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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.

– CONTROL AND MERGER –

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

CANADIAN PACIFIC'S BRIEF

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In accordance with Decision Nos. 4 and 7 in this proceeding, Canadian Pacific Railway Company Limited and its U.S. railroad subsidiaries (collectively “Canadian Pacific” or “CP”),¹ submit this Brief to explain why the Board should impose on the Transaction presented in the Revised Application² the conditions sought by CP in its August 27, 2021 Comments (CP-2).

INTRODUCTION

As CP’s Comments explained, CP is keenly interested in the health and competitive vigor of the rail network serving the New England region, in which CP is an important participant. CP handles many thousands of carloads annually moving to and from Pan Am Southern (“PAS”)

¹ Canadian Pacific’s U.S. rail carrier subsidiaries are Canadian Pacific Railroad Company, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc.

² CP’s Brief, as with its previous Comments, refers to the Transaction as that presented in the primary CSX/Pan Am control docket (Finance Docket No. 36472) as well as the five sub-dockets, all of which are “Related Transactions” as set forth in Decision No. 4 herein: *Norfolk Southern Ry. – Trackage Rights Exemption – CSX Transportation, Inc.*, Finance Docket No. 36472 (Sub-No. 1); *Norfolk Southern Ry. – Trackage Rights Exemption – Providence & Worcester R.R.*, Finance Docket No. 36472 (Sub-No. 2); *Norfolk Southern Ry. – Trackage Rights Exemption – Boston & Maine Corp.*, Finance Docket No. 36472 (Sub-No. 3); *Norfolk Southern Ry. – Trackage Rights Exemption – Pan Am Southern LLC*, Finance Docket No. 36472 (Sub-No. 4); and *Pittsburg & Shawmut R.R., LLC d/b/a Berkshire & Eastern R.R. – Operation Exemption – Pan Am Southern LLC & Springfield Terminal Ry.*, Finance Docket No. 36472 (Sub-No. 5).

and Pan Am Railway (“PAR”). In order to access shippers in the heart of New England from the west, CP and its shippers depend critically on the roughly parallel routes of CSX Transportation (“CSXT”) and PAS from Upstate New York to eastern Massachusetts: CSXT’s route from Albany, which CSXT refers to as the “Southern Route,” and PAS’s former Boston & Maine mainline, which crosses the Berkshire Mountains via the 4.7-mile Hoosac Tunnel (and which we refer to as the “Hoosac Tunnel Route”). These CSXT and PAS routes are head-to-head competitive alternatives, and they are the only viable rail routes into New England from the west.

Without competition preserving conditions, the proposed Transaction would permanently alter this landscape, with potentially adverse long-term consequences for rail capacity and competition. By acquiring Pan Am, CSX would simultaneously achieve control of the railroad that operates PAS (Springfield Terminal, a Pan Am subsidiary) and acquire a 50 percent interest in PAS itself, while also stripping PAS of much of its overhead traffic. The Board should proceed with great caution here, and condition the Transaction in a way that preserves the long-run incentives of the various parties to invest in and operate PAS’s Hoosac Tunnel Route as a no-less-viable competitive alternative than it would have been absent the Transaction.

DISCUSSION

I. THE TRANSACTION RAISES MATERIAL COMPETITIVE CONCERNS

As Applicants explain, “[u]nder the Section 11324(d) analysis, the Board’s ‘primary focus is on the anticipated competitive effects.’” Applicants’ Response to Comments (CSXT/PAR-37) (filed Oct. 18, 2021) (“CSXT/PAR-37”) at 3 (quoting *Norfolk Southern Ry. – Acquisition & Operation – Certain Rail Lines of the Delaware & Hudson Ry.*, Finance Docket No. 35873 (STB served May 15, 2015) at 14). The competitive threat posed by an unconditioned Transaction is well established in the Board’s evidentiary record. It is apparent on the face of the Transaction, which gives CSX half ownership of the only real competitive route

serving New England while simultaneously shifting away a significant portion of that route's service-sensitive traffic. The risk to competition is acknowledged by Applicants, which sought to address it through a complex web of contractual arrangements and numerous representations and assurances in this proceeding. The likelihood of competitive harm is echoed in the Comments of the Antitrust Division of the U.S. Department of Justice ("DOJ").³ And these competitive concerns are magnified still further by Applicants' own arguments against the relief proposed by DOJ and CP.

