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October 18, 2021

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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

ENTERED
Office of Proceedings
October 18, 2021
Part of
Public Record

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

Dear Ms. Brown:

Enclosed for filing in the above referenced docket is the Pittsburg & Shawmut Railroad, LLC doing business as Berkshire & Eastern Railroad ("B&E") Response to Comments. Also enclosed are unredacted "Highly Confidential" and redacted "Public" versions of the Response Verified Statement of Leonard Wagner that is being filed in support of the B&E Response.

Please let me know if there are any questions regarding this filing.

Sincerely,

A handwritten signature in blue ink that reads 'Justin J. Marks'.

Justin J. Marks
Counsel for Pittsburg & Shawmut Railroad, LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36472 (Sub-No. 5)

**PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
– OPERATION OF PROPERTY OF RAIL CARRIER PAN AM SOUTHERN LLC –
PAN AM SOUTHERN LLC AND
SPRINGFIELD TERMINAL RAILWAY COMPANY**

BERKSHIRE & EASTERN RAILROAD RESPONSE TO COMMENTS

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*Counsel for
Pittsburg & Shawmut Railroad, LLC d/b/a
Berkshire & Eastern Railroad*

Dated: October 18, 2021

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SURFACE TRANSPORTATION BOARD

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BERKSHIRE & EASTERN RAILROAD RESPONSE TO COMMENTS

Pittsburg & Shawmut Railroad, LLC doing business as Berkshire & Eastern Railroad (“B&E”), a Class III carrier and subsidiary of Genesee & Wyoming Inc. (“GWI”), files this Response to Comments in accordance with the schedule established by the Board’s Decision 4 in this proceeding.¹

B&E is petitioning the Board for an exemption under 49 U.S.C. §10502 and 49 C.F.R. §1121 from the provisions of 49 U.S.C. §§11323(a)(2) and 11324 to allow B&E to enter into contracts to operate – as a contract operator – the approximately 425 route miles of lines and incidental trackage rights of Pan Am Southern LLC (“PAS”). If the related transactions in FD

¹ Specifically, B&E directs its response to comments filed in B&E’s Sub-docket No. 5 by: the American Chemistry Council (“ACC”); Canadian Pacific Railway Limited (“CP”); M4 Capital Group (“M4 Capital”); United States Department of Justice (“DOJ”); United States Department of Transportation (“US DOT”); Vermont Rail System (“VRS”); Vermont Agency of Transportation Agency (“VTrans”); American Train Dispatchers Association (“ATDA”); The Brotherhood of Locomotive Engineers and Trainmen National Division, Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment 120 (“BLET”), Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (together, “Allied Rail Unions”); International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”); Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”); and International Federation of Professional and Technical Engineers (“IFPTE”).

35762 are approved, PAS will be owned jointly by CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”).

B&E filed its original Petition for Exemption on February 25, 2021, and an Amended Petition for Exemption on April 26, 2021 (the “B&E Amended Petition”). In addition, B&E filed a Supplement to Amended Petition on July 1, 2021 (“B&E Supplement”) to provide additional information requested by the Board in Decision No. 3, and to otherwise update the B&E Amended Petition. Together, the B&E Amended Petition and the B&E Supplement constitute B&E’s case in chief.²

INTRODUCTION

The B&E Amended Petition meets the Board’s standards for granting a petition for exemption because the B&E transaction to become the contract operator of the PAS Lines³ will not result in any substantial anticompetitive effects, and shippers do not need to be protected from any abuse of market power.

However, Commenters VRS, VTrans, and DOJ argue that B&E as the contract operator of the PAS Lines will result in competitive harm to VRS, the State of Vermont, and shippers throughout New England. These Commenters assert that GWI will not be incentivized to have its subsidiary B&E, as the contract operator of the PAS Lines, compete against another subsidiary, New England Central Railroad, Inc. (“NECR”), that operates alongside PAS on the Conn River Line. Commenters assert that B&E’s role as contract operator of the PAS Lines will place the vast majority of VRS gateways under the operational control of GWI railroads. Further, they argue that B&E as the contract operator of the PAS Lines will create a “virtual 2-

² Capitalized terms not otherwise defined herein shall have the meanings set forth in the B&E Amended Petition.

³ The description of the “PAS Lines” is set forth in the B&E Amended Petition, Exhibit C.

to-1” corridor along the Conn River Line. Commenters also view B&E, CSXT, and NSR’s proposed efforts to address any potential competitive concerns as inadequate. As demonstrated below, these fears are unfounded and without the support of a single customer. Therefore, there is no likelihood of any substantial anticompetitive effects as a result of the transaction and regulation is not needed to protect shippers from the abuse of market power.

First, it must be noted that PAS will remain as the owner of the rail lines and the holder of the trackage rights that comprise the PAS Lines. B&E will merely be the contract operator of the PAS Lines. There will be no reduction in the number of railroads serving any PAS customers or the number of gateways available to any connecting carriers.

As the contract operator of the PAS Lines, B&E will have contractual obligations to operate in the best interests of PAS, and its own financial incentives to ensure that PAS is a success. In addition, a portion of the compensation of the B&E management team will be tied to the financial and safety performance of B&E. All parties to the transaction have an interest in a successful PAS, and CSXT and NSR would not have chosen B&E if they thought that B&E would do anything but operate in the best interests of PAS.

In addition to B&E’s fundamental contractual and financial incentives to ensure a successful PAS, CSXT and NSR have also offered pricing, haulage, service and other commitments to ensure that no substantial anticompetitive effects arise and that shippers in Vermont, and the connecting carriers that serve them, will not be harmed. Indeed, relevant shipper stakeholders appear to agree. Significantly, not one customer on PAS (including the two shippers dual-served by PAS and NECR), on any of the PAR Railroads, on any of the VRS railroads, CSXT, NSR, Canadian Pacific Railway Company (“CP”) or on any other railroad that connects to PAS, has raised a single objection or concern whatsoever to B&E serving as the

contract operator of the PAS Lines. One customer – Republic – did have concerns, but now joins the more than 70 customers that have submitted support letters on the record. Further, commenting labor groups have raised no objections to B&E serving as the contract operator of the PAS Lines or to the application of the protective conditions provided in *New York Dock Railway – Control – Brooklyn Eastern District*, 360 ICC 60 (1979) (“*New York Dock*”).

Under a petition for exemption, B&E is not required to demonstrate the public benefits of the transaction. Nevertheless, B&E serving as the contract operator of the PAS Lines presents benefits for PAS, its employees, customers, and the public because B&E, as a subsidiary of GWI, will have GWI’s corporate and regional resources available to support B&E in its operation of the PAS Lines as an independent contract operator. Furthermore, the transition of the contract operator of the PAS Lines from Springfield Terminal Railway Company (“Springfield Terminal”) to B&E is a significant undertaking, with the need to hire more than 150 employees, acquire and deploy 33 locomotives and other required equipment and vehicles, and establish an entire operating organization. Few companies, and certainly no regional or short line operator, have the experience and track record of GWI’s subsidiaries, many of which have successfully started up new rail operations and hired, onboarded and trained full workforces, acquired equipment, and prepared and implemented safety and operating rules and policies. Lastly, GWI owns multiple railroads in New England, which have long-established relationships with a significant portion of the labor unions, customers and state departments of transportation in the region, and which host and/or operate over many of the same commuter and intercity passenger operations as PAS, including Amtrak and Metro-North.

