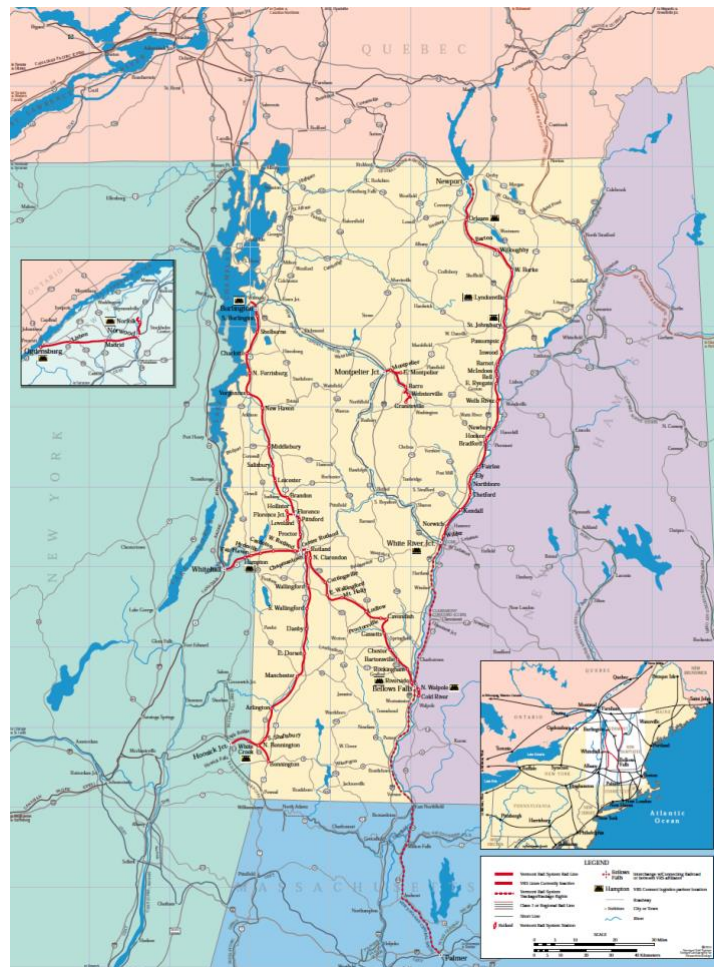


Source: Vermont Rail Plan 5-20-2021

17. Vermont Rail System (“VRS”) – The Vermont Rail System began operations in 1964 after a lease agreement with the State of Vermont was signed to operate a portion of the Rutland Railroad which was closed by a strike in 1961 and authorized for abandonment in 1963. The State purchased the line and contracted the operation out to what became the Vermont Railway (“VTR”). Over the next four decades, VTR accumulated other operations in and around the State of Vermont including the Clarendon & Pittsford, the Green Mountain Railroad (“GMRC”), the

Washington County Railroad (“WACR”) Montpelier & Barre Division (which was previously operated by the New England Central Railroad (“NECR”)), the New York and Ogdensburg Railway and the White River Jct. – Newport, VT portion of the WACR referred to as the Connecticut River Division. VRS operations are depicted in Figure 3. At the time VTR signed its lease to operate the former Rutland line in 1964, it was the first privately-owned railroad to operate a State-owned railroad. Today, the VRS operates all of Vermont’s state-owned rail infrastructure.