A. There Is No Real Dispute About the Significance of Horizontal Competition Between CSXT and Pan Am Southern's Hoosac Tunnel Route

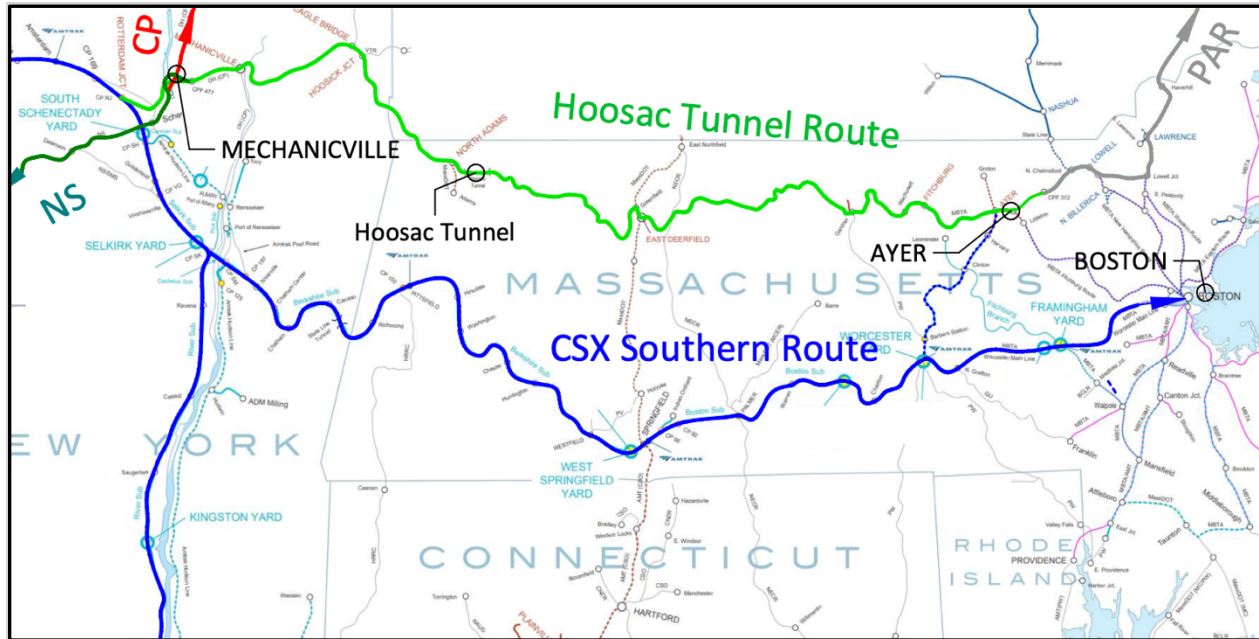
The starting point for the Board's analysis of competitive effects in this case is the plain fact that the Transaction implicates horizontal competition between the only two independent rail routes connecting New England with points west: CSXT's Southern Route between Albany and Boston and PAS's Hoosac Tunnel Route. CP Comments (CP-2) at 7-9.

DOJ's competitive analysis confirms the horizontal nature of the competitive relationship between CSX and PAS: "CSX and Pan Am offer competing rail service between the Albany and Boston areas on parallel lines. Pan Am's service uses the PAS line, which runs through northern Massachusetts in the 'Patriot Corridor,' and CSX uses its own line in Southern Massachusetts. Pan Am owns the PAS line through a joint venture with Norfolk Southern." DOJ Comments (Aug. 26, 2021) ("DOJ Comments") at 3.

The map set forth in CP's Comments – and reproduced below – shows that PAS's Hoosac Tunnel Route is in fact the only viable alternative to CSXT's Southern Route for rail traffic between New England and points west.

³ President Biden's Executive Order on Promoting Competition in the American Economy (July 9, 2021) encourages agencies to "giv[e] significant consideration to the views of the Attorney General" with respect to matters involving the "oversight of mergers." *Id.*, § 3(c)(ii).

FIGURE 1⁴
HEAD-TO HEAD COMPETITION FROM PARALLEL CSX AND PAS ROUTES



B. An Unconditioned Transaction Would Threaten the Long-Term Competitive Viability of the Hoosac Tunnel Route

The Transaction – unless appropriately conditioned – will inevitably diminish the competitive viability of the PAS Hoosac Tunnel Route, for reasons CP’s Comments explained in detail. *See* CP-2 at 7-21. DOJ reached the same conclusion, finding that the Transaction “is likely to diminish competition between CSX and PAS on these parallel routes.” DOJ Comments at 3.