For all of the foregoing reasons and based on the legal standards that should be applied, the Board should grant B&E’s Amended Petition.

ARGUMENT

B&E is petitioning the Board for an exemption under 49 U.S.C. §10502 and 49 C.F.R. §1121 from the provisions of 49 U.S.C. §§11323(a)(2) and 11324 to allow B&E to enter into contracts to serve as the contract operator of the PAS Lines.

The Board is directed by 49 U.S.C. §10502 to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the rail transportation policy (“RTP”) of 49 U.S.C. §10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power. The Interstate Commerce Commission held:

In determining whether regulation of a transaction proposed for exemption under §10505 [now 10502] is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. See Finance Docket No. 31493, Blackstone Cap. Partners -- Cont. Exempt. -- CNW Corp., Et Al. (not printed), served July 5, 1989, at 2. Section 10505 provides a shortcut analysis to see if regulation -- in this case under §11344(d) [now 11324(d)] -- is necessary. If §11344(d) does not require review of particular issues, neither does the §10505 process.

Under §11344, Congress has limited the Commission’s jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition.¹⁰ If the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context need not be broadened beyond consideration of those aspects of the RTP that deal with competition. We need not look at RTP issues unrelated to the purposes of §11344.

Indiana R. Co. – Acq. & Oper. – Illinois Central R. Co. (“Indiana R. Co.”), 6 ICC 2d 1004, 1006-1007 (1990), *aff’d sub nom., Village of Palestine v. ICC*, 936 F. 2d 1335 (D.C. Cir 1991) (internal footnotes omitted). The ICC in *Indiana R. Co.* went on to conclude: “We agree with applicants that the ALJ’s finding that the transaction will have no anticompetitive effects is dispositive of the RTP issue.” *Id.*, at 1009.

As stated above, the underlying statute that B&E seeks an exemption from is 49 U.S.C. §11324(d). It states that in proceedings not involving at least two Class I railroads, the Board shall approve 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.

In Decision No. 4, the Board determined that B&E's utilization of a petition for exemption under 49 U.S.C. §10502 is permissible. Therefore, the Board should grant B&E's petition if it finds that regulation is not required due to no substantial anticompetitive effects as a result of the transaction and regulation is not needed to protect shippers from the abuse of market power.

I. The proposed transaction will not result in any substantial anticompetitive effects.

The proposed transaction under which B&E will become the contract operator of the PAS Lines will not result in any substantial anticompetitive effects because (1) PAS will continue to hold its common carrier obligations as an independent railroad, (2) there are contractual protections in place to prevent B&E as the contract operator of the PAS Lines from causing any anticompetitive effects to occur, (3) B&E and its parent, GWI, have financial and other incentives to ensure that PAS is successful and (4) CSXT and NSR have offered pricing, haulage, service and other commitments to ensure that no substantial anticompetitive effects arise from the transaction.

Commenters opposing B&E's Amended Petition do not support their conclusory arguments that the transaction is anticompetitive by providing any data. Commenters impute upon B&E an intent to use its role as the contract operator of the PAS Lines to drive traffic away

from PAS for the benefit of another GWI railroad – NECR – that also operates on the Conn River Line.⁴ Yet these commenters do not explain why the remedies proposed by CSXT and B&E do not alleviate this concern, why the PAS owners – CSXT and NSR – do not share this concern, or why no shippers share this concern.

A. No substantial anticompetitive effects will arise from B&E serving as the contract operator of the PAS Lines because B&E will be contractually obligated to operate in the best interests of PAS.

B&E’s prior filings explain that if its petition and the primary application of CSXT are approved, B&E will consummate an agreement with the owners of PAS – CSXT and NSR – to operate the PAS Lines for the benefit of PAS (and its owners).⁵ Under the agreement, B&E will be responsible for setting market-based interline rates for PAS in a manner consistent with the terms of the agreement.

The agreement will stipulate that B&E is required to establish rates on behalf of PAS that advance the economic interest of PAS as an independent rail carrier, and B&E will not be permitted to set rates that are intended to favor the interests of any individual PAS owner (i.e., NSR or CSXT) or the separate interests of GWI and its affiliates.⁶ The Term Sheet Agreement prohibits B&E from using its rate-setting obligation to create a competitive advantage or disadvantage to any rail carrier or between or among any rail carriers connecting to PAS – it must be neutral. B&E will be required to set rates that are sufficient to cover PAS’s costs at a minimum so that PAS does not require a capital contribution or other subsidy from its owners – CSXT and NSR. The agreement will permit B&E to establish rates taking into consideration the

⁴ NECR owns the Conn River Line between East Northfield, MA and White River Junction, VT, and PAS has trackage rights over the line under terms established by the Board in a trackage rights order. The PAS trackage rights are primarily overhead rights with limited local service rights.

⁵ See B&E Amended Petition at 4 and Exhibit D, Term Sheet Agreement.

⁶ See *Id.*, Term Sheet Agreement, Sec. 4.

relative volume of traffic interchanged with a particular railroad, the commodity involved, the mileage traveled, and any equipment provided, so long as any such rates are reasonably based on cost differences associated with handling such variations in traffic.⁷ All PAS traffic will move under PAS revenue waybills and B&E, as the contract operator, will not be permitted to move traffic over the PAS Lines in its own revenue waybill

In addition, the Term Sheet Agreement that B&E has entered into provides for a penalty (termination) for failure to perform and an operating bonus for strong performance. These incentives will ensure that B&E complies with the terms of the proposed operating contract. The claims of certain commenters that B&E will operate PAS not for the benefit of PAS, but instead for the benefit of NECR is shortsighted. As stated, B&E taking actions that would result in the diminution of service, traffic volume or revenues on the PAS Lines would be risking termination of the B&E operating agreement with PAS. The shareholders of PAS – NSR and CSXT – will benefit from the very same access to two carriers on the Conn River Line as VRS and VTrans claim is important for Vermont shippers – it is entirely in their mutual interest that B&E operate the PAS Lines as efficiently and successfully as possible. Neither owner could be expected to tolerate B&E's subversion of service on the PAS Lines as suggested by VRS and VTrans. Moreover, PAS will have the right to remove B&E as contract operator of the PAS Lines if PAS determines after the third full calendar year after B&E's commencement of operations that PAS is not expected to be operated profitably by B&E on a long-term and recurring basis.

⁷ *Id.*

B. No substantial anticompetitive effects will arise from B&E serving as the contract operator of the PAS Lines because B&E and its parent, GWI, have financial and other incentives to ensure that PAS is successful.

Although certain of the commenters assert that B&E will act to the detriment of its own interest as the contract operator of the PAS Lines and instead favor another GWI railroad, NECR, there is no basis for this assertion given the financial and other incentives for B&E and its parent, GWI.