Figure 3



Source: Vermont Rail System

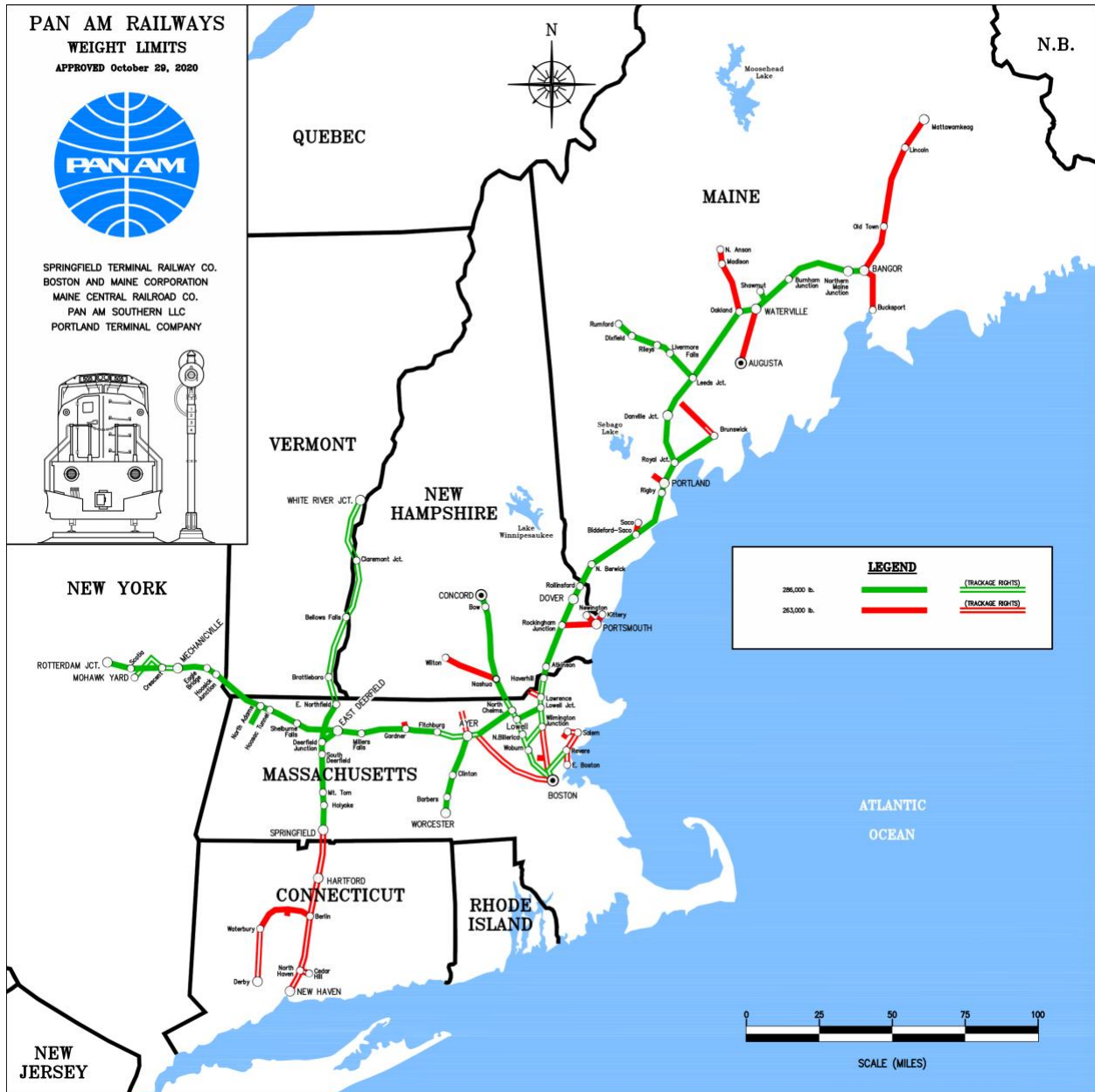
18. New England Central Railroad (“NECR”) – The New England Central Railroad began as a part of the Central Vermont Railway, originally an independent railroad formed in the late 1800’s that fell on hard times in the 1920’s and was purchased by Canadian National Railway

(“CN”). CN held the line until the mid-1990’s when it was sold to RailTex, which merged with RailAmerica, a shortline holding company, shortly thereafter. Rail America operated the line until 2012 when the holding company, including its NECR property, were acquired by Genesee and Wyoming (“GWI”), another railroad holding company with properties across the United States and in several other countries. Today, the NECR operates its line, depicted in pink on Figure 2 above, that traverses the State of Vermont on a southeast-northwest axis. NECR interchanges with six railroads at multiple locations on the line including four Class I’s (CN, CP, CSX and NS) and VRS in four locations: Burlington, VT; Montpelier Junction, VT; White River Junction, VT and Bellows Falls, VT. NECR is one of the two railroads VRS interchanges with to access the two, eastern US Class I railroads, CSX and NS, with the other interchange partner being Pan Am Southern (“PAS”).

