

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH
(312) 252-1504
rwimbish@fletcher-sippel.com

March 16, 2021

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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
March 16, 2021
Part of
Public Record

Re: **FD 36472**
CSX Corporation and CSX Transportation, Inc. — Control and Merger —
Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & 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

FD 36472 (Sub-No. 5)
Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad —
Operation of Property of Property of Rail Carrier Pan Am Southern LLC —
Pan Am Southern LLC and Springfield Terminal Railway Company

Notice of Intent to Participate and Preliminary Comments of the Commonwealth of
Massachusetts Department of Transportation and the Massachusetts Bay
Transportation Authority

Dear Ms. Brown:

The Commonwealth of Massachusetts Department of Transportation (“MassDOT”) on behalf of itself and its concurrently-supervised agency, the Massachusetts Bay Transportation Authority (“MBTA”), hereby – (1) gives notice of intent to participate in the above-referenced proceedings; (2) opposes the Applicants’ attempt in the subject Application to characterize the proposed arrangements that comprise the full scope of these proceedings as warranting evaluation under the Board’s “minor” transaction procedures, when they clearly involve, and should be governed by the procedures for, a “significant” transaction; (3) requests

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that the Board reject the individual petition for exemption in the Sub-No. 5 proceeding (the “Petition”), and, in so doing, direct the petitioners to make their operating authority request as Co-applicants in the main docket; and (4) comment on the Applicant’s proposed, 60-day minor transaction procedural schedule

The proposed transactions will re-shape railroad transportation service throughout New England, and they are themselves shaped by concerning competitive dynamics.

CSX Corporation and its Class I rail carrier holding, CSX Transportation, Inc. (“CSXT”), (collectively, “CSX”) seek to acquire control of Pan Am Railways (“PAR”) and to operate PAR’s majority-owned rail carrier holdings as integrated portions of the CSXT system (the “CSX-PAR Transaction”). While the CSX-PAR Transaction by itself involves the change of ownership and operation of more than 800 miles of railroad throughout New England, it is hardly the end of the story. The CSX-PAR Transaction would also give CSX a 50% membership stake in Pan Am Southern LLC (“PAS”), and would, absent any other arrangements, enable CSX to control operations over PAS via Springfield Terminal Railway Company (“ST”).

PAS, however, has been critical to offsetting CSXT’s position as the only Class I railroad in New England by affording Norfolk Southern Railway Company (“NSR”) (which holds the other 50% membership in PAS) a means to compete with CSXT’s predominant position in the region. PAS was formed pursuant to Board authorization granted almost exactly 12 years ago under a formal application process in *Norfolk Southern Railway Company, Pan Am Railways, et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC*, FD 35147 (STB served Mar. 10, 2009). Recognizing the anticompetitive impacts that would flow from a CSX-PAR transaction, CSX and NSR have contrived to install an independent carrier, the Pittsburg & Shawmut d/b/a Berkshire & Eastern (“B&E” – a Genesee & Wyoming, Inc. (“G&W”) holding) to operate the PAS system in an attempt to correct such a result. B&E’s proposed operation of PAS in place of ST – the “B&E-PAS Transaction” – is the subject of the Petition in FD 36472 (Sub-No. 5).

MassDOT and MBTA are key stakeholders.

MassDOT and MBTA own several of the lines that are involved in these transactions.¹ Those railroad lines would host new freight service operators under the events envisioned in FD 36472 (the Application) and FD 36472 (Sub-No. 5) (the Petition), and not, at this point, with MassDOT’s or MBTA’s concurrence. This is just one of several rail service and safety issues of concern to the Commonwealth. MassDOT is entrusted with protecting the interests of various railroad service-dependent industries and smaller freight railroads that

¹ Application, Exhibit 1 (System Map).

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support the Commonwealth's economy. It must advance the public interest while ensuring that people and environment of Massachusetts are protected. Amongst the Commonwealth's concerns is ensuring that the proposed transactions would not unduly threaten the safety of a fresh water source for approximately 3 million people in the greater Boston Metropolitan area – the Wachusett Reservoir.