GWI has no financial incentive to cause B&E to operate in a manner that pushes traffic to NECR – to do so would risk removal after a start-up investment of up to \$20,000,000 in capital for B&E operations and hundreds (if not thousands) of hours of management time and attention dedicated to this Board process and the creation and implementation of start-up and integration plans.⁸

In addition, other GWI railroads in the region such as Providence and Worcester Railroad Company (“P&W”) interchange substantial amounts of traffic with PAS and rely on PAS as a partner in handling such traffic. As noted in the attached Wagner Response V.S., in 2019, P&W interchanged a substantial number of freight and haulage carloads with PAS.⁹ Thus, GWI has no incentive to cause B&E to harm PAS and, in fact, it has a free market incentive to ensure the success of PAS.

GWI, as a logical business enterprise, would be incentivized to pursue that which is most financially advantageous to itself, namely, by causing B&E to operate PAS so that it is successful. While a portion of its compensation will be in the form of a management fee, a meaningful portion of B&E’s compensation will be derived from the operating bonus B&E will be entitled to receive under the proposed railroad operating agreement similar to the operating

⁸ See SIP at 86; Wagner Response Verified Statement (“Wagner Response V.S.”) attached hereto at 2.

⁹ Wagner Response V.S. at 3.

bonus that Springfield Terminal is eligible to receive under its current contract with PAS. The B&E operating bonus would be paid out on a graduated scale based on PAS's operating ratio – the lower the operating ratio, the higher the bonus but with a cap and a collar. As a result, B&E will be incentivized to retain and win enough traffic, and efficiently manage its costs and operations, so as to enable it to earn the highest possible operating bonus.¹⁰ The success of B&E will be financially advantageous both to B&E and to its parent GWI and likely far more impactful than any gains NECR might generate if B&E were to take actions to purposely diminish PAS.

Indeed, GWI recognizes the importance of a successful B&E. In order to incentivize the B&E management team (i.e., general manager, assistant general manager, sales & marketing, etc.), the compensation of the B&E management team will be linked to their acting in the best interest of B&E (and PAS) and the resulting financial and safety performance of B&E. This is a standard compensation approach that GWI applies to all of its railroads, and B&E will be no different.¹¹ Accepting Commenters' arguments would imply that the B&E management team would act in a way adverse to their own economic interests.

Commenters' claim that GWI is incentivized for B&E to price traffic such that the traffic will move to NECR or other GWI railroads is not logical. What is logical is for GWI to have NECR remain profitable and to have a well-managed and competitive PAS that pays out the maximum operating bonus to B&E. The success of B&E will be financially advantageous both to B&E and to its parent GWI, without materially affecting the profitability of NECR. A healthy PAS would also benefit other GWI railroads like P&W that have existing significant commercial relationships with PAS. Commenters' suggestion is that GWI would be better off – for the sake

¹⁰ Wagner Response V.S. at 3.

¹¹ Wagner Response V.S. at 4.

of spiting VRS – to have an NECR that is marginally more profitable combined with a B&E that makes less money and is at risk of being removed as the contract operator of the PAS Lines. Commenters do not seem to consider the risk to GWI of this approach because losing the PAS contract would thereby waste the money and management time and attention required to obtain Board approval and commence operations.

Further, B&E’s role as a neutral carrier is not a novel concept in the rail industry. There are many examples of short line carriers serving a role similar to the role B&E will serve for PAS, including GWI’s subsidiary, Tazewell & Peoria Railroad, Inc. (“TZPR”).¹² TZPR is a short line terminal and switching railroad that operates over 24 miles of main line and 100 miles of yard and industrial track. TZPR leases its rail line from Peoria and Pekin Union Railway Company (“PPU”), which is owned by three Class I railroads – Canadian National Railway Company (“CN”), NSR, and Union Pacific Railroad Company (“UPRR”). TZPR interchanges with BNSF Railway, Inc., CN, Iowa Interstate Railroad, Keokuk Junction Railway, NSR, Pioneer Industrial Railway, UPRR, and GWI owned railroads Illinois & Midland Railroad, Inc. and Toledo, Peoria & Western Railway Corp. TZPR operates independently on behalf of the owners of PPU to foster competition, treating all connecting carriers fairly on a non-discriminatory basis, including those owned by GWI. TZPR and various other terminal railroads under the Board’s jurisdiction clearly demonstrate the ability of short lines, including GWI subsidiaries, to operate as a neutral carrier.

¹² Wagner V.S. at 4-5.

- C. *CSXT and NSR have offered pricing, haulage, service and other commitments to ensure that no substantial anticompetitive effects arise as a result of the B&E transaction.*

Pricing and haulage commitments offered by CSXT and NSR – as the future owners of PAS – ensure that no substantial anticompetitive effects will arise from the transaction, and that shippers in Vermont will not be harmed from B&E serving as the contract operator of the PAS Lines. First, existing haulage arrangements will remain in place – by NECR for VRS between White River Junction and Bellows Falls, and by PAS for NSR between Mechanicville and Hoosick Jct. In particular, the NSR haulage rights ensure that VRS’s traffic with NSR over the VRS Mechanicville / Hoosick Jct. gateway will not be affected – pricing will be in the hands of NSR, not PAS or B&E, and NSR as an owner of PAS can ensure that B&E’s service is not degraded.¹³ Second, a new haulage arrangement will be provided – by PAS for VRS between East Deerfield and Bellows Falls for LPG traffic that uses storage facilities at East Deerfield - at the average of current commodity-specific interline rates for those movements. One of the benefits of this new haulage arrangement is that B&E will not be involved in establishing rates for this traffic moving over PAS, and it will have no ability to influence how the affected traffic will be routed or priced.

In addition to the haulage arrangements, PAS will provide VRS with price stability. PAS will keep current rates in place for VRS movements to and from the east through East Deerfield and Ayer (subject to future reasonable escalation), and PAS will establish rates at current levels for movements to and from the west with a connection to CSXT at Rotterdam for VRS traffic between Rotterdam and Hoosick Jct. (subject to future reasonable escalation).¹⁴ PAS will also

¹³ Reishus Reply V.S. (as defined hereinafter), ¶32.

¹⁴ Traffic to and from the west with an NSR connection is already covered / protected by the existing NSR haulage arrangements discussed above. *See also* Reishus Reply V.S., ¶32.

provide VRS with 5-day per week service in these lanes if volumes support this level of service – this is a commitment that VRS does not currently have as Springfield Terminal as the current operator has no service commitments and currently provides service less frequently than B&E will be obligated to as the contract operator of the PAS Lines.

To address any concern that GWI would cause B&E to share VRS rate information with other GWI controlled railroads, PAS will prohibit B&E from sharing rate divisions that it learns of through its operation of PAS with any other GWI controlled railroad (except for rates for interline traffic with other GWI railroads, such as for PAS-P&W traffic). This restriction is consistent with the requirements of 49 USC §11904, which prohibits the disclosure of traffic information “that may be used to the detriment of the shipper or consignee, or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.” GWI will backstop this requirement by establishing barriers that will prevent B&E from sharing competitively sensitive information that it learns as the contract operator of the PAS Lines with any other GWI subsidiary.¹⁵

To ensure that these commitments have the necessary effects, the parties to this proceeding have asked the Board to impose these commitments as conditions to the approval of the transactions so that if the parties were to fail to comply, then VRS, VTrans or other affected parties would have recourse at the Board.