19. Pan Am Railways (“PAR”) and Pan Am Southern Railway (“PAS”) – Pan Am Railways began as the Guilford Rail System (“GTI”) which was formed as a holding company in the late 1970’s and entered the rail business in the early 1980’s by acquiring the Maine Central Railroad (“MEC”) and its subsidiary, the Portland Terminal (“PT”). Shortly thereafter, GTI purchased the Boston & Maine Railroad (“B&M”) and its subsidiary, the Springfield Terminal (“ST”). Portions of both properties make up what became Pam Am Railways. GTI was rebranded as Pan Am Railways or “PAR” in 2006. Then, in 2008, PAR partnered with NS to improve its route between Mechanicville, NY and Ayer, MA (Boston area). This transaction was completed in 2009 and created Pan Am Southern (“PAS”), a 50/50 owned line shared between PAR (more specifically B&M) and NS. This line is now referred to as the PAS Patriot Corridor. In addition to the Patriot Corridor, PAS operates a north/south rail line between southern Connecticut and White River Junction, VT which PAS refers to as the “Conn River Line”. Pan Am operates over the Conn River Line between East Northfield and White River Junction via trackage rights on the NECR. Pan Am Southern is operated by ST, which is one of the PAR properties that will be acquired by CSX. If left unmitigated, the proposed transaction would leave CSX as the operator of Pan Am Southern (which is owned by NS and B&M). In addition, CSX would gain ownership of B&M making them 50% owners in PAS. NS and CSX have proposed a settlement agreement to address NS’s concerns about CSX’s purchase of interest in B&M and ownership of PAS’s

operator, ST, whereby PAS will be operated by GWI under the name Berkshire & Eastern Railroad. Figure 4 illustrates PAS and PAR trackage.

