

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

**OPENING COMMENTS OF
THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

The United States Department of Transportation (“DOT” or the “Department”) and the Federal Railroad Administration (“FRA”), an operating administration of DOT, appreciate the Board’s consideration of the important issues in this proceeding involving the proposed merger of CSX and Pan Am Systems and related entities.¹ If approved, this proposal, which the Board has classified as “significant” under 49 U.S.C. § 11325 and 49 C.F.R. § 1180.2(b), will have myriad implications for stakeholders in the New England region and beyond. Furthermore, the proposal affects not only the state of competition in the freight rail industry, but also bears upon the continuing vibrancy and fluidity of passenger rail service in the Northeast.

DOT is examining this matter closely and working with stakeholders to understand their interests in the proposal. At this time, DOT does not take a final position on the merits of the

¹ For simplicity, these comments will sometimes refer generally to the “proposal” or “the proposed transaction” to address the applicants’ Revised Application, the Merger Transaction, and the Related Transactions, consistent with the Board’s instituting decision. *See* Decision, FD No. 36472, at 1-2 & n.1 (July 26, 2021) (“Inst. Dec.”) (summarizing the proceeding and noting that the Board’s decision encompasses the sub-docketed proceedings associated with FD 36472). DOT requests that the Board consider these comments in each of the various corresponding sub-dockets of this proceeding as well.

proposal, or whether the Board should approve the Revised Application. Instead, we offer this opening comment to highlight some of the issues that are of particular interest to DOT, which we urge the Board to consider carefully in the course of its review of the proposal. The Department looks forward to reviewing the submissions of other parties and may provide additional views to the Board at a later stage of the proceeding.

Safety. Safety remains the Department’s top priority. The applicants have argued that the proposed transaction will enhance safety along the affected lines, given CSX’s safety record, systems, and culture, as well as through anticipated investments in and improvements to the Pan Am network. Rev. App. Opp. Plan at 346-48.² The Board directed the applicants to submit their Safety Integration Plan (SIP) by August 30, 2021 for review and approval by the Board and FRA. The SIP process, governed by 49 C.F.R. Part 1106, requires the applicants to establish clear, detailed procedures to ensure that their operations will be safely integrated in the event that the Board approves the proposed transaction. Compliance with an approved SIP is treated as a condition of the Board’s approval, and FRA retains the authority to oversee SIP implementation and to advise the Board of whether SIP requirements are met. 49 C.F.R. § 1106.4(b)(4).³ FRA has already begun to communicate with the applicants about any potential safety issues raised by the proposal, and we look forward to working with the Board in the review of the SIP to ensure that any appropriate safety conditions are attached to the Board’s ultimate decision.⁴

² In these comments, the Revised Application, or “Rev. App.,” has the same meaning as in the Board’s instituting order, and refers to the filing of July 1, 2021, which the Board has accepted for consideration.

³ FRA also retains all of its usual statutory authority to enforce rail safety.

⁴ DOT recognizes that some stakeholders, including Massachusetts authorities, are concerned about the potential environmental implications of the proposed transaction, particularly with regard to the safety of operations around the Wachusett Reservoir, a vital drinking water resource. *See, e.g.*, MassDOT and MBTA Comments at 2 (Mar. 23, 2021); Mass. Water Supply Citizens Adv. Cmte. Comments at 1-2 (Mar. 23, 2021). DOT appreciates the Board’s careful attention to these concerns as well, and encourages the applicants to continue working with the affected stakeholders on potential solutions.

Competition. Under the governing standard, set forth at 49 U.S.C. § 11324(d), the Board “shall approve” the proposed transaction unless (1) “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.” The weighing of factors bearing upon the public interest is largely a matter of the Board’s expertise and experience. *See, e.g., W. Coal Traffic League v. STB*, 169 F.3d 775, 778 (D.C. Cir. 1999) (public interest determinations of the STB depend upon expert agency examinations of the industry, and have historically been given “considerable deference”). The Board therefore examines a variety of factors and evidence bearing upon whether the public interest is served. 49 C.F.R. § 1180.6(a)(2).

Consistent with this well-established framework, on July 9, 2021, President Biden signed Executive Order 14036, *Promoting Competition in the American Economy* (“EO 14036” or the “EO”). 86 Fed. Reg. 36987. The EO reaffirms the importance of robust competition to the Nation’s economy, and states that the Biden Administration will enforce governing law rigorously to combat excessive industry consolidation. The President called upon the Board in particular, asking it to ensure that it reviews industry proposals carefully in view of competitive consequences, the effects upon shippers, and other public interest considerations.

