BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL. --CONTROL AND MERGER-- PAN AM SYSTEMS, INC., ET AL.	Finance Docket No. 36472

COMMENT OF
THE UNITED STATES DEPARTMENT OF JUSTICE

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As President Biden's Executive Order on Promoting Competition in the American Economy recently explained, "A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers." To protect and revitalize competition throughout the economy, the President called for a "whole-of-government approach…to address overconcentration, monopolization, and unfair competition," including instructing federal agencies with overlapping jurisdiction over competition matters "to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency."

In that spirit, the United States Department of Justice ("Department") appreciates this opportunity to share its perspective with the Surface Transportation Board ("Board") regarding the proposed merger of CSX Corporation and CSX Transportation, Inc. (collectively "CSX") and Pan Am Systems, Inc. ("Pan Am"). The Department commends the Board for its decision to undertake a more detailed investigation by classifying this transaction as a significant transaction under 49 U.S.C. § 11325 and 49 C.F.R. § 1180.2(b), and for the careful investigation of this proposed merger the Board has undertaken to date. The Department has an interest in this matter because of the Attorney General's statutory right to intervene in transactions of "regional or national transportation significance." *See* 49 U.S.C. § 11325(c)(1).

This comment focuses on the proposed contractual commitments offered by CSX and Pan Am attempting to address the competitive concerns raised by their proposed merger. Specifically, the parties have proposed a number of complicated contractual arrangements to

remedy the reduction in competition from CSX's acquisition of Pan Am's stake in the Pan Am Southern line ("PAS"). In doing so, the parties' proposed commitments have created another entirely new competitive issue on a different portion of the PAS line.

Through its investigation and enforcement activities against mergers that may violate the Clayton Antitrust Act, the Department has extensive experience crafting remedies to competitive concerns in a multitude of industries and contexts.[1] In the Department's view, the proposed remedies do not accord with best practices, and are less likely to succeed than the kinds of robust relief that the Department has sought in prior cases, and will not fully address the competitive concerns posed by the CSX-Pan Am transaction. The Department recommends that the Board instead consider imposing a structural remedy, such as a carefully crafted divestiture. Unlike the complicated contractual arrangements proposed by the parties, structural remedies tend to be cleaner, more efficient, more durable, and easier to enforce, and they reduce the likelihood of ongoing entanglements that can further harm competition.[2]

The Proposed Transaction and the Proposed Remedy

Today, 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 Railway Co. ("NS"). A Pan Am subsidiary currently operates the PAS line service on behalf of the joint venture. The proposed transaction would give CSX both control over the operating entity on a competing line and a 50% stake in the track and physical infrastructure of that line. This arrangement is likely to diminish competition between CSX and PAS on these parallel routes. Additionally, the transaction may allow CSX to impair the ability of its remaining rival, NS, to effectively compete. Although NS owns, and will continue to own, the other 50% of the PAS line, CSX could potentially hamstring its rival through its stake in PAS and its control of the joint venture's operating entity. Because certain joint venture customers will purchase service attributable to NS, CSX could undermine NS notwithstanding the joint venture by sabotaging this service and expecting to recapture traffic on its independent line. [3]

To address concerns that the transaction will give CSX operational control over the competing parallel PAS line, CSX and NS have agreed to change the operating railway of PAS from Pan Am subsidiary Springfield Terminal to Berkshire & Eastern ("B&E"). And to address

[1] The Department has published a *Merger Remedies Manual* which lays out the kinds of remedies that, based on the Department's experience, are more likely to succeed in preventing competitive harm. *See generally* Antitrust Div., U.S. Dep't of Justice, Merger Remedies Manual (Sept. 2020) [hereinafter "Remedies Manual"].

[2] *See* Remedies Manual at 13. *See also* Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011) at 5 [hereinafter "2011 Remedy Policy Guide"] ("[I]f a competitive problem exists with a horizontal merger, the typical remedy is to prevent common control over some or all of the assets, thereby effectively preserving competition. Thus, the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers.").

[3] When the Board approved the PAS joint venture in 2009, the Board cited the advantage of having a parallel line competing with this CSX line. *See* Norfolk Southern Railway Company, Pan Am Railways, Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern LLC, F.D. 35147 (STB served Mar. 10, 2009), slip op. at 5.

concerns that the transaction will give CSX the ability to curtail rival NS's ability to compete, CSX has contracted with NS to provide it with limited access to the CSX track in southern Massachusetts that parallels the PAS line. *See* Amended & Supplemented Application, *CSX Corp. & CSX Transp., Inc. et al.—Control and Merger—Pan Am Systems, et al.*, F.D. 36472 (July 1, 2021) [hereinafter "Application"], at 431-62.

The Proposed Remedy Presents Significant Competitive Concerns

The selection of B&E as the contract operator of the PAS line does not adequately address the competitive concerns created by the proposed transaction. Notwithstanding any claims CSX may make that it will be insulated from pricing or scheduling decisions made by B&E on the PAS Patriot Corridor line, such insulation is at best imperfect so long as CSX remains co-owner of PAS infrastructure. There remains a significant potential for interference with joint-venture traffic on the PAS line. CSX ownership of 50% of the physical infrastructure on which B&E will operate may give CSX the ability to influence joint venture operations notwithstanding any authority CSX may grant to B&E or any behavioral safeguards that CSX claims it will institute. *See* Application at 453-54, 456-57.