Figure 4

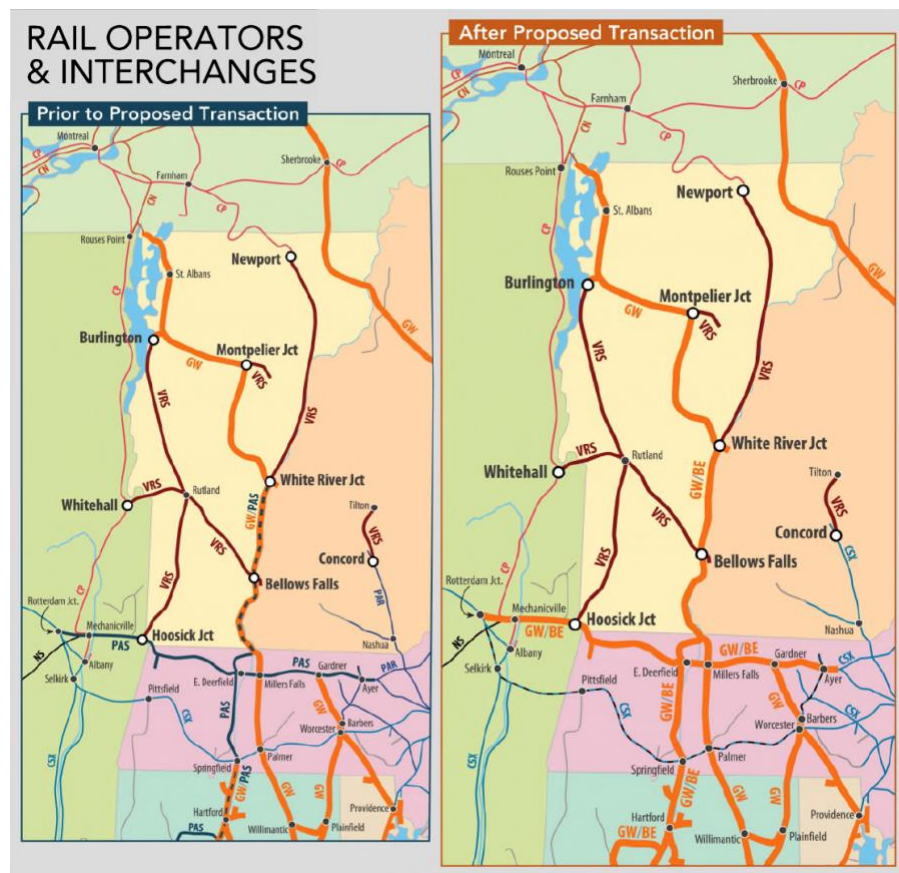


Source: Pan Am Railways website

20. Pittsburg & Shawmut Railroad d/b/a Berkshire & Eastern Railroad (“B&E”) - Pittsburg & Shawmut is an idle, STB-approved railroad operating entity owned by GWI. Under the proposed transaction described in paragraph 19 above, Pittsburg & Shawmut, under the name

Berkshire and Eastern Railroad, would fill the shoes of ST as operator of PAS. This apparently solves concerns NS may have that its only access to the Boston/New England area would be operated by its main competitor, CSX (which would purchase ST as part of its PAR merger). However, it creates new issues adversely affecting the State of Vermont, its companies and citizens and its rail operator, VRS, by allowing GWI to take over almost all of VRS' interchange locations as depicted by the map filed with VRS' STB response to the CSX/PAR transaction. The map is reproduced here as Figure 5.

Figure 5



Source: VRS notice of intent to participate, STB FD 36472 and FD 36472 (Sub-No. 5)

V. The Proposed Transaction

a. Pre-Pan Am VRS Operations

21. The focus of this section is to address the “Related Transaction” associated with STB FD 36472 where, to appease NS and GWI’s concerns about the proposed merger between CSX and PAR, GWI will become the contract operator of PAS. As described above, the change in operator derived from a proposed settlement agreement between NS and CSX, due to the proposed transaction giving CSX ownership of the existing PAS contract operator, ST, and a 50% ownership in PAS the other half of which is owned by NS and represents NS’s sole route to/from Ayer, MA in the greater Boston metropolitan area.

22. The proposed settlement agreement also grants NS trackage rights to operate 1 train daily over the CSX mainline on the Selkirk - Ayer corridor in each direction, limited to intermodal or automotive traffic. However, for NS to reach Ayer, MA where their intermodal facility is located in the Boston area, NS also must receive rights on shortline railroads including the Providence & Worcester (“P&W”), a GWI subsidiary.

23. Both settlement provisions raise concerns about the future frequency of service to the VTrans-owned rail assets and the competitive environment that results from GWI taking over another shortline railroad in the New England area.

24. To properly address those concerns, I would like to discuss the history of the VTrans rail assets and VRS’ interaction with its connecting carriers as it has shifted over time starting prior to 2009 when NS and PAR entered into their joint operating agreement to form PAS. Prior to that transaction and the subsequent track improvements, PAS (B&M at the time) was unable to interchange traffic with VRS at Hoosick Jct. due to poor track conditions and sections of out-of-service track. This left VRS with no connection to NS and only a connection to CSX via haulage to/from Palmer, MA. NECR and CP were the only interchange options available to VRS at that time. The revitalization of the Patriot Corridor brought much needed competition and optionality to the VRS system by gaining interchange with NS and CSX (via PAS haulage from Hoosick Jct.). This is a good example of a transaction partnership that improved competition and service, not

only to VRS but to the greater New England area by providing a more competitive route by which NS and PAS could compete with CSX's Selkirk – Boston corridor to the south.

b. Existing VRS Operations

25. Since B&M and NS partnered to create PAS, traffic has grown on the VRS as efficiencies were gained from the connections described above and all of the participating railroads were able to participate in new markets thanks to those efficiencies. Today, VRS handles approximately 50,000 cars a year. It interchanges with NECR between 3 and 5 days per week at 4 separate locations (Bellows Falls, Burlington, Montpelier and White River Jct.). In addition, VRS interchanges with PAS 5 to 7 days per week at 3 locations (Hoosick Jct., Bellows Falls and White River Jct.).