The salient facts are straightforward. Today, PAS is owned by NS and Pan Am, each of which has a strong and undivided incentive to support the viability of the PAS route in competition with CSXT. With the Transaction and the related remedies for which CSXT, Pan Am, Norfolk Southern (“NS”), and Genesee & Wyoming (“GWI”) (collectively, “Transaction Participants”) seek approval or exemption, by contrast, those incentives will be sharply reduced,

⁴ Reproduced from CP-2 at 8, Figure 2.

undermining the viability of the Hoosac Tunnel Route as a competitive counterweight to CSXT's already-dominant Southern Route. Among the Transaction-induced changes are the following:

- CSX will become the one-half owner of PAS and have *incentives to degrade PAS's competition against CSX single-line routes*. CSX will have a veto over capital maintenance and other investments in the viability of the competing PAS route;
- A significant portion of the NS traffic that supports the PAS route will be diverted to the CSX route under the CSX-NS settlement agreement, *reducing NS's incentives* to support the continued viability of the Hoosac Tunnel Route;
- The new single-line CSX routes would, absent conditions requiring otherwise, certainly *divert additional freight traffic now exchanged between PAR and PAS to CSX single-line routes*, bypassing PAS;
- Those diversions may be attenuated somewhat by CSX's "transitional" commitment in the NS-CSX agreement to move certain traffic over PAS rather than over CSX's own route, but once that transitional period expires, that traffic too would disappear;
- Limitations on PAR's trackage rights in the Ayer area that had limited the volume of PAR-CSX interchange (and ensured that traffic would move over PAS) will be eliminated, reinforcing the potential for traffic to shift away from PAS to CSX single-line routes; and
- CSX's contractual rate commitments in the NS-CSX settlement agreement for PAR traffic interchanged with PAS will disappear after a "transitional" period.

See CP Comments (CP-2) at 4. Absent effective remedies, these changes would have permanent and far-reaching consequences, eliminating or significantly diminishing the long-term competitive viability of the Hoosac Tunnel Route.

C. Applicants' Arguments Highlight the Fundamental Change in Competitive Incentives Created by the Transaction

As CP pointed out in its Comments (CP-2 at 9), from the beginning Applicants have acknowledged the core competitive problem with CSXT's acquisition of Pan Am's interest in PAS. In fact, CSXT goes so far as to say that *it did not want to acquire* that interest, a fact that incidentally demonstrates that this aspect of the Transaction carries with it no real public

benefits.⁵ When CSXT ended up choosing to acquire the PAS interest it acknowledged that acquisition's anticompetitive implications and took pains to say that its web of contractual undertakings would fully address them by::

“eliminate[ing] any potential for competitive harm that would occur if CSXT, through its acquisition of an interest in PAS or its acquisition of the PAS operator, were able to exercise control over the price of access to New England over PAS or otherwise prevent rail carriers from accessing New England through PAS. There are currently two direct routes to and from New England through upstate New York – PAS and CSXT's mainline route described earlier. Through a series of agreements with NSR and GWI, *CSXT has structured the Proposed Transaction to eliminate any risk of competitive harm relating to these two roughly parallel routes.*”

Amended Application, Exh 12, Market Analysis at 16, APP-288 (emphasis added).

The Comments of both CP and DOJ demonstrate why Applicants' contractual undertakings with NS and GWI are not sufficient to prevent competitive harm. CP Comments (CP-2) at 12-13; DOJ Comments at 3-5. Applicants' response to these comments fails to come to overcome those deficiencies and in fact provides still more cause for competitive concern. Three of Applicants' principal arguments against the competition-preserving conditions sought by CP and/or DOJ underscore why the Transaction is likely to harm competition unless conditioned appropriately and effectively.

1. Applicants' Concern About Competitive Harm from a Divestiture of Pan Am's PAS Interest Confirms that Such Harm Is Likely from CSXT's Unconditioned Acquisition of That Interest

First, Applicants' arguments against DOJ's proposed divestiture remedy strongly reinforces concern about the impact of the Transaction. Applicants assert that it would “likely ... produce *significant harm to the public interest*” were Pan Am's interest in PAS sold to an entity that might weaken PAS as a “competitor.” CSXT/PAR-37 at 51 (emphasis added). Applicants

⁵ According to Applicants, “CSXT sought to exclude PAS from its purchase of Systems, but Systems declined.” CSXT/PAS-37 at 51.

explain that “[a]n investor without an existing commercial relationship with PAS and a corresponding incentive of keep PAS viable could lead to a weakened PAS.” *Id.* at 51-52.