D. *The Commenters have not demonstrated that B&E serving as the contract operator of the PAS Lines will have any substantial anticompetitive effects.*

As analyzed in detail by CSXT’s expert David Reishus in his Reply Verified Statement (“Reishus Reply V.S.”) being filed with CSXT’s Response, VRS will not be placed at risk as a result of the Merger and Related Transactions. Most VRS traffic is not subject to competition

¹⁵ Wagner Response V.S. at 4.

between NECR and PAS. Specific pricing protections already exist and additional commitments as part of the Merger and Related Transactions have been made that preserve the benefits of existing competition for most of the traffic on which PAS and NECR compete.¹⁶ Most of VRS's traffic moves over western gateways at Whitehall (with CP) and at Hoosick Junction (with NSR via haulage and with CSXT with pricing commitments). Neither PAS nor NECR serve Whitehall, and NECR's Conn River Line is not competitive with the movements with VRS over Hoosick Junction.¹⁷ Further, Dr. Reishus's analysis concludes that even on the Conn River Line that is served by both PAS via trackage rights and by NECR, very little traffic potentially loses competition as a result of the proposed contract operation of the PAS Lines by B&E.¹⁸ In sum, Dr. Reishus confirms that there is no risk of meaningful competitive harm to VRS or its shippers from the proposed B&E transaction, or the Merger or Related Transactions.¹⁹

The lack of shipper opposition by customers potentially impacted by the proposal for B&E to be the contract operator of the PAS Lines supports Dr. Reishus's conclusions and is compelling evidence that the proposed transaction will not result in any substantial anticompetitive effects. None of VRS, VTrans or DOJ either cite a single customer that shares their vague and unfounded competitive concerns or offer any data to support their assertions.

The CSXT Transaction has broad support from the shipper community – not one customer located on PAS (including the two shippers on the Conn River Line dual-served by PAS and NECR), on any of the PAR railroads, on any of the VRS railroads, CSXT, NSR, CP or on any of the other railroads connecting to PAS, has raised a single objection or concern whatsoever to B&E serving as the contract operator of the PAS Lines, or requested any

¹⁶ Reishus Reply V.S., ¶57.

¹⁷ Reishus Reply V.S., ¶¶ 27, 32, 34.

¹⁸ Reishus Reply V.S., ¶76.

¹⁹ Resishus Reply V.S., ¶57.

competitive conditions. As the Board is aware, the shipper community is sophisticated, so the absence of any shipper opposition to the B&E Amended Petition is a strong indication that the proposed transaction will not have any substantial anticompetitive effects.

The VRS Comment asserts that GWI “will have no incentive to compete against itself.”²⁰ The VRS Comment states that GWI “despite NSR and CSXT efforts, undoubtedly will explore any and all ways to exploit [B&E’s role as the contract operator of the PAS Lines] to reduce competition in New England wherever such efforts would benefit GWI as a whole.”²¹ VRS includes in its Comment a verified statement that argues that GWI, “as a logical business enterprise, [it] would be incentivized to pursue that which is most financially advantageous to itself, and, here, it would be to GWI’s advantage, naturally, to reduce competition faced by its subsidiaries wherever it could.”²² The VRS Comment does not include any verified statements from shippers in Vermont that share this concern, nor have any shippers in Vermont or otherwise served by PAS filed independently to raise competitive concerns. In addition, as described above in Sections I.A. and I.B., B&E will be contractually obligated to operate in the best interests of PAS, and both B&E and its parent, GWI, are fully incentivized to ensure that PAS is successful. And there is no evidence that even if B&E had the power to influence traffic to shift from PAS to NECR, that GWI “as a whole” would benefit.

VTrans and DOJ argue that B&E’s Amended Petition represents a reduction in competitive rail alternatives because B&E is a member of the same corporate family as NECR. VTrans asserts that “[t]he impact would extend beyond VRS and directly affect Vermonters who would either not receive shipments of critical commodities or bear additional costs to get

²⁰ VRS Comment at 6.

²¹ VRS Comment at 12.

²² VRS Comment at 13.

them.”²³ And DOJ states that “[t]he effects of this consolidation would likely be felt beyond the NECR line itself, as NECR provides important connections to [VRS].”²⁴ There will of course be no change in the “important connections” that NECR provides to VRS. Further, there will be no change in the connections that PAS provides to VRS. Neither DOJ nor VTrans cite to any Vermont shippers that fear the outcome they portend. Moreover, as described above in Section I.C., the parties’ commitments ensure that there will be no such reduction in competitive alternatives for VRS or its shippers.

VTrans provides in its Comment a verified statement contesting the value of GWI’s commitment to preserve competition for the betterment of PAS and disputing GWI’s incentive to have B&E operate for the benefit of PAS instead of for the benefit of NECR. VTrans’ expert states that “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.”²⁵ As an initial matter, GWI is not going to operate PAS, a subsidiary of GWI is. To conflate the two is to misstate the facts. Further, not included in this analysis is that the cited provision also provides that any such action by B&E (as opposed to GWI) cannot occur without approval of the PAS owners - NSR and CSXT - and unless any such action provides a benefit to PAS.

VRS and VTrans attempt to further dispute B&E’s interest, and for that matter GWI’s interest, in B&E operating PAS in the best interest of PAS by citing the 2017 NECR/PAS

²³ VTrans Comment at 8.

²⁴ DOJ Comment at 4.

²⁵ Verified Statement of James C. Cunningham at 14-15.

Trackage Rights Proceeding and intimating that NECR acted nefariously.²⁶ This attempt is a red herring.

In the NECR/PAS Trackage Rights proceeding, NECR and PAS were successors-in-interest to the original parties to a trackage rights order imposed by the Interstate Commerce Commission (“ICC”) in 1990. The ICC trackage rights order allowed the parties the right to petition for modifications to the terms and conditions of the agreement after 20 years (starting in 1988); NECR elected to do so in 2014.²⁷ In that proceeding, NECR and PAS disputed the interpretation of certain provisions in the agreement and the appropriate level of compensation for use of the trackage rights, and the Board resolved the disputes and entered a revised trackage rights order. NECR and PAS have operated under the revised trackage rights order without incident or dispute.

VRS and VTrans raise this issue now in order to create a false inference that GWI and NECR harbor ill-will toward PAS. This endeavor fails because if NECR were attempting to “eliminate viable competition”²⁸ then NSR as a 50% owner of PAS in 2014 and as a current 50% owner would have reservations about B&E serving as the contract operator of the PAS Lines. But, NSR has no such reservations and is a proponent of this transaction.

Notably, the VRS and VTrans Comments selectively ignore the benefits of the commitments that the parties to the B&E transaction are willing to make, which will put VRS in a better position than it is currently. To begin, the haulage and pricing commitments prevent B&E from eliminating PAS as an effective competitor along the Conn River line and creating a 2

²⁶ VRS Comment at 9; VTrans Comment at 4.