The EO recognizes that many railroad mergers and consolidations may have benefits for stakeholders and for the Nation’s economy; the critical point is to ensure that regulators give close scrutiny to such proposals, and that the proponents are charged with putting forth a robust record to demonstrate the competitive benefits and harms, consistent with governing law. In this proceeding, the applicants have argued that the proposed transaction will result in a number of

improvements to the rail network that will yield substantial public interest benefits, and that will maintain or enhance the level of competition in the affected region. These include:

- More single-line traffic movement, with reduced switching and interchange;
- Operational efficiencies;
- Expected investments and improvements in trackage and facilities;
- Increased velocity and improved technology, leading to more consistent service, including the potential to increase speed from 10 to 25 miles per hour on some Pan Am lines; and
- Transfer of freight from trucks to rail, improving fuel economy and reducing emissions.⁵

Numerous additional parties have expressed their support for the transaction in light of these expected benefits. Maine, New Hampshire, and Connecticut officials and transportation authorities have notified the Board of their support for the Revised Application, based upon the expected economic benefits to industries and individuals in those States. Furthermore, numerous shippers, connecting railroads, and other stakeholders have filed statements of support with the Board to express their enthusiasm about the expected improvements in service and access to additional transportation networks and markets.

However, some other stakeholders have expressed concerns, even at this early stage of the proceeding, about potential adverse effects of the proposed transaction. Although the applicants characterize the proposal as essentially an “end-to-end” merger of the kind that typically does not pose major competition concerns, there are additional features and related proposals before the Board, some of which are addressed in related petitions contained in this proceeding’s sub-dockets. As one example, the applicants propose that Pittsburg & Shawmut

⁵ Some of these factors may also bear upon the safe integration of the merged railroads. FRA will consider these factors as appropriate in consultation with STB in review of the applicants’ SIP.

Railroad, LLC d/b/a Berkshire & Eastern Railroad (B&E), a wholly owned subsidiary of Genesee & Wyoming, Inc. (GWI), replace Springfield Terminal as the operator of Pan Am Southern LLC (PAS). PAS is a 50/50 joint venture that CSX would own with Norfolk Southern Railway Company (NS) under the proposals before the Board. The applicants argue that this arrangement would not cause competitive harm because B&E would have independent responsibility for setting rates, and shippers would maintain critical access to existing lines and services. However, the Board and the applicants have recognized this this arrangement could nonetheless affect competition in some areas, for example, along the Connecticut River Line, where the two carriers operating over the line would both be GWI subsidiaries if the Board approves the proposal.⁶ Inst. Dec. at 16. Furthermore, questions remain about the impact of this arrangement upon the competitive balance in the region, for example, for shippers and short-line service in Vermont. *Id.* at 16-17; State of Vermont’s Reply to Applicants’ Mar. 18, 2021 Response to Initial Comments, FD 36472, at 2-4 (Mar. 18, 2021).

In addition, and related to the main Merger Transaction, the parties have agreed upon arrangements to permit NS to obtain trackage rights over a route between Voorheesville, New York, and Ayer, Massachusetts, permitting a shift of some service (intermodal/automotive) from the existing PAS route onto a CSX mainline. This would in turn permit NS to provide double-stack intermodal service, which is presently constrained by height limitations at the Hoosac Tunnel in Western Massachusetts. Inst. Dec. at 7.

⁶ Furthermore, DOT recommends that the Board consider potential competitive concerns related to operations between the Albany and Boston areas on the PAS line through the Patriot Corridor and the CSX line that runs parallel to and south of the PAS line, given CSX’s acquisition of Pan Am’s fifty percent ownership of PAS and the possible impacts upon the incentives of the carriers as a result of the proposal.

DOT recognizes the efforts that the applicants have made to identify competition concerns and to propose remedies and solutions, particularly to help alleviate any potential adverse effects upon shippers and other stakeholders. *Id.* at 14-18. These include arrangements to preserve specified rates and services at current levels, subject to certain conditions. *Id.* We also appreciate the applicants' efforts to work collaboratively with stakeholders to anticipate and address their concerns. Nonetheless, DOT urges the Board to examine these issues carefully in its review of the proposed transaction, consistent with the principles set forth in EO 14036, and should ensure that the promised public benefits of the transaction will actually be achieved if the proposal is approved. DOT also asks the Board to afford the substantial weight due to the views provided by the Department of Justice ("DOJ"), given its statutory role and institutional expertise on competition issues. 49 U.S.C. § 11325(c)(1). DOT looks forward to working with the Board and other parties as this matter proceeds.