CP could not agree more, and this is exactly why the Board must condition the Transaction to prevent CSXT’s acquisition of Pan Am’s interest in PAS from leading to a “weakened PAS.”⁶

Applicants suggest that CSXT’s existing “commercial relationship” with PAS will ensure that PAS stays viable. This is a red herring. At most CSXT has an incentive to see that PAS can continue to originate and terminate traffic that is interchanged with CSXT’s network (*see* CSXT/PAR-37 at 51, 56-57). Such an interline relationship provides no protection for the competitive role PAS plays as a counterweight to CSXT’s own Southern Route. PAS’s lines east of the Hoosac Tunnel could readily feed traffic to and from CSXT’s network even if PAS’s existence as a through-route alternative to CSXT’s system were extinguished completely.

2. The Fiduciary Obligations of PAS’s Directors Will Not Prevent Competitive Harm

Second, Applicants seek to brush off any basis for concern about CSXT becoming the new 50 percent owner of Pan Am Southern based on the assertion that the directors appointed by CSXT would have “fiduciary obligations” to act in the interest of PAS rather than CSXT. CSXT/PAR-37 at 40. This position ignores reality, and is contradicted by Applicants own concern about the public interest consequences of a divestiture of the PAS interest. As noted in the previous section, Applicants know that the identity of the new half-owner of PAS will have

⁶ CP shares Applicants’ ostensible concern about a divestiture of Pan Am’s interest in PAS to an entity without incentives to maintain PAS’s competitive viability, and CP agrees with Applicants that CP would be such an entity. Contrary to Applicants’ implication that CP would lack an interest in acquiring Pan Am’s interest in PAS (CSXT/PAR-37 at 51), CP would have such an interest were it not feasible to fully protect PAS’s competitive viability via conditions short of divestiture.

material impacts on PAS's investments and competitive direction notwithstanding any ostensible fiduciary obligation to further "PAS's interests," especially when the Transaction will also alter NS's own incentives.

It is not hard to see why. Fiduciary duties would not prevent CSXT and its PAS directors from taking a self-serving view of what actions are in "PAS's" own self-interest. If CSXT thought that PAS's interests were best served by having the railroad focus on local originations and terminations of traffic moving to/from CSXT's network via the CSXT Southern Route, rather than making further investments to compete more effectively *against CSXT*, fiduciary duties would not stand in the way. This is not a mere hypothetical; Applicants' Response already hints at precisely such a view of PAS's appropriate role as an interchange partner for CSXT. *Id.* at 56-57. At the same time, the Transaction transforms the interests of PAS's other owner (NS) as well as a result of the shift of NS's service sensitive intermodal and automotive traffic off of PAS and onto CSX's Southern Route. To the extent CSXT's and NS's interests end up aligning in favor of a downgrade in PAS's competitive viability, fiduciary duties will be irrelevant since all PAS shareholders would be of the same mind.

More fundamentally, Applicants' suggestion that "fiduciary duties" obviate competitive concern is profoundly at odds with how competition works in the railroad industry (among others). Competitors do not sit on one another's boards of directors. To illustrate, consider whether CSX be free to invite NS to appoint nearly half of CSX's board of directors on the theory that each of those directors must act as a fiduciary to further solely the interest of CSX, and not that of NS? Of course not. Not only would such an interlock violate the antitrust laws

unless exempted by Board approval,⁷ it would plainly have the tendency to align the interests and actions of the two erstwhile-competing railroads. The concern of antitrust agencies with acquisitions of minority interests in competing firms demonstrates that the presence of potential “fiduciary duties” does not overcome competitive concerns.⁸

3. Applicants’ View of PAS as Tantamount to a “Joint Facility” Acting in the Interests of Its Owners Confirms the Need for Conditions Safeguarding Competition

Third, Applicants suggest that joint CSXT-NS ownership of PAS is appropriate because PAS should be viewed as akin to a switching carrier or other joint facility “serv[ing] the interests of its carrier owners.” CSXT/PAR-37 at 51. To be sure, joint facilities are a vital part of the railroad landscape, but it would not be in the public interest to allow the Transaction to convert PAS into a switching carrier serving “the interests of [CSXT].” The fact that CSXT sees PAS this way is an independent cause for competitive concern. Today, PAS *is not a terminal switching carrier*, but a key competitor of CSXT providing a critical portion of the only through route that competes directly with CSXT’s Southern Route. Before the Transaction, neither of PAS’s owners (Pan Am and NS) has any interest in dampening competition with CSX’s Southern Route. Post-Transaction, PAS’s owners will *include CSXT*, whose “interests” are not aligned with the continued existence of a robustly competitive Hoosac Tunnel Route.

⁷ See 15 U.S.C. § 15 (also known as Clayton Act Section 8). As DOJ has explained: “Section 8 of the Clayton Act prohibits the same person or company from serving as an officer or director of two competing companies.” DOJ Press Release, Endeavor Executives Resign from Live Nation Board of Directors after Justice Department Expresses Antitrust Concerns (June 21, 2021).