²⁷ *New England central R.R., Inc. – Trackage Rights Order – Pan Am Southern LLC*, STB Finance Docket No. 35842, slip op. at 2 (Oct. 31, 2017).

²⁸ VTrans Comment at 4.

to 1 scenario – VRS and its shippers, as well as dual-served on-line customers,²⁹ will continue to have access to two independent carriers, PAS and NECR. VRS’s existing access to NSR via NSR’s haulage rights between Hoosick Jct. and Mechanicville will not change. Next, all gateways will remain open, so Vermont rail shippers would not suffer a reduction in competitive alternatives nor have any rail shippers complained that any competitive routes currently available will be lost as a result of gateways being closed. In addition, Vermont shippers will not suffer service delays or bear additional costs because of the transaction since PAS is making a 5-day per week service commitment to VRS that VRS and its Vermont shippers do not have today with Springfield Terminal as the current contract operator of the PAS Lines.

The VRS argument that the commitments above are too vague is a mischaracterization – the commitments are clearly stated in the parties’ previous filings. There is nothing vague about the commitment to provide service five days per week (when Springfield Terminal had no such commitments), or to maintain “current pricing” (when VRS has participated in the routes with PAS and is well aware of the current pricing and the traffic that has moved under that pricing).

The VRS Comment claims that setting haulage rates at current levels demonstrates that PAS won’t be a strong competitor³⁰ misses the point. VRS and PAS move traffic today based on the current rates so to address any competitive concerns raised by B&E serving as the contract operator of the PAS Lines, CSXT and NSR have agreed to have PAS set rates at the current levels, which should presumably allow PAS and VRS to retain the traffic. Taking away from B&E the ability to raise rates above current levels eliminates the risk that B&E could price VRS

²⁹ Under the trackage rights order, PAS has only limited local service rights. There are currently only two customers on the Conn River Line that are eligible to receive service from both PAS and NECR. Wagner V.S. at 2.

³⁰ VRS Comment, Verified Statement of Thomas Crowley and Robert Mulholland at 15.

out of the traffic. Moreover, the rate commitment that CSXT is making provides a ceiling on rates, but this rate commitment is not intended to prevent B&E from establishing prices below that ceiling if B&E believes downward adjustments are warranted.³¹

VRS shows its true colors when, in its Comment, VRS argues that the only way that the B&E transaction would have any chance of obtaining its non-opposition is for VRS railroad, Green Mountain Railroad Corporation, to receive “trackage rights from Bellows Falls to the [Washington County Railroad Company] connection at White River Junction to adequately protect VRS overhead traffic flows between those two VRS railroads.”³² VRS’s general opposition to B&E’s proposed operations seems to merely be an attempt to leverage that opposition as an opportunity to improve its existing operating limitations over a line that is owned by NECR and not part of the transactions in this proceeding; limitations that are not caused, or exacerbated, by and in fact that are completely unaffected by the proposed operation of the PAS Lines by B&E. VRS’s traffic flows between these points and its railroads are already handled by NECR under haulage arrangements between the parties. VRS fails to cite to any Board authority that would permit the Board to impose a trackage rights condition over the tracks of a non-party.

E. DOJ proposes a regulatory sledgehammer – divestiture – which if applied would mitigate the public good that will result from the B&E transaction.

The DOJ’s proposed remedy – “carefully crafted divestiture”³³ – by CSXT of its interest in PAS to an operator other than a GWI railroad would be anything but carefully crafted. Divestiture is a heavy-handed regulatory remedy that ignores the Board’s power (and preference) to impose narrowly tailored conditions. Although the Board has authority to order divestiture

³¹ See Verified Reply Statement of Sean Pelkey being filed with the Reply Statement, at 7.

³² VRS Comment at 14.

³³ DOJ Comment at 3.

under 49 U.S.C. § 11324(c), the Board has – in the past – expressed its preference to impose other conditions that are “narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger’s substantial public benefits” in lieu of divestiture.³⁴ The facts set forth herein demonstrate there is no need or benefit to justify a divestiture. B&E is not aware of any similar proceeding in which the Board has ordered a divestiture and doing so in this case would be an unwarranted departure from Board precedent.

DOJ’s proposal would undercut the benefits associated with B&E serving as the contract operator of the PAS Lines. Further, DOJ’s position ignores the historical benefit of consolidations in the rail industry, particularly for the short line industry. These consolidations have greatly benefitted the industry by creating financially stable, healthy, competitive and well-run railroads. B&E recognizes that the Board will be mindful of President Biden’s Executive Order on Promoting Competition in the American Economy, but the goals outlined in that order can be achieved through the Board’s long-standing approach to narrowly tailored remedies without resorting to the DOJ’s heavy-handed approach. This is particularly true given the complete lack of customer opposition or concerns, the non-opposition of railroad labor, and the pro-competitive commitments of the parties that the Board has been requested to impose as conditions on its approval. In addition, preventing B&E from serving as the contract operator of the PAS Lines would introduce significant execution risk in the transition of contract operators, with the result that a less experienced operator with less corporate and financial support would come in and be confronted with the significant task of hiring more than 150 employees,

³⁴ *Union Pac. Corp., et al. – Control and Merger – S. Pac. Rail Corp. et al.*, STB Financed Docket No. 32760, slip op. at 157 (served Aug. 6, 1996) (Decision No. 44).

acquiring and deploying 33 locomotives and other required equipment and vehicles, and establishing an entire operating organization.

II. Regulation of the proposed B&E contract operation of the PAS Lines is not needed to protect shippers from the abuse of market power.

As discussed above, B&E's proposed operation of the PAS Lines as the contract operator will not have any substantial anticompetitive effects or provide B&E (or GWI) with any opportunities to consolidate or abuse market power. PAS will remain as a strong and independent railroad competitor in the region. Moreover, as discussed above, no shippers have indicated any opposition to the CSXT Transaction or to B&E's proposed role as the contract operator of the PAS Lines, or any worry about an abuse of market power. It is clear that regulation is not needed to protect shippers from any abuse of market power.

III. B&E's proposed operations will provide benefits to the public.

B&E is not required to demonstrate the public benefits of its proposed operations in order to qualify for an exemption to operate the PAS Lines. However, as set forth in detail in the B&E Supplement and the attached Verified Statement of Leonard Wagner (the "Wagner V.S."), the public will benefit from B&E becoming the operator of the PAS Lines. B&E Supplement at pp. 4-6, Wagner V.S. at pp. 3-8. The PAS Lines are currently operated by Springfield Terminal, which also operates the rest of the PAR system. Because B&E will only be operating the PAS Lines, it will not be subject to the competing demands, operationally and financially, of the operations of other parts of the PAR system. As explained in the B&E Supplement and the Wagner V.S., this will result in PAS being a more efficient, better-run and financially stable railroad.

Moreover, customers and contiguous railroads will benefit from the committed service standards to be established in the proposed B&E-PAS operating agreement as set forth in the

Term Sheet Agreement and as described in Section I.C. above. By contrast, the current Springfield Terminal-PAS operating agreement does not include any required service standards.