26. Having two interchange partners to handle traffic benefits shippers in Vermont by giving them flexibility and choice. It also motivates the two connecting carriers to compete on speed, reliability and service frequency. Interchange frequency on NECR improved dramatically after PAS started operations. Another example shared by VRS when interviewed discussed how NS blocks VRS traffic so it can be set out at Hoosick Jct. while CSX traffic is put in a PAS block and must be re-switched at PAS's E. Deerfield yard before being sent back to Hoosick Jct. to complete the interchange, adding significantly to transit and cycle times.

27. Another issue that is aided by the presence of two, unaffiliated, interchange partners is the fact that VRS and NECR are competitors. Both rail lines traverse the entire state of Vermont and vigorously compete on commodities like road salt, propane and feed products. As an "island" carrier with no direct connection to NS or CSX, having PAS available to route traffic to/from the national rail system gives VRS the ability to keep volumes and commodities confidential, which would not be possible if NECR were the only connecting carrier to VRS, given its corporate affiliation with the proposed operator of the PAS.

28. NECR also has had issues in the past, as recently as 2014, when it attempted to require revenue waybill data and implement a foreign railroad speed restriction when renegotiating the

trackage rights governing PAS operations on the NECR Conn River Line². PAS took its grievance to the STB and won but actions like this don't ease the concerns of VRS and the State's railroad freight customers who rely on competition to move their goods at a reasonable price and speed.

c. GWI's Operation of Pan Am

29. The railroad industry in the United States has been highly regulated since the late 1800s when the Interstate Commerce Commission ("ICC") was created and ultimately succeeded by the Surface Transportation Board ("STB") in 1995. The ICC set minimum and maximum rates to which the nation's private railroads had to adhere, which ultimately led to poorly maintained railroads because they earned inadequate returns on investment. That is, until the Staggers Act was passed in 1980 which allowed railroads to set rates that reflected the costs associated with their operations and sign contracts, allowing them to better utilize their assets and maintain their infrastructures.

30. The regulatory changes completely revitalized the railroad industry, leading to mergers of Class I railroads that ultimately have consolidated into the 7 Class I's operating in the U.S. today, down from 33 in 1980. These mergers and regulatory freedom also led to "rationalization" of some Class I rail lines. More and more, the larger railroads sought to capture business that was high volume over long distances and divest themselves of the shorter lines with lower volumes/profit margins. These lower volume lines ultimately were purchased and operated by smaller, shortline railroads or holding companies who focused more on the switching intensive customers and bespoke service that the Class I's tried to avoid. For instance, CN sold off the line that is now the NECR. In many cases, this has led to a symbiotic relationship between the large and small railroads. The Class I's with large, unionized work forces and tens of thousands of track miles need longer hauls to justify their long-term variable costs that cannot be justified through revenues earned on shorter distance moves or switching intensive, low volume customers. The shortlines, though smaller, became more nimble operations that can do the switching intensive work with a smaller workforce and lower overhead at lower total cost. In short, the two groups have honed

² STB Docket No. 35842

their operating models to succeed in what they do best with a reliance on each other to create an efficient, successful and profitable national rail system.

31. However, as this system has continued to evolve, many larger railroads have looked to increasingly streamline their operations, looking to limit the amount of work done “online” (work done between origin and destination points of their trains). This has led to a reduction in service at many low volume customers and reductions in interchanges between large and small railroads as the new thresholds to obtain a given level of service continue to increase. This is illustrated by the numerous STB hearings about Class I service over the last 5 - 10 years brought by railroad customers.