⁸ See DOJ and Federal Trade Commission, Horizontal Merger Guidelines, § 13 (Aug. 19, 2010), available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

In fact, the record is clear that the Transaction is *designed* to diminish the long-run viability of PAS as a robustly competitive through service route:

- By design, the Transaction will divert away from PAS the traffic that demands the highest level of service, NS's two daily trains of intermodal and automotive traffic. CP Comments at 12, 15. Whatever Applicants may say about the "advantages" of these diversions – for NS, which gets access to CSXT's route, or for PAS, which sheds traffic that it claims is only marginally profitable – the fact is that PAS's incentives and wherewithal to maintain service levels on the Hoosac Tunnel Route will be diminished.
- By design, CSX's commitment to make up some of the lost intermodal traffic by rerouting certain CSXT Ayer-area manifest traffic over PAS will end after a brief transitional period. CP Comments at 16 n.18, 18 & n.22.
- By design, CSXT's acquisition of PAR is intended to give PAR shippers access to single-line rail routes across CSXT's entire system. For apparent tactical reasons CSXT has not forecasted any shift of PAR rail traffic to these new single-line rail routes, but such shifts are inevitable if CSXT is correct about the advantages of those routings. CP Comments at 15-17. Shifts away from the PAS route could be procompetitive, but only if the competitive viability of the PAS route can be maintained despite the cumulative effect of such traffic losses and the altered incentives of its joint owners.

Under these circumstances, competition will not be preserved unless the Board imposes effective competition ensuring that PAS's future competitive viability is protected.

II. THE BOARD SHOULD IMPOSE CONDITIONS TO SAFEGUARD COMPETITION

The Transaction, including NS's exercise of its new trackage rights over CSXT's Southern Route, could well generate meaningful public benefits, but it could also have long-term and permanent adverse consequences for rail competition in the New England region. The Board need not take the bad with the good. It should impose conditions that take Applicants at their word – that the Transaction should not pose “*any risk of competitive harm relating to these two roughly parallel routes*” – and establish binding and perpetual obligations to ensure that the competitive viability of the Hoosac Tunnel Route is not undermined by the Transaction.

CP has proposed a set of carefully-tailored conditions designed to assure the continued competitive viability of the Hoosac Tunnel Route without the need for a divestiture. Those conditions, which are described in detail in CP's Comments (at 23-28), would:

- Hold the Transaction Participants to all of their representations, including representations regarding the effects of the Transaction that are within their ability to control;
- Require that the Transaction Participants keep open on commercially reasonable terms all gateways for the movement of traffic via the Hoosac Tunnel Route to PAS's western gateways, *including PAS's Mechanicville Gateway with CP*;
- Require that PAS and its owners support sufficient spending on maintenance and infrastructure on the Hoosac Tunnel Route to maintain the line's physical condition at or above pre-Transaction levels;
- Require that PAS provide service levels (frequency, transit times, and consistency) that are at least comparable to those offered for traffic interchanged with CP or exchanged with NS at the Mechanicville Gateway pre-Transaction; and
- Retain jurisdiction to oversee the impact of the Transaction on the Hoosac Tunnel Route, and specifically retain the authority to impose additional conditions, including requiring specific investments or other measures, as may prove necessary to protect the viability of the Route.

The conditions CP seeks are necessary to preserve at least some portion of the incentives that exist today for PAS and its owners to maintain the competitive viability of PAS's Hoosac Tunnel Route in the face of the very significant reductions in traffic the Transaction will cause.

A. The Board Has Authority to Protect Competition Even if It Concludes that the Overall Transaction Has Public Benefits

Applicants acknowledge the Board's authority to impose conditions on this Transaction in order to safeguard competition. Lest there be any doubt, the law squarely establishes that authority. Most recently, in the Massena Line case, the Board explained that it "has issued numerous decisions over many years imposing conditions under 49 U.S.C. § 11324(c) to mitigate various concerns and protect the public interest broadly."⁹ Accordingly, the Board will "impose competition-related conditions in non-major transactions [to remedy anticompetitive effects] ... without also making a finding under § 11324(d)(2) that those anticompetitive effects would outweigh the overall public interest." *Id.* at 8.¹⁰

The Board should exercise that authority here, where an unconditioned Transaction would permanently and irrevocably threaten to alter the future competitive role of the PAS Hoosac Tunnel Route.