Passenger Rail. The proposed transaction has important implications for passenger rail in the Northeast. The region affected by the transaction is home to a thriving network of Amtrak and commuter rail lines, which are interdependent with one another and with host freight railroads. Amtrak's potentially affected services include the *Lake Shore Limited*, as well as five State-supported routes that Amtrak operates through partnerships with Maine, Massachusetts, Vermont, and New York: the *Downeaster*, the *Valley Flyer*, the *Vermont*, the *Ethan Allen Express*, and the *Adirondack*. Nat'l R.R. Passenger Corp.'s Notice of Intent to Participate, Docket No. FD 36472, at 2 (May 17, 2021) ("Amtrak NOI"); Rev. App. Ex. 13-C, Daly Verified Statement, at App. 370-73. Potentially impacted commuter rail services include those operated by the Massachusetts Bay Transportation Authority, the Connecticut Department of

Transportation, and the Metropolitan Transportation Authority/Metro-North Railroad. Rev. App. Ex. 13-C, Daly Verified Statement, at App. 370-73.

The applicants have made encouraging representations to the Board about their commitment to ensuring the vitality of the passenger rail network. The Revised Application states that “CSXT will maintain or improve existing passenger service,” based upon “the more consistent and reliable network and the focus of a dedicated Passenger Operations team that will result from” the Board’s approval of the transaction. Rev. App. Ex. 13-C, Daly Verified Statement, at APP-370. CSX states that its Amtrak on-time performance has reached record highs of over 90% in recent years. *Id.* at 377. Furthermore, CSX represents that it will introduce technological improvements, including to Positive Train Control systems, that will make passenger rail service safer and more consistent across the network. *Id.* at 374-75.

In addition, the applicants have reached agreement with the Northern New England Passenger Rail Authority (“NNEPRA”), the state sponsor of Amtrak’s *Downeaster* passenger rail service between Brunswick, Maine, and Boston, Massachusetts. CSX Filing, Docket No. FD 36472 (Aug. 5, 2021). This settlement, which CSX proposes as a condition of the Board’s approval, requires CSX to maintain current *Downeaster* service levels and frequencies, and to work in good faith with NNEPRA and Amtrak on future improvements and expansions. *Id.*, Encl. Letter Agreement at 2. The applicants are continuing to work with other passenger rail stakeholders as well.

Although DOT is pleased by these commitments, we also recognize that interested parties have noted some potential adverse effects upon passenger rail service. For example, Amtrak has expressed concern about service interruptions and delays, given potential increases in freight volume. Amtrak NOI at 3. Furthermore, Amtrak correctly recognizes that passenger service in

the region has been made possible through significant investments of public funds, including on Pan Am's lines over the past two decades. Amtrak NOI at 3.⁷ It is important to ensure that these investments are protected and that they continue to benefit passengers and communities.

In DOT's view, the Board should closely scrutinize the proposed transaction to determine the impact upon passenger rail service, and should consider imposing conditions upon the applicants to ensure that existing passenger service is appropriately maintained. The applicants should also keep open channels of communication with regulators and other stakeholders to facilitate growth, improvements, and investment in passenger rail service. Such measures are not only consistent with the statutory preference afforded to passenger rail service, 49 U.S.C. § 24308, but also, with the goals set forth in EO 14036. President Biden encouraged the Board to review freight rail competition issues, including mergers and acquisitions, with a special sensitivity toward passenger rail concerns, and to alleviate passenger service disruptions. 86 Fed. Reg. at 36996.

The restoration, enhancement, expansion, and on-time performance of passenger rail service is a key priority for DOT and for the Biden Administration, and should also be an important component of the Board's review of the public interest in this transaction. We look forward to working with the Board, the applicants, Amtrak, commuter rail service providers, and

⁷ Based upon a preliminary review, FRA estimates that Pan Am and its predecessor entities have benefitted from as many as twenty FRA-funded rail projects over the past two decades, totaling more than \$379 million, through a variety of grant programs. Pan Am was the direct beneficiary of several of these grants; in others, Pan Am indirectly benefits through use of improved rights of way and other upgrades to tracks, crossings, and equipment. Many of these grants included significant expenditures on passenger rail enhancement. As one notable example, FRA has provided more than \$120 million in High-Speed Intercity Passenger Rail (HSIPR) grants to Amtrak, the Connecticut Department of Transportation, CTRAIL Hartford Line, and Pan Am Railways/Guilford System for Phase Two of the New Haven-Hartford-Springfield, Connecticut Rail Program.

other stakeholders as this matter proceeds to help ensure that passenger rail service is appropriately protected.

DOT appreciates the Board's consideration of these comments, as well as the Board's careful review of the issues presented in the Revised Application. The Department looks forward to hearing from other parties and may provide additional views to the Board at a later stage of the proceeding if appropriate.

Respectfully submitted,

August 27, 2021

/s/ John E. Putnam

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2021, I caused the foregoing document to be filed electronically with the Board's e-filing system, and caused a copy of this document to be served by electronic mail upon all parties of record in this proceeding.

/s/ Christopher S. Perry
Christopher S. Perry
United States Department of Transportation