32. While not a Class I railroad, GWI is increasingly becoming a large presence in the rail freight market, with 116 railroads and over 7,000 employees. The growing size of GWI’s operations, and large presence in New England lead it to act more like a Class I than a shortline. Even if that alone does not transition their operating plan to act more like a Class I, the proposed Term Sheet between GWI, CSX and NS requires GWI to adhere to operating metrics established by the Class I railroads³. This is a concern to VTrans and its operator, which relies on competition to provide adequate service to its customers. Those customers can be impacted directly by a reduction in service or interchange that results in a railcar of propane being stuck at an interchange in Massachusetts in the winter when heat is needed or a railcar of salt is needed to clear icy roads.

33. The applicants and witness statements in this proceeding have made two arguments in an attempt to relieve the concerns VTrans has with GWI operating PAS. The first is that the voluntary conditions agreed to between GWI, CSX and NS (“The Parties”) will preserve competition for Vermont shippers and VRS. The second is that the 3 parties have a vested interest in preserving the viability of the PAS as their operations depend on the line and the Class I’s collectively own the line.

34. These conditions may seem compelling on their face but in practice I see several issues with their ability to preserve competition and optionality. First, the conditions in the Term Sheet

³ Term Sheet Agreement G&W Subsidiary as PAS Operator – Section II.(i)

governing GWI's operation of PAS independently are circumvented by Section V.(6) which discusses GWI's and the Class I's acknowledgement and acceptance of GWI's ability to intertwine PAS's operations with those of GWI's other railroads in the region. This leaves the door open for GWI to combine operations between PAS and NECR for instance (absent conditions imposed on them by the STB).

35. In another commitment made to appease shippers and connecting carriers of GWI and PAS, conditions requiring GWI to set rates in an indiscriminate manner are caveated with the ability for GWI to discriminate based on, "mileage, density and similar operating characteristics⁴." Should VRS "density" or volume not adhere to GWI's metrics (or the metrics CSX and NS impose on them), GWI will have the ability to change rates or levels of service. If this happened today, VRS would have a third-party competitor to rely on in the alternative but should the transaction take place as proposed, VRS's recourse is only to turn to another GWI subsidiary or an inefficient and more costly route via CP. In other words, the delicate competitive balance that has been established and is working well is now destroyed beyond redemption.

36. The Parties also have committed to allow B&E to establish rates on existing lanes for customers at current levels as of the date of the proposed transaction.⁵ It's unclear to me how this will be established from the descriptions filed but in interviews with VRS management they discussed how volumes have been depressed over the last several months as interchange frequency has dwindled on the PAS, presumably due to resignations accompanying the news of the pending takeover. In addition, the Covid-19 pandemic has taken a toll on various commodities over the last year and a half. Taking a snapshot of commodities and volumes at the time of the transaction hardly seems like a fair way to ensure pricing competition between two railroads operated by the same owner. Will artificially lowered volumes over the last year and a half cause artificially high rates that VRS is stuck with going forward? How will GWI ensure pricing competition on new lanes or volumes over and above those captured at the time of the transaction? And what incentive does GWI have to compete with itself on the Patriot Corridor and, in particular, along the Conn River line where VRS enjoys two interchange carrier today? These issues illustrate the incomplete

⁴ Term Sheet Agreement G&W Subsidiary as PAS Operator – Section IV.(4)

⁵ Pelkey VS - 18

and/or inadequate remedies proposed to alleviate the competitive concerns of VTrans and its operator.

37. Regarding the vested interests of the Parties to keep PAS viable, data shown in Tables 14 and 15 of Dr. Reishus' statement show that the majority of traffic operated on PAS today is haulage service on behalf of NS. Since that proffered volume of traffic alone is sufficient to make PAS viable, even absent any revenue derived from adequate service to connecting carriers like VRS, it is pretty apparent that the applicants couldn't care less about the competitive framework established as a result of the transaction and whether or not VRS can remain viable given the unlevel playing field that is its inevitable result.