B. CP's Proposed Conditions Meet All of the Criteria Advanced by Applicants

Conditions protecting the competitive viability of the Hoosac Tunnel Route meet all of the criteria that Applicants themselves identify at pages 4-7 of their Response to Comments:

⁹ *Bessemer & Lake Erie R.R. – Acquisition & Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y.*, Finance Docket No. 36347 (STB Decision No. 7 served Feb. 25, 2021) at 7.

¹⁰ Some ambiguity arises from the language of Section 11324, which refers to the Board's obligation to approve a non-major transaction in the absence of a finding that competitive harm would outweigh competitive benefits. But the Board has held that, "[u]nder the plain language of the statute, ... it is only the Board's authority to *deny* approval that is constrained by both (d)(1) and (d)(2); there is no such constraint on its authority to *approve with conditions*." *Id.* at 9 (emphasis in original); *see also Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir. 2011) (applying same analysis to environmental conditions).

- First, they are ““related to the impact of the merger”” (CSXT/PAR-37 at 4 (quoting *Burlington N., Inc. – Control & Merger – St. Louis*, 360 I.C.C. 788, 951 (1980))), and there is ““a sufficient nexus between the condition imposed and the transaction before the agency”” (CSXT/PAR-37 at 7 (quoting *CN/EJ&E*, Finance Docket No. 35087 (STB served Apr. 25, 2008) at 5 n.2)).

CP’s proposed conditions address the Transaction’s fundamental shift in the structure of ownership and incentives that bear directly on the future competitive viability of the Hoosac Tunnel Route, and they are the only means short of a divestiture of that route (or PAS) that would replicate pre-Transaction conditions. Absent the Transaction, PAS’s pre-Transaction co-owners would have had undivided incentives to invest in the route, to maintain service levels on the route, and to compete aggressively against CSX via the route. Those conditions cannot be preserved absent enforceable condition addressing each of those key aspects of the line’s competitiveness.

- Second, they address “a reduction of the competitive options that existed before the transaction” (CSXT/PAR-37 at 5) and would not “burden[] [the Transaction] with conditions unless they are necessary either to ameliorate the anticompetitive impact of a merger or to protect essential services” (*Id.* at 6).

Again, CP’s proposed conditions address the Transaction’s adverse impact on horizontal competitive options that would remain available to shippers absent the Transaction.

- Third, CP’s proposed conditions would not “create new competitive options for parties seeking conditions or ... expand business opportunities” (*Id.* at 5) or “put the proponent in a better position than it occupied before the consolidation” (*Id.* at 7 (quoting *CP/DM&E*, Finance Docket No. 35081 (STB served Sept. 30, 2008) at 12)).

Neither New England rail shippers nor CP would gain any windfall from the conditions CP proposes. To the contrary, the Transaction threatens to diminish competitive options that those shippers – supported by access to CP at Mechanicville via PAS – would benefit from in perpetuity, and only with conditions such as those proposed by CP can those options be preserved.

C. CP's Proposed Conditions Would Not Impose a "Complex Layer of Additional Regulatory Mandates"

Applicants' leading objection to CP's conditions is that they would impose on the Transaction a "complex layer of additional regulatory mandates." CSXT/PAR-37 at 54. This contention is contradicted both by Applicants' own arguments and by a careful examination of the conditions CP seeks.

First, if "complexity" is a valid objection, the only real complexity is that associated with Applicant's own Rubik's Cube of a Transaction. By comparison with the Transaction itself, CP's proposed conditions are a model of simplicity.

Applicants have cobbled together a Transaction that veers from one complicated contractual obligation to another in an ultimately unsuccessful effort to avoid public interest harm. Beginning with CSXT's apparent lack of interest in acquiring Pan Am's ownership stake in PAS, the Transaction is built on one after another contractual obligation that creates more competitive issues than it solves: CSXT's ownership in PAS, CSXT's grant of trackage rights to NS over the Southern Route, CSXT's term-limited commitments respecting the routing of CSXT traffic on PAS; PAS's decision to replace Springfield Terminal as operator of PAS with GWI, which also owns nearly every other non-Applicant railroad in New England; and most recently a complex trackage rights arrangement with Vermont Rail Systems.¹¹ CP's proposed conditions, by contrast, simply seek long-term protection for the competitive role of the Hoosac Tunnel Route – its maintenance and investment, its service levels, and its pursuit of robust competition against CSXT's Southern Route.

¹¹ See Letter from Anthony J. Larocca to Cynthia T. Brown (CSXT/PAR-48) (filed Dec. 31, 2021) (requesting that Board impose agreement "CSX hereby requests that the Board impose the terms and conditions of the enclosed settlement agreement as a condition of the Board's approval of the Application and B&E's Amended Petition for Exemption").