Regrettably, however neither the Applicants nor those engaged in so-called “related” transactions in this proceeding's sub-dockets have engaged the Commonwealth in meaningful, or satisfactory, discussions over the proposed transactions' impacts and appropriate mitigation measures. The most dismaying example is the lack of progress toward appropriate protective measures for the safety of the Wachusett Reservoir, one of the largest and most important fresh water impoundments in Massachusetts, critical to over 3 million residents of the greater Boston area. The reservoir, located immediately to the east of West Boylston, MA, and its immediate watershed are traversed by railroad lines that are the subject of these proceedings. A portion of those lines, for example, traverse a bridge and causeway over a northern portion of the reservoir. MassDOT understands that the line (including the causeway and bridge over the water supply) will see increased freight volumes, including NSR trackage rights trains. Such additional freight traffic would increase proportionately the risk of a derailment or other accident that could release toxic or other harmful substances into the reservoir. Naturally, the Commonwealth must protect the integrity of its fresh water supplies, its chief aim in this instance is proactive steps that can be taken to prevent against accidents and spills.

With such an objective in mind, MassDOT had attempted to facilitate meetings with the Applicants and the Massachusetts Water Resources Authority (“MWRA”) to discuss train accident protection. MWRA provided detailed environmental and operational concerns related to train velocity, train idling, and track conditions. The Applicants were ill-prepared for such discussions, and were dismissive of MWRA's interest in accident and hazardous materials release prevention measures. The Applicants instead promoted CSXT's accident response protocols. By emphasizing accident *response* measures and discounting, or failing to consider, accident *prevention*, the Applicants reflect an alarming inattention to critical Commonwealth concerns, and an alarming disregard for health and safety to the detriment of the public interest that the Applicants claim that they wish to advance.

Catastrophic accident prevention is not the only blind spot for CSX; of similar importance is the continued timely and efficient conveyance of commuters in the region without new freight interference. MBTA operates commuter rail service throughout the region, serving Massachusetts, New Hampshire² and Rhode Island. It is the sixth-largest commuter rail system

² MBTA currently provides service in Massachusetts and Rhode Island. It serves New Hampshire via service to Haverhill, MA adjacent to the state line. However, both MBTA

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in the country serving 32 million annual commuters. The transaction may threaten commuter service disruption where freight and commuter passenger trains will jointly operate. MBTA is particularly concerned about the proposed transactions' potential affect upon its services and routes from Boston – (1) north to Haverhill, MA; (2) northwest to Lowell MA; (3) west to Fitchburg, MA; and (3) southwest to Worcester, MA. MBTA is keenly aware that traffic growth and freight service operating changes could overwhelm the MBTA route between Ayer and CPF Willow – part of the “Island Line” – which is clearly central to CSXT’s proposed north-south related freight traffic flows.

The interconnected transactions must be considered as part of a single “significant” transaction.

A transaction not involving the control or merger of two or more Class I railroads is “significant” under the Board’s rules if it: (1) is of “regional . . . transportation significance;”³ and (2) fails “clearly” to demonstrate either (i) the absence of “*any* anticompetitive effects,” or (ii) that any anticompetitive effects are outweighed by the public interest.⁴ By contrast, a minor transaction is one for which the Board can determine, on its face, is not of regional scope and significance, has competitive impacts (if any) that are clearly outweighed by the public interest.

The interdependent transactions that are the subject of these proceedings are undeniably of “regional transportation significance” under 49 U.S.C. § 11325(a)(2). As such, the Application must be rejected as presented, as the Petition also should be.

These proceedings involve – (1) a Class I carrier (CSXT) seeking to acquire and to operate, the most extensive network of commonly-owned and operated railroad lines in New England (PAR); (2) another Class I carrier (NSR), whose involvement is triggered by its stake in PAS; (3) PAS, a regional carrier whose competitive role in New England railroad transportation is threatened by the CSX-PAR Transaction; and (4) G&W – the largest short line holding company in the U.S. and the world (which also happens to boast the largest non-Class I railroad presence in New England after PAR and PAS) – and at least three of its short line holdings in New England, including B&E. In acquiring PAR, CSXT would add 808 route miles of rail lines in Massachusetts, Maine, New Hampshire, and Vermont to its system.⁵ B&E, on the other hand, would assume operational control of, and G&W would provide centralized marketing services

and New Hampshire have expressed an interest in extending MBTA service to and within New Hampshire (<https://www.nh.gov/dot/org/aerorailtransit/railandtransit/projects.htm>).

³ 49 C.F.R. § 1180.2(b) (emphasis supplied).

⁴ *Id.*

⁵ Application, 26.