US DOT generally asks the Board to closely scrutinize the transaction for possible impacts on passenger service. US DOT does not raise these concerns specifically about B&E's contract operation of the PAS Lines, nor does Amtrak raise any concerns with respect to B&E's operations. As described in the B&E Supplement and Wagner V.S., B&E believes that the proposed B&E operations will have a positive impact on passenger (including commuter) operations. B&E recognizes the importance of those operations and will be required to comply with all PAS contractual commitments in respect thereof. In addition, GWI's affiliated railroads have a long history of working with passenger and commuter operators to improve safety and performance of both freight and passenger carriers, and that experience will be shared with B&E.

US DOT further urges a focus by the Board on safety. CSXT filed a Safety Integration Plan ("SIP") on August 30, 2021, which details how the operations, including those of B&E, will be safely implemented. Additionally, safety improvements should result from B&E becoming the operator of the PAS Lines. As explained in the B&E Supplement at pp. 5-6, and the Wagner V.S., at pp. 7-8, B&E, as a subsidiary of GWI, will have access to substantial corporate resources, including GWI's safety and training programs. These programs are one reason why GWI's affiliated railroads in New England (NECR, P&W, Connecticut Southern Railroad, Inc. ("CSO") and St. Lawrence & Atlantic Railroad Company) were able to achieve an FRA reported injury ratio of 0.54 per every 200,000 working hours for the years 2018-2020. This safety performance compares favorably to Pan Am System's combined ratio of 1.22 for the same period (which ratio, on a comparable basis within the short line and regional railroad industry, is in itself a strong result). In furtherance of these safety efforts, all B&E employees will

participate in training programs offered to GWI's affiliated railroads that cover all levels of employees and crafts. These programs are supported by GWI's inhouse operations training center in Jacksonville, FL and dedicated corporate safety and compliance staff that provide services to GWI's affiliated railroads.

IV. Labor has raised no objections to B&E serving as the contract operator of the PAS Lines or to the application of *New York Dock* protections.

Comments were filed in B&E's Sub-docket No. 5 by various labor unions – IBEW, ATDA, Smart-TD, BLET, ARU and IFPTE. Each of the commenting unions currently represents employees of Springfield Terminal. Importantly, as explained below, none of the unions oppose the B&E Amended Petition (or the CSXT Application), although they have requested certain conditions. B&E has already agreed that it will negotiate implementing agreements where required under the protective conditions set forth in *New York Dock*,³⁵ and those implementing agreements will effectively guarantee that the current unions representing Springfield Terminal employees will continue to represent employees in the same Railway Labor Act crafts and classes. The unions' request that the Board address representation issues is plainly improper because the National Mediation Board ("NMB") has exclusive jurisdiction over representation matters, as this Board has specifically recognized. *See, e.g., Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western Railroad Inc.—Control—Illinois Central Corp., et al.*, 2011 WL 4578616 (S.T.B.), *11 and n. 64 ("We agree that questions of labor representation are reserved to the NMB, and are not within the jurisdiction of the arbitrator or the Board to decide.") (citation omitted). The *New York Dock* protective conditions and B&E's express agreement to recognize the unions for the purposes of negotiating implementing

³⁵ B&E Amended Petition at 14-15.

agreements, is plainly sufficient to protect the interests of Springfield Terminal employees that may be affected by the proposed contract operation of the PAS Lines by B&E, and no additional conditions are necessary or appropriate.

A. Comments of IBEW, ATDA, IFPTE and SMART-TD

ATDA and SMART-TD simply request that any approval of B&E's Amended Petition be conditioned on the application of *New York Dock* protective conditions. IBEW and IFPTE also request that the Board condition its approvals on recognition of the unions that currently represent Springfield Terminal employees. As noted above, union representation issues are outside of the Board's jurisdiction. B&E has agreed to recognize the unions for the purposes of negotiating implementing agreements.

B. Comments of BLET

In addition to requesting the imposition of *New York Dock* protective conditions, BLET has asked that the Board order that the "transaction" not be permitted to proceed until *all* necessary implementing agreements have been concluded. This proposed requirement is unnecessary because the *New York Dock* protective conditions, and precedent thereunder, already address the conditions under which implementing agreements are necessary, and the requirement to have necessary implementing agreements in place before consummation of the transaction. To the extent BLET is referencing B&E's operation of PAS as part of the "transaction," B&E notes that the *New York Dock* protective conditions already require completion of implementing agreements before B&E operations can begin. *New York Dock*, 360 I.C.C. at 85. Further, the Term Sheet Agreement, Section V.2, attached to the B&E Amended Petition as Exhibit D, confirms that B&E will not assume the operations of PAS until all implementing agreements necessary for such operations are in place.

BLET also asks that the Board require B&E to clarify whether it intends to alter negotiated work rules that currently apply to STR employees. As is customary, work rules will be addressed in the negotiation of new labor agreements between B&E and the relevant unions, including BLET.

BLET also asks for clarification of certain B&E proposed safety programs as discussed in CSXT's SIP. BLET does not oppose B&E's proposed operation based on these concerns, but requests further explanation and clarification in the SIP.

Specifically, BLET advocates for the Confidential Close Call Reporting System and identifies challenges it sees with the Target Zero program proposed by B&E.³⁶ As noted in the Wagner V.S., GWI employs the Target Zero program throughout its subsidiaries, and the program is carefully structured and implemented to avoid the concerns raised by BLET. GWI's stellar safety record is in part due to the efficacy of the Target Zero program. B&E's use of the Target Zero program does not preclude the implementation of other complementary programs such as the Confidential Close Call Reporting System if they were determined to be beneficial.

BLET also raises concerns with B&E's use of real-time mobile reporting apps, stating that the use of platforms such as Wabtec's mCrew pose a safety risk and that railroads' provision of such devices is a way to avoid Federal Railroad Administration ("FRA") restrictions on the use of "personal" electronic devices.³⁷ GWI's affiliated railroads currently utilize the mCrew devices in a majority of their operations, and there have been no safety issues related to the use of these devices. The use of such technology is employed across the North American rail industry and is designed to be user friendly and includes straps, holsters, and cases to facilitate safe use. FRA regulations do not prohibit the deployment or use of such devices.

³⁶ BLET Comment at 4-5.

³⁷ BLET Comment at 5.

CSXT's SIP fully addresses the safety practices that GWI employs throughout its subsidiaries that have been responsible for its well-recognized safety record, and why BLET's concerns are unfounded.

C. Comments of ARU

As discussed above, B&E's Petition already acknowledges that *New York Dock* protective conditions should be applied as part of board approval of B&E's proposed operation of PAS, and that it will recognize all unions that currently represent Springfield Terminal employees, including all of the unions that comprise the ARU, for the purposes of negotiating implementing agreements. As noted above, union representation issues themselves are beyond the Board's jurisdiction.