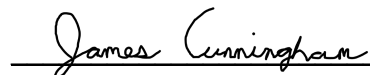
38. The proposing parties make no attempt to address the competitive issues related to GWI enjoying a near monopoly on interchange with VRS in contrast to the status quo that their proposed transaction would create. Today, VRS has the ability to route traffic to/from Hoosick Jct. to connect with PAS for furtherance to/from NS and CSX. The competitive status quo gives VRS the ability route commodities that it competes with NECR on through channels that don't allow direct competitors to see volumes and, in some cases, rates. In contrast, if GWI takes over the operations of PAS, it leaves VRS with only less efficient routings via CP to prevent GWI from exploiting its access to competitive information. This is particularly concerning as the best predictor of the future is the past. As I mentioned above, GWI attempted to gain competitive information on interchanged volumes to/from VRS when re-negotiating its trackage rights agreement with PAS in 2014. This seems akin to NS having to interchange all of its traffic with CSX to get to BNSF or UP in the west. In this hypothetical, CSX would not know the rates under which NS traffic was moving but it would see the commodities and volumes to obtain a much better picture of the overall market. NS would never tolerate that commercial disadvantage and neither can VRS. But, in fact, VRS is being asked to tolerate an even less competitive commercial marketplace, one in which its competitor will have access to its rates. That combination of market disadvantages, which will be inevitable if the proposed transaction is consummated as proposed, is highly detrimental to competition and the vital piece of Vermont's economy dependent on the operation of its state-supported rail infrastructure.

VI. Summary of Conclusions

39. In the applicants' Statements, much is made of the end-to-end nature of the transaction and the competitive benefits of the proposed merger supposedly flowing from single line service. While my focus was specific to the "Related Transactions," in reviewing the documentation I can see several advantages associated with the merger to go forward. Much like the prior transaction, facilitating joint operation of PAS between NS and B&M several years ago, I can see many aspects over the overall transaction benefiting the New England region and increasing competition. CSX's concession to find a third-party operator I see as a sound remedy to preserve competition between NS and CSX. They've addressed 2-1 shipper concerns in the Boston area and they've given GWI another railroad to operate in the New England area (should the related transaction be completed).

40. In short, they've addressed the concerns of interested/concerned parties in many/most cases. However, they have not done anything to preserve competition in connection with the State of Vermont, VTrans or its contract operator, VRS. In fact, the opposite. The proposed transaction would not only reduce competition throughout Vermont, rail competition would be worse post-transaction than it was before ever NS invested in the PAS. Choosing GWI as the third party is the wrong choice. It gives the world's largest shortline and regional railroad holding company another puzzle piece in the New England area where its presence is already one of, if not the, largest. Other shortlines and shortline holding companies have the ability and credentials in the industry to operate the PAS in a truly independent manner. By choosing GWI, CSX and NS have solved one problem by choosing the course of least resistance but creating another which can only be fixed by selecting another operator of PAS.

I affirm my belief in the opinions expressed herein.

_____

James C. Cunningham

8/27/2021

Appendix A

James C. Cunningham Resume
[attached hereto]



Charlie Cunningham

Manager

Mr. Cunningham joined RLBA in 2020 after over a decade with a Class 1 railroad and the third largest Port in the United States. During his time with BNSF Railway, he held various roles in Operations including both bulk freight and intermodal in Northern California. He also managed Contracts and Joint Facilities in the Southern and Eastern regions of the BNSF system, negotiating agreements with other Class 1 railroads, ports and government entities. Then he moved to the Port Authority of New York and New Jersey where he was in charge of business development of discretionary cargo.