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for, the 425-mile PAS system in Connecticut, Massachusetts, New Hampshire, New York, and Vermont.⁶ B&E would connect – and extensively overlap – with another G&W carrier, New England Central Railroad, Inc. (“NECR”). As the record consistently indicates, these transactions will affect New England – an area universally regarded, by definition, as a “region.”⁷ If these interconnected transactions fail to satisfy the Board’s standards for a significant transaction under Section 1180.2(b) then *nothing will*.

The present Application wrestles with the proposed transaction’s anticompetitive impacts, and tries inappropriately to shield a so-called “related” transaction’s adverse impacts from scrutiny and Board remedial action.

The CSX-PAR Transaction, by itself, is anticompetitive. It would give CSX control of PAS service through ST. For this reason, CSX has conceived of its own competition-protecting conditions in coordination with NSR and G&W, culminating in the proposed B&E-PAS Transaction. However, the B&E-PAS yields competitive problems of its own by creating a roughly 70-mile 2-to-1 corridor from East Northfield, MA, to White River Junction, VT (the “Conn River Line”), where existing competitive rail service options would fall under the complete control of one company – G&W (through its B&E and NECR subsidiaries).

Either way, the question is not whether there are *any* anticompetitive effects (the purpose of the Section 1180.2(b) analysis in distinguishing between significant and minor transactions), but rather, the *extent* to which the transactions’ collective anticompetitive effects have been mitigated (or simply shifted). Because the proposed CSX-PAR Transaction satisfies neither the “no regional significance” standard, nor the requirement that the proposed transaction must not yield “any” anticompetitive impacts, the Application’s push for a minor transaction designation must fail.

As troubling, the participants in the clearly-interdependent CSX-PAR and B&E-PAS Transactions have attempted to compartmentalize those transactions in order to shield the B&E-PAS Transaction from Board scrutiny and, in turn, Board-imposed protective conditions. The B&E-PAS Transaction is offered as an essential remedy to the CSX-PAR Transaction’s adverse impacts, yet CSX’s self-imposed protective condition is treated as merely “related” to the CSX-PAR Transaction. Under CSX’s plan, B&E would escape Co-Applicant status by way of the Petition.

⁶ *Id.*

⁷ See, e.g., <https://www.britannica.com/place/New-England>; https://en.wikipedia.org/wiki/New_England (“New England is a region . . .”).

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But the Petition is so facially deficient, and so out-of-place, that it must be rejected. Under Section 10502(a), to be approved under an individual petition for exemption, the B&E-PAS Transaction must either be – (a) limited in scope; or (b) one for which regulation is not needed to protect shippers from an abuse of market power. The B&E-PAS Transaction plainly is not limited in scope, and it should be subjected to closer regulatory scrutiny due to its Conn River Line harms. This has always been true, considering that PAS was formed by way of a formal application in 2009, not a petition for exemption. A transaction involving the 425-mile PAS rail network, formed as a counterbalance to CSXT’s New England hegemony, is decidedly not minor in scope. And a transaction that would place the Conn River Line – currently served by unrelated, and fiercely-competitive, carriers (PAS and NECR)⁸ – under the control and marketing oversight of a single company (G&W) surely cannot satisfy the alternative, competitive abuse standard of Section 10502(a). As such, the Petition must be rejected.

The Applicants must not be permitted to fast-track their proposed transaction when they have failed to engage in any meaningful consultation with MassDOT and MBTA.

The Applicants have not shown (much less shown “clearly”)⁹ that the public interest outweighs the CSX-PAR Transaction’s anticompetitive effects. The Applicants’ B&E-PAS Transaction comrades don’t even bother attempting such a showing. The series of railroad transactions that the Applicants propose to set into motion warrant advance consultation with key public stakeholders such as MassDOT and MBTA. Indeed, MassDOT sought such consultation in a letter addressed to CSX on January 14, 2021, outlining in detail MassDOT’s concerns, and urging a response aimed at reaching a binding written accord in advance of the Application.¹⁰ MassDOT’s invitation to address the Commonwealth’s concerns was ignored until after the Application was filed.

Applicants’ claim to have “been engaged in discussions with . . . MassDOT and MBTA” (Application, 38) is, sadly, incorrect.¹¹ The Applicants’ lack of due diligence with MassDOT and MBTA must not be rewarded by way of acceptance of the Application. Rather, a significant transaction designation may compel all of the entities that should be transaction applicants (CSX, B&E, PAS, G&W and others) to engage the Commonwealth meaningfully, where CSX and CSXT have not done so to this point. Requiring approval through the significant

⁸ See *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, FD 35842 (STB served Oct. 31, 2017).