ARU, however, goes further and requests that the Board require that B&E explain what it means by its representation that it expects to propose "substantially similar terms and conditions to those in existing [Springfield Terminal labor] agreements." However, there is really nothing further to explain – it means B&E will start with the existing agreements as a base and then modify them to reflect the change in operators and the terms of the operating agreement that will govern B&E's operations as set forth in the Term Sheet Agreement. This would include modifications to reflect changes in parties and dates, the reservation of capital work by the owners of PAS along with the caveat that if the owners of PAS elect not to perform the work then B&E either will perform the work itself or have the ability to hire contractors, as well as other changes that may be negotiated as part of the negotiation of the implementing agreements.

ARU expresses concern about B&E's ability to operate safely with a reduced number of signal and maintenance of way forces. However, as B&E has explained much of the proposed reduced work force is a result of the owners of PAS reserving the right to perform capital work. When this reservation is taken into account, B&E intends to employ only two fewer signal

workers (7 vs. 9 currently) and five fewer MOW workers (27 vs. 32 currently), so the differences are not as drastic as ARU suggests. Additionally, fewer positions will be required due to efficiencies that will be gained through the implementation of new and updated technology and newer and more efficient equipment.

D. The proposed transaction is a good deal for labor

Overall, the Board, Springfield Terminal employees and the unions that represent them should recognize that B&E's operation of PAS is a good deal for labor. B&E agreed to recognize all of the unions currently representing Springfield Terminal employees for purposes of negotiating implementing agreements and to offer substantially similar terms and conditions to those currently in existing Springfield Terminal labor agreements.³⁸ And B&E has agreed to the application of *New York Dock* protective conditions which will provide benefits to those employees whose positions may be abolished and will require negotiation of implementing agreements.

V. Miscellaneous Comments

There are only two additional comments that were filed in B&E's Sub-docket No. 5, and that requested conditions related to B&E.

A. American Chemistry Council

The American Chemistry Council ("ACC") requests that B&E's commitments and representations in its filings be made conditions of approval. B&E stands by its commitments and has no objection to such a condition.

³⁸ The proposed operations by B&E are obviously substantially better for the unionized Springfield Terminal employees than if the proposed operator had a non-unionized work force, such as VRS, and/or sought reduced or no labor protection conditions.

The ACC also requests that B&E take over as the contract operator of the PAS Lines at the same time as the merger closing. This request is actually a condition that would need to be considered in connection with the CSXT Transaction. B&E wishes to take over operations as soon as possible following approval of the Transaction, and once all preconditions to its operations, including the negotiation of the necessary implementing agreements with labor.

B. M4 Capital Group

M4 Capital Group (“M4”) seems to be seeking a condition that would require the sale of the Conn River Line and the Knowledge Corridor. M4 makes only vague assertions about potential competitive harm. However, even if there were more evidence of competitive harm, seeking this relief in the context of the B&E Amended Petition (or even in the context of the CSXT Transaction), is misplaced. B&E is only seeking to become the contract operator of the PAS Lines, not the owner of the PAS Lines. As such, B&E would not have the power or the right to sell any of the PAS Lines. Moreover, PAS itself does not own the Conn River Line or the Knowledge Corridor, those lines being owned by NECR and Amtrak, respectively. PAS does not have the power or the right to divest these lines. Amtrak and NECR are not parties to the proceeding and there is no basis or jurisdiction for the Board to entertain this suggestion or force such a sale.

VI. B&E is the best option to operate PAS to ensure a financially successful and safe railroad.

It is acknowledged by all parties, including CSXT, that there would be significant competitive concerns if CSXT as part of the Transaction were to acquire PAR’s 50 percent interest in PAS and succeed Springfield Terminal as the operator of the PAS Lines without restrictions to address competitive issues. Operation of the PAS Lines is a substantial and complex undertaking – revenues of a large Class II railroad with operations commingled with Amtrak and commuter rail services, and interchange points with 12 different Class I and short

line carriers. The new operator will need to hire, onboard and train a full workforce, equipment will need to be acquired, rules and policies put in place and start-up and integration plans prepared and implemented. In looking for an independent operator that could handle such a large and complex task, the owners of PAS (NSR and CSXT, if approved) determined that GWI was a qualified entity (perhaps the only such entity). GWI is the only railroad holding company that has the experience of starting up from scratch a railroad of this size – the Rapid City, Pierre & Eastern Railroad, Inc. (“RCPE”) in 2014. By all measures, the startup and operation of RCPE went smoothly, and has been a hugely successful railroad.

GWI has the necessary start-up experience for a railroad of this size; its regional management team is very knowledgeable about the New England rail market; other GWI railroads in the region, including NECR, P&W and CSO, already have commingled operations with Amtrak and Metro-North Railroad; and all of its railroads in the region are unionized and have good and productive relationships with rail labor. US DOJ’s suggestion that someone other than B&E should be the operator does not recognize that B&E is uniquely situated to safely and efficiently start up and take over the operations of PAS. PAS is already suffering from service issues due to the uncertainty surrounding the sale of Pan Am Systems to CSXT and the lengthy regulatory review period – it would be a substantial risk to have someone other than B&E without the corporate experience, resources and regional expertise, come in and try to run PAS with all that is involved in a start-up operation like this.

CONCLUSION

The Board should grant the Amended B&E Petition because B&E has demonstrated that the proposed transaction for CSXT and NSR to engage B&E as the contract operator of the PAS Lines will have no substantial anticompetitive effects. The transaction will have no substantial

anticompetitive effects because: B&E will be contractually obligated to run PAS – the owner and holder of trackage rights of the PAS Lines – as an independent railroad without regard to any potential conflicts of interest; B&E (and GWI) will be financially incentivized for B&E to operate the PAS Lines for the benefit of PAS and B&E management’s compensation will be tied to the financial and safety performance of B&E; the parties to this transaction have made pricing, haulage, service and other commitments to insulate VRS and Vermont customers from any adverse effects of the transaction; and finally, this transaction is a good deal for labor.

Opponents of the transaction have failed to refute the potential benefits that will result from B&E as the contract operator of the PAS Lines, including the indisputable fact that B&E is the most qualified railroad to operate PAS. B&E, as a GWI subsidiary, is one of the few companies that has the experience to manage the complex start-up and transition of contract operations from Springfield Terminal to a new operator.

In addition, there has been no indication from shippers that there will be any abuse of market power as a result of the transaction or that they need protection. Finding the transaction will have no substantial anticompetitive effects is dispositive in demonstrating that regulation is not required to carry out the RTP.

For the reasons set forth above, B&E respectfully requests that the Board find that the B&E Amended Petition satisfies the requirements of 49 U.S.C. §10502 and grant the petition.

Respectfully submitted,

/s/ Eric M. Hocky

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*Counsel for
Pittsburg & Shawmut Railroad, LLC d/b/a
Berkshire & Eastern Railroad*

Dated: October 18, 2021

VERIFICATION

I, Leonard Wagner, Senior Vice President, Genesee & Wyoming Inc. Northern Region and President of Pittsburg & Shawmut Railroad, LLC, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on October 18, 2021.



Leonard Wagner

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing Berkshire & Eastern Railroad Response to Comments was served on all parties of record by email or by U.S. first class mail, postage pre-paid.