Education

Bachelor of Science in
Economics, Texas A&M
University, College Station,
TX (Minor in Business)

Transportation Experience

15 Years

Expertise

Business Development
Transportation Service
Planning
Cost Reductions
Negotiation
Safety
On-time Delivery
Hazardous Materials
Performance Improvement

Relevant Project Experience

- ***Burlington Northern Santa Fe*** Led internal discussions and participated in negotiations with Union Pacific and Kansas City Southern to implement service in Lake Charles, LA that BNSF believe it had the right to serve under a UP/SP settlement agreement to those customers whose service options dropped from 2 to 1 (had service from UP and SP pre-merger, only UP post-merger). As BNSF's Joint Facilities Manager along the Gulf Coast, participated in binding mediation before the STB to outline BNSF's position and provided a service plan in the event the STB sided with BNSF. The mediation resulted in confirming BNSF's access.
- ***Burlington Northern Santa Fe*** (On-going) Provided expert witness support in the form of a report submitted to a national arbitration panel on behalf of a BNSF Railway that was seeking changes in the operating practices of Canadian National railroad because of the discriminatory results the latter's practices had on the former's commercial business. The report included a history of rail operations and regulatory influences, an analysis of rail operations before and after new practices were established and impacts of the practices on BNSF business.
- ***Port of Lake Charles, LA*** (On-going) Leading RLBA's assistance to the Port of Lake Charles (the Port) in understanding what rights each of the three Class I Railroads that serves the Port enjoys including trackage rights, customer access, alternative operating scenarios and contractual issues between the Port and the railroads.

Charlie Cunningham

- **Energy Transfer Partners** Led an RLBA team in providing expert opinion on the North American Rail system's ability to handle a quick, significant spike in crude by rail (CBR) volumes should the Dakota Access Pipeline be shut down due to environmental considerations. Analyses included a review of available rolling stock capable of handling crude oil, current congestion on rail infrastructure and the likely outcome of the pipelines volumes being displaced would have on the rail system and the markets they serve that might be disadvantaged should congestion increase.
- **Port of NYNJ Service Agreement** Led negotiations between a Terminal Operator and Class 1 Railroad to adjust service offerings to move more freight via rail versus truck out of the Port Facility. Contributed by conducting an operational and marketing analysis of current operations and acting as an intermediary between the Terminal and Railroad to compromise on a solution that was beneficial to both parties.
- **Global Bayonne Rail Agreement** Negotiated with Terminal Operator on the operational and financial terms of agreement for Terminals use of the Ports new near-dock rail facility. Negotiations balanced compensation for use of the Ports assets with Terminals need for flexibility in service options available from Class 1 railroads and ocean liners availability to alter the amount of rail bound traffic brought to the Terminal facility.
- **Tower 55 TIGER Grant** Developed strategy for BNSF Railway to negotiate with Union Pacific Railroad (UP), the Federal Railroad Administration (FRA) and TxDOT on the allocation of funding for a new North/South Mainline at the intersection of BNSF and UP mainline tracks in Fort Worth, TX. Negotiations included ownership and maintenance of new and existing assets, percentage of funds allocated to each party and operational planning before, during and after the project to allow for construction windows.

Prior Work Experience

Port Authority of New York and New Jersey, New York, NY, Manager of Intermodal Rail Development 2017 – 2019

- Provided subject matter expertise in rail policies and planning in creating strategically focused initiatives to drive intermodal programs to meet future Port development needs and in recommending programs to improve intermodal systems and rail access.
- Analyzed cost-effectiveness of new customer incentive program, which was subsequently discontinued without negative impact on growth.

BNSF Railway Company 2006 – 2016

- **Manager of Contracts and Joint Facilities, 2010 – 2016** Negotiated, developed, interpreted, and administered Joint Facility agreements for the southern half of the BNSF system, including rates and liability provisions. Communicated with other large railroad companies, Ports, and government organizations to determine allowed commodities, handling restrictions, and rates.

CERTIFICATE OF SERVICE

I hereby certify that I have on the 27th of August, 2021, caused to be served a copy of the foregoing COMMENTS OF THE STATE OF VERMONT IN OPPOSITION TO THE APPLICATION, upon the following parties of record in this proceeding by email:

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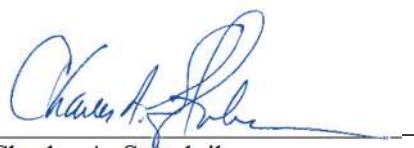
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