⁹ 49 C.F.R. § 1180.2(b).

¹⁰ Exhibit A.

¹¹ For example, CSX revealed its B&E-PAS Transaction a mere two days before filing the Application.

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transaction procedures will also extend to MassDOT and MBTA adequate time to consult short lines and railroad customers within the Commonwealth, and to evaluate the proposed transactions' potential impact on public health and safety and commuter rail service – all in the interest of protecting or enhancing the public interest in Massachusetts.

In the unfortunate event that the Board were to accept the Application as one involving a minor transaction, interested parties cannot feasibly be expected to evaluate the proposed transaction, comment on its merits, and seek protective conditions in the 30 days CSX would have the Board provide.

Accepting the Application as filed and treating the CSX-PAR Transaction as minor would, in MassDOT's view, render the Board's significant transaction standards meaningless. 105 days, as provided under the Board's minor transaction procedures,¹² is simply inadequate time to develop an administrative record for transactions of this scope and potential impact. Worse yet, the Applicants advance a procedural schedule that strains credulity – allotting a mere 30 days for interested parties to undertake and complete discovery, assess the application (and information produced in discovery), engage in discussions with the Applicants to explore a negotiated resolution of transaction-related concerns, and, if necessary, draft and submit substantive comments on the Application (and requests for Board-imposed conditions). Oddest of all is CSX's inexplicable proposal to allow the administrative record to stew pointlessly for 45 days – without provision for supplemental filings or anything else – before it “closes.” CSX's proposed schedule is not a 105-day schedule at all; it is a 60-day schedule.

If the Board were to take the unfortunate step of processing the Application as one involving a minor transaction, then, at a minimum, CSX's completely unworkable procedural schedule – valuable though it may be as an insight into CSX's strategic miscalculations and disregard for interested parties – must be rejected. Instead, the Board must implement the following procedural schedule:

- Day 30: Board accepts application and establishes schedule. Discovery begins.
- Day 45: Notices of intent to participate must be filed with the Board.
- Day 105: Comments due from all parties, including the Attorney General and Secretary of Transportation, on the transportation merits of the Proposed Transaction.

¹² 49 C.F.R. § 1180.4(e)(2)(iii).

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Day 135: Responses to comments on the transportation merits of the Proposed Transaction due. Applicants' rebuttal in support of the application due. Close of Record.

Day 180: Board serves final decision

* * *

The railroad transactions encompassed by the above-docketed proceedings involve the operation of 1,200 miles of railroad in New England. They are, separately and collectively, regionally significant transportation matters. Those advancing the transactions seem to not understand the public interest impacts of their proposals, except as they perceive them as a matter of promotion, business advantage and expedience. Nor could they see them any differently, since many closest to the public interest in New England – entities as MassDOT and MBTA – have been overlooked. Instead of rewarding such indifference, the Board would do all stakeholders a service by rejecting the Application and the Petition, and directing the parties to each filing to develop and file a single, comprehensive application encompassing all interdependent elements of the CSX-PAR and B&E-PAS Transactions, which the Board would then allow to be assessed under its significant transaction application procedures.

Very truly yours,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Audrey L. Brodrick

Bradon J. Smith

**ATTORNEYS FOR THE MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION AND
THE MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY**

RAW:bjs

Attachment – Exhibit A

cc: All parties of record



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



January 14, 2021

James Foote, President and CEO
CSX Transportation
500 Water Street
Jacksonville, FL 32202

Jamie Boychuck
Executive Vice President of Operations
CSX Transportation
500 Water Street
Jacksonville, FL 32202

Gentlemen:

As you know, the Massachusetts Department of Transportation, Rail and Transit Division (“MassDOT”), the Massachusetts Bay Transportation Authority (“MBTA”), and CSX Transportation, Inc. (“CSX”) have been involved in discussions regarding CSX Corporation’s proposed acquisition of control of Pan Am Railways, Inc. (“Pan Am”). Both passenger rail service and freight rail are priorities for the Commonwealth of Massachusetts and we need to ensure that CSX’s stewardship of the Pan Am assets will be compatible with MassDOT/MBTA passenger rail operations, plans and priorities.