/s/ Eric M. Hocky

Eric M. Hocky

Dated: October 18, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36472 (Sub-No. 5)

**PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
– OPERATION OF PROPERTY OF RAIL CARRIER PAN AM SOUTHERN LLC –
PAN AM SOUTHERN LLC AND
SPRINGFIELD TERMINAL RAILWAY COMPANY**

RESPONSE VERIFIED STATEMENT OF LEONARD WAGNER

My name is Leonard Wagner, and I am currently the Senior Vice President of the Northern Region railroads of Genesee & Wyoming Inc. (“GWI”), and have served in that position since February 2020. I previously led GWI's former Northeast Region railroads since 2017. I joined GWI with the 2008 acquisition of the former Ohio Central Railroad System and served as Vice President of Operations of the Ohio Central Railroad and for the East division of GWI's former Midwest Region railroads. Prior to that, I held various positions with Conrail in operations, customer service and sales.

In my current role as Senior Vice President of the Northern Region railroads, I also serve as President of the various GWI affiliated railroads comprising the region, including Pittsburg & Shawmut Railroad, LLC (“P&S”) and the other railroads operating in New England, those being Connecticut Southern Railroad, Inc. (“CSO”), New England Central Railroad, Inc. (“NECR”) and Providence and Worcester Railroad Company (“P&W”). As such, I am familiar with the New England railroad market and operations, as well as the relationship between GWI’s affiliated railroads and the other carriers that operate in the region, including CSX Transportation, Inc. (“CSXT”), Norfolk Southern Railway Company (“NSR”), Pan Am Southern LLC (“PAS”), the various Pan Am Railways railroads (the “PAR

Railroads”), such as Springfield Terminal Railway Company (“Springfield Terminal”), and the various railroads comprising the Vermont Rail System (“VRS”). On July 1, 2021, I submitted a verified statement in support of the B&E Supplement to the Amended Petition for Exemption.

I am providing this verified statement in support of the B&E Response to Comments in Sub-Docket No. 5, to respond to assertions that P&S, doing business as Berkshire & Eastern Railroad (“B&E”), would use its role as the PAS contract operator to benefit other GWI railroads, such as NECR, to the detriment of PAS, and to explain that B&E’s role as a neutral contract operator is not unusual in the rail industry. These assertions that B&E would abuse its role as the PAS contract operator are not grounded in practical reality because GWI and B&E have more to gain from a successful PAS than it has from leveraging its contract operations of PAS to benefit NECR or any other GWI railroad.

The amount of traffic subject to diversion is limited. PAS and NECR both operate over the Conn River Line between East Northfield, MA and White River Junction and Bellows Falls, Vermont. NECR owns the line, and PAS has trackage rights over the line under updated terms established by the Board in a trackage rights order issued in 2017. The PAS trackage rights are primarily overhead rights with limited local service rights – there are currently only two on-line shippers that can be served by both PAS and NECR. If the transactions currently before the Board are approved, PAS as operated by B&E under its contract will continue to offer service to these customers. Additionally, PAS as operated by B&E under its contract will continue to provide connecting service over the Conn River Line to the VRS railroads that connect to the PAS trackage rights at White River Junction and Bellows Falls.

B&E will be incentivized to operate PAS for the benefit of PAS by the contract that it

will enter into with the PAS owners CSXT and NSR.

First, the fundamental risk GWI and B&E would face if B&E were to operate PAS poorly is the risk of being terminated as the contract operator. As stated in the Safety Integration Plan (“SIP”) submitted by CSXT, B&E expects to invest up to \$20,000,000 for the acquisition of locomotives and the purchase or lease of maintenance of way equipment prior to its start-up on the PAS lines. GWI is disincentivized to have B&E operate PAS to the benefit of NECR because to do so would threaten the B&E contract to operate PAS and the start-up investment. Further, GWI and its affiliates will have invested hundreds (if not thousands) of hours of management time and attention dedicated to this Board process and the creation and implementation of start-up and integration plans, including meeting with various stakeholders such as PAS customers, connecting railroads, government officials and passenger providers.

Second, GWI will be incentivized for B&E to operate a successful PAS so that B&E earns the maximum operating bonus. Under the proposed railroad operating agreement, B&E can earn an operating bonus similar to what Springfield Terminal receives under its current contract. The B&E operating bonus would be paid out on a graduated scale based on PAS’s operating ratio – the lower the operating ratio, the higher the bonus but with a cap and a collar. As a result, B&E will be incentivized to retain and win enough traffic, and efficiently manage its costs and operations, so as to enable it to earn the highest possible operating bonus.

Third, GWI will be incentivized to cause B&E to operate PAS in the best interest of PAS because other GWI railroads in the region, such as P&W, rely on PAS as a dependable interchange partner. In 2019, P&W interchanged over [[REDACTED]] freight and haulage carloads with PAS. A PAS that is losing car loads because B&E is pushing traffic to NECR would threaten the overall viability of PAS to be a reliable interchange partner.

GWJ understands the benefit of a successful B&E operation of PAS and will implement financial incentives to encourage B&E management to operate B&E successfully. A portion of the annual bonus compensation of B&E management (i.e., general manager, assistant general manager, sales & marketing, etc.) will be based on the financial and safety performance of B&E. This is a standard compensation approach that GWJ applies to all its railroads, and B&E will be no different.

B&E will not share VRS or other competitively sensitive information that it learns as the contract operator of PAS with any other GWJ subsidiary. B&E is aware of the restrictions on the disclosure of traffic information in 49 USC §11904. Additionally, the operating contract with PAS will prohibit B&E from sharing rate divisions that it learns of through its operation of PAS with any other GWJ controlled railroad (except for rates for interline traffic with other GWJ railroads, such as for PAS-P&W traffic). GWJ will backstop this requirement by establishing barriers that will prevent B&E from sharing competitively sensitive information that it learns as the contract operator of PAS with any other GWJ subsidiary railroads.

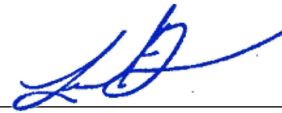
The proposal for B&E to operate PAS as a neutral operator is common across the country. GWJ's subsidiary, Tazewell & Peoria Railroad, Inc. ("TZPR"), operates in a similar capacity. TZPR leases its rail line from Peoria and Pekin Union Railway Company ("PPU"). PPU is owned by three Class I railroads – Canadian National Railway Company ("CN"), NSR, and Union Pacific Railroad Company ("UPRR"). TZPR is a short line terminal and switching railroad that operates over 24 miles of main line and 100 miles of yard and industrial track. TZPR interchanges with BNSF Railway, Inc., CN, Iowa Interstate Railroad, Keokuk Junction Railway, NSR, Pioneer Industrial Railway, and UPRR. It also interchanges with GWJ owned

railroads - Illinois & Midland Railroad, Inc. and Toledo, Peoria & Western Railway Corp. TZPR operates independently on behalf of the owners of PPU. TZPR and other terminal railroads across the United States serve as examples of short lines that operate as neutral carriers.

VERIFICATION

I, Leonard Wagner, Senior Vice President, Genesee & Wyoming Inc. Northern Region and President of Pittsburg & Shawmut Railroad, LLC, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on October 18, 2021.



Leonard Wagner