Second, Applicants' complaints about CP's conditions as imposing unwarranted "regulatory mandates" are hard to square with Applicants' own hearty embrace of a robust role for Board regulation, upon which they rely in opposing the structural divestiture relief proposed by DOJ. A principal thrust of Applicants' opposition to DOJ's proposed relief is to criticize DOJ's proposal as out of place in the regulated railroad industry. Applicants go to great lengths to distinguish the present situation, where the Board has "broad regulatory authority" (CSXT/PAR-37 at 46), "supervises competitive behavior of regulated firms" (*id.* at 53), "supervis[es] ... the implementation of rail transactions [to] ensure that commitments made in those transactions are carried out" (*id.*), and has "'broad conditioning power.'" (*id.*, quoting *UP/SP*, 1 S.T.B. 233, 367 (1996)). As Applicants note, the Board here is "available to ensure that the parties' own commitments are enforced." CSXT/PAR-37 at 53.

CP strongly endorses this view of the Board's power and responsibility in addressing the kinds of horizontal competitive concerns posed by this Transaction. CP has no doubt that non-divestiture conditions imposed by the Board can be a viable substitute for divestiture relief. But if such conditions are to serve that vital role effectively, Applicants' commitments regarding the competitive implications of their Transaction must be interpreted and enforced with sufficient breadth to assure that the conditions enforcing them are adequate to avoid any adverse impact on the long-run competitive viability of the Hoosac Tunnel Route.

D. CP's Proposed Conditions Are Carefully Tailored to Address the Horizontal Competitive Concerns Raised by the Transaction and Not "Unworkable" or "Inappropriate"

Applicants' final line of argument against the conditions CP proposes is that they would be "unworkable" and "inappropriate." CSXT/PAR-37 at 59. Applicants' objections reflect an inappropriately narrow view of what is necessary to protect the competitive viability of the Hoosac Tunnel route.

We address briefly each of Applicants' critiques.

1. Applicants' Resistance to Being Held to Their Representations and Commitments Is Not Well Founded

CP's Comments recited a long list of representations and commitments that Applicants made in support of approval of their Transaction. Applicants' response appears to accept that the Board should impose a condition holding Applicants to those representations and commitments (CSXT/PAR-37 at 59), including a condition requiring them to keep affected gateways open on commercially reasonable terms (*id.* at 57, 59). But Applicants appear to want this condition watered down or narrowed to the point of ineffectiveness.

First, Applicants recast their gateway pledge as one to "keep[] gateways open for New England shippers to reach PAS, ensuring the continued flow of traffic on PAS." *Id.* Lest there be any ambiguity, the Board should make clear that this condition applies not just to connections between PAR and PAS, but equally to the connection between PAS and CP at Mechanicville, which could otherwise be affected by the Transaction's impact on PAS's incentives and ability to cooperate fully with CP in light of CSXT's new role in PAS decision-making and the conflicted incentives of B&E as the new PAS operator. *See* CP Comments (CP-2) at 25.

Second, Applicants appear to walk away from many of their representations and commitments, arguing that only CSXT should be held to commitments, and then only to the "specific commitments it made on the record about actions it will take," but not to "expectations about future market developments, or to guarantee that PAS will become a stronger competitor." CSXT/PAR-37 at 59. The Board should impose a condition holding all Transaction Participants to any representation or commitment upon which the Board's approval is based. CP agrees that mere "expectations about future market developments" should not constitute such a representations, but Applicants' many representations at issue here are about the effect of their own transaction, not mere predictions of future market conditions. Applicants' proposed

limitation will not suffice to protect competition given the significant role played in this proceeding by Applicants' promises about the future impacts of their Transaction on the competitive viability of the Hoosac Tunnel Route.

Likewise, CP does not expect CSXT – or anyone else – to “guarantee” PAS will “become a stronger competitor,” but given the changes in structure and incentives for PAS they should guarantee that the Transaction does not come to undermine PAS’s strength as a competitor. The Board has not hesitated to require adherence to such representations in past cases. *See Soo Line R.R. d/b/a Canadian Pacific Ry. – Acquisition & Operation Exemption – BNSF Ry.*, Finance Docket No. 35068 (STB served Dec. 29, 2020) at 6 (“Based upon the breadth of the representations made prior to the 2007 Decision, the Board could properly have expected that CP and BNSF would work to ensure shippers would continue to be served in an equitable manner as market conditions change.”).