Specifically, MassDOT seeks with your assistance to gain a better understanding of CSX’s plans concerning – (1) freight rail traffic changes (volume of freight and train frequency) on railroad lines over which MBTA provides commuter rail service (the “Commuter Rail Area”); (2) projected freight traffic changes over rail lines outside the Commuter Rail Area (including the Knowledge Corridor/Connecticut River Line and Pan Am’s Worcester-Ayer main line), and how those changes may affect future and prospective passenger service over those lines; and (3) dispatching of passenger and freight service on and over trackage owned by MassDOT, MBTA, Pan Am, Pan Am Southern (“PAS”) and CSX.

Among other priorities, MassDOT and MBTA seek commitments from CSX regarding its prospective operations in the Commonwealth – which commitments could be instrumental to reaching an understanding by which MassDOT and MBTA may be in a position either to register support for, or non-opposition to, a CSX application before the Surface Transportation Board (“STB”) seeking authorization to control Pan Am – including the following:

- CSX will not increase freight service inside the Commuter Rail Area (defined as roughly the network of trackage east of Framingham and south of Haverhill over which MBTA provides scheduled passenger service);

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

EXHIBIT A

- CSX will assure priority for passenger service within the Commuter Rail Area, and will permit MassDOT/MBTA to assume control of dispatching on both the Knowledge Corridor and over the Commuter Rail Area;
- CSX will accelerate its efforts to reach agreements with MassDOT/MBTA on the use and control of – (a) Readville Yard; (b) the Fitchburg-Westminster line segment; and (c) the line proximate to Wachusett Reservoir;
- CSX will assure that PAS and Norfolk Southern Railway Company (“NSR”) will confer with MassDOT/MBTA regarding whether Pan Am (and, by extension, Springfield Terminal) will retain its current roles and responsibilities on PAS-owned lines (notably the Knowledge Corridor and the Adam’s Branch), and, if so, how those functions will be carried out post-transaction (and also that PAS will negotiate with MassDOT/MBTA regarding the same);
- CSX will assure that freight service to businesses in the Commonwealth will be at least as frequent and reliable post-transaction as currently is the case, or will be better;
- CSX will agree to negotiate a global agreement with the Commonwealth covering the foregoing rail service and operating issues;
- CSX will agree with the Commonwealth to prioritize railroad passenger service in the western part of the Commonwealth, including, but not limited to, CSX’s former Boston & Albany main line, and the PAS main line between Ayer to the New York State border;
- CSX will promptly outline and clarify its intentions with regard to the use of MBTA and MassDOT-owned railroad facilities, including, but not limited to, East Deerfield Yard, the Lawrence Yard offices, and the general offices at Iron Horse Park, in North Billerica; and;
- CSX will commit to prevent against disruption of MBTA and MassDOT capital plans and planned operating systems improvements, including, but not limited to, the planned joint dispatching system upgrades for all MBTA northside rail lines and Pan Am’s system, and the horizontal clearance improvements necessary to allow MBTA to expand its use of high-level passenger platforms (e.g., Winchester, Ballardvale, and North Wilmington).

As MassDOT and the MBTA have made clear, the above issues and commitment objectives are of vital importance to the Commonwealth, and I therefore ask that these concerns be taken seriously. While there will be opportunities to raise these issues during the STB process, failure to resolve them now would certainly complicate matters in an STB proceeding. The Commonwealth would prefer that CSX, Pan Am, PAS, NSR, MassDOT and the MBTA work together now to achieve a result that will benefit all parties.

On that note, the Commonwealth is unlikely to support a CSX-Pan Am control transaction in which the future role of PAS (and, by extension NSR) in the New England transportation market

remains unclear, given the potentially sweeping regional significance of the transaction that CSX has proposed. In fact, we would expect the STB to subject CSX's application to the highest level of scrutiny available if CSX and NSR were unable to reach an accord on PAS and the role it (and NSR) would play in the region going forward. To be fair, the Commonwealth would hold NSR accountable, too, if it were to choose not to engage in such an essential dialogue with CSX.

MassDOT and the MBTA look forward to continuing a dialogue with CSX, and to work with CSX to develop a mutually-acceptable post-transaction plan for both freight and passenger rail service in the Commonwealth.

Sincerely,



Stephanie Pollack
Secretary and CEO