Third, Applicants seek refuge in the specific limitations they managed to incorporate into their various agreements with other Transaction Participants as defining the outer edge of the competitive protections the Board can order. *See CSXT/PAS-37* at 59. That position is misguided. CP does not ask to have Applicants “re-write a carefully negotiated agreement” (*id.*), but conditions holding them to their representations about the long-run impacts of the Transaction for the viability of the PAS Hoosac Tunnel Route should not confer an escape clause triggered by the expiration of the specific contractual terms they have negotiated. This is especially so given that CSXT’s contractual counterparties were negotiating with their own interests in mind, not necessarily the public’s interest in the long-run competitive viability of the Hoosac Tunnel Route.

The same goes for Applicants’ apparent desire to opt out of any obligation to preserve the competitive viability of PAS by replacing PAS’s operator. *Id.* Whatever “conditions might give

rise to the replacement of B&E as PAS operator,” that operator should be bound to preserve the competitive viability of the Hoosac Tunnel Route to the same extent as Applicants and B&E.

2. Applicants’ Resistance to Conditions Regarding Investment and Service Levels Is Misguided

Despite their assurances that the Transaction will not undermine the competitive viability of the Hoosac Tunnel Route, Applicants reject any obligation whatsoever to support any particular level of service or investment on PAS. *See* CSXT/PAR-37 at 59-60. Yet these aspects are crucial to PAS’s future competitive role.

Applicants pretend as if PAS’s only incentives today were to provide the bare-minimum level of service necessary to avoid a violation of its common carrier service obligation. *Id.* That is not the case, as demonstrated most starkly by the premium intermodal/automotive trans that PAS operates for NS today. With those trains gone, and competitive incentives permanently disrupted by the Transaction, a common carrier floor is likely a very low floor indeed. PAS likely could shut down the west end of its Hoosac Tunnel Route entirely and continue to comply with its common carrier obligation by interchanging traffic with CSXT for movement via the Southern Route. Indeed, Applicants themselves recognize that the identity of PAS’s owner can influence greatly the level of service it provides, with material implications for the public interest. *Id.* at 51-52; *see also* page {8 above.

CP is encouraged by Applicants’ continued emphasis on the incentives that B&E will have to “provide service that will keep PAS competitive and that might expand PAS business.” CSXT/PAR-37 at 60. Were this incentive real, perpetual, and unfettered by CSXT’s influence at PAS or GWI’s potentially conflicting incentives, it would go a long way to reassuring CP and its shippers. But it also suggests that the conditions CP seeks regarding the maintenance of service levels on PAS and continued support for investments in PAS’s Hoosac Tunnel Route ought to be sleeves out of Applicants’ vest. Applicants’ resistance redoubles the cause for concern.

An appropriate set of conditions relating to PAS's service and investment levels need not invade the nitty-gritty of PAS's day-to-day operations or negotiation of contractual service commitments. Instead, the Board need only require that PAS not make reductions in service or investment that would have been unjustified had the Transaction-induced changes not occurred. PAR service levels can be monitored via aggregate data on metrics such as the interchange-to-delivery or interchange-to-interchange times for railcars destined to shippers via PAS's Hoosac Tunnel Route.

3. Applicants Embrace of Oversight Is Constructive But Unduly Limited in Duration

CP proposed an oversight period that would last indefinitely, in the sense of allowing any interested party to raise concerns about the long-run implications of the Transaction whenever in the future those concerns might arise. Applicants accept a five-year period of oversight, apparently to ensure that the initial implementation of the Transaction is as represented. CSXT/PAR-37 at 60. But given the potential long-run nature of the Transaction's impacts, coupled with the Board's presumed reliance on non-structural relief to safeguard competition, oversight should not come to a premature end. CP also proposed that the Board protect its ability to take action if circumstances warrant by "explicitly reserve the authority to impose additional conditions on the Transaction as necessary to preserve (or restore) the competitive viability of the Hoosac Tunnel Route." CP Comments (CP-2) at 28. Applicants object that the Board should not "burden the oversight process in advance ... with a discussion of potential remedies." CSXT/PAR-37 at 60. CP proposes no such "burden," but merely the express reservation by the Board in its decision approving the Transaction of any and all potential relief that might become necessary to achieve the objective of avoiding Transaction-induced degradation in the competitive viability of the Hoosac Tunnel Route.

CONCLUSION

Applicants acknowledge the importance of preserving the competitive role of the Hoosac Tunnel Route, but the complex contractual undertakings it proposes are not sufficient to ensure that the public's interest in competition is fully protected. The Board should impose the conditions CP proposes to ensure that the long-term consequences of the Transaction will line up with the pro-competitive characterizations and representations of Transaction Participants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing redacted public record version of Canadian Pacific's Brief to be served electronically or by first class mail, postage pre- paid, on all parties of record in this proceeding.

/s/ David L. Meyer

David L. Meyer

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