Further, selecting B&E as the operator of PAS separately *introduces* a new competition concern on a different rail line.[4] Pursuant to the parties' proposed remedy, B&E will also operate PAS's service in the so-called "Knowledge Corridor" running north from New Haven, CT to White River Junction, VT. In the Knowledge Corridor, PAS and the New England Central Railroad ("NECR") are the only competing train operators on the Vermont segment, and both offer service on the same NECR-owned tracks. NECR and B&E are both subsidiaries of Genesee and Wyoming ("G&W"). *See id.* at 49, 73. Therefore, as a result of the parties' proposed remedy, a single entity will control all operations on the NECR line and within the overlapping portions of the Knowledge Corridor. The effects of this consolidation would likely be felt beyond the NECR line itself, as NECR provides important connections to the Vermont Railway ("VTR"). *See id.* at 73.

If a remedy creates new competitive harm, that, in and of itself, would be sufficient for the Department to reject a proposed remedy.[5] Today, PAS and NECR compete to provide rail services, including connections to and from VTR, in Southeastern Vermont. The availability of these alternatives, limited though they may be, ensures continued competition on price and service. If the CSX-Pan Am transaction is consummated and B&E becomes the contract operator of the Knowledge Corridor PAS line, G&W subsidiaries will be both the contract operator of PAS and PAS's primary competitor. In effect, the proposed remedy reduces the numbers of competitors in the Knowledge Corridor from two to one.

[4] To be clear, absent the remedy transaction, the Department believes CSX's proposed acquisition of Pan Am would not create any competitive issues in the Knowledge Corridor. CSX does not operate trains on this route nor does it have trackage rights or an easement on this route, outside of a short segment in southern Connecticut. Application at 72.

[5] *See* Remedies Manual at 26 ("[D]ivestiture . . . to the proposed purchaser must not itself cause competitive harm.").

Though G&W may promise to employ certain safeguards or make certain commitments that would ostensibly enhance the incentives of B&E and NECR to compete,[6] the Department is highly skeptical of the efficacy of these protections.[7] B&E and NECR would potentially have significant insight into the pricing, scheduling, and other key competitively sensitive information of the other. Even if merging parties and remedy partners were able to overcome these concerns and employ sufficiently robust safeguards and protections, such an arrangement would require constant monitoring and oversight to identify and address any deficiency or incipient concern as it may arise.

As noted above, CSX and Pan Am have also attempted to address competitive concerns about their proposed transaction by executing a contract between CSX and NS, which will allow NS to access the track on a limited basis. Contractual commitments between merging competitors to reduce the harm from a transaction are at best a band-aid. Though commitments may provide temporary relief, they can be breached, often without any recourse or remedy, and fail to maintain premerger competition.[8]

Notwithstanding any claims CSX may make that the contract protects NS, the CSX-NS agreement includes imprecise pricing terms as well as other vague terms (e.g., "reasonable schedule and operating plan") and allows CSX to delay or veto the actual implementation of the remedy, particularly the operation of NS traffic on the CSX route. *See* Application at 434-38. Moreover, the proposed remedy compromises competition on this route by further entangling two close competitors. *See id.* The ongoing nature of NS's contractual reliance on CSX may lead to problems down the road, when it may be more challenging for the Board to address competition issues that arise from this transaction. If CSX successfully evades or manipulates these contractual requirements, the harm will not just be to NS, but will ultimately be felt by those customers who previously relied on robust competition between CSX and the NS-Pan Am joint venture on these routes.

Alternatively, CSX may use these entanglements to soften its competition with NS to the detriment of shippers. Today, CSX's competitor for serving Boston is NS via its 50% joint-ownership stake in the PAS line. The proposed remedy does not maintain this independent competitive relationship, but fosters an ongoing entanglement between the two competitors, both through CSX's ownership stake in the PAS track and physical infrastructure NS uses and through the new NS service on the CSX line. The two companies may have the incentive to compete less aggressively, as they both stand to profit from higher prices and reduced service

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[6] *See CSX Corp. & CSX Transp., Inc.—Control and Merger—Pan Am Systems, Inc.*, FD. 36472 (STB served July 30, 2021), slip op. at 17. The efficacy of these protections and commitments also assume rigorous compliance by G&W, which may not be an appropriate assumption given G&W's incentives as a direct competitor. *See* Remedies Manual at 26 ("The Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market.").

[7] Remedies Manual at 15 ("Firewalls are infrequently used because, no matter how well crafted, the risk of collaboration in spite of the firewall is great.").

[8] *See* Remedies Manual at 9. *See also* 2011 Remedy Policy Guide at n. 41 ("Contractual terms can be difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to effectively preserve competition.")

quality. Because customers have no alternative to the CSX-NS duopoly on this route, it is ripe for coordination and competitive harm.[9]

The Board Should Consider Imposing Structural Remedies

Ultimately, the easiest, cleanest, and least risky solution would be a structural remedy involving the sale of Pan Am's stake in PAS to another party that could operate PAS. Structural remedies are strongly preferred in merger cases because they are clean and effective, and they avoid ongoing government entanglement in the market.[10] The Department has also viewed ongoing contractual entanglements between competitors as introducing unnecessary risk to the viability of a remedy.[11] While it may be challenging to eliminate entirely the contractual entanglements between competitors on the affected rail lines, a structural remedy would better preserve existing competition and mitigate concerns arising out of contracts between competitors by minimizing the need for and scope of these arrangements.

The Department's concerns regarding the proposed CSX-Pan Am transaction and proposed remedies may be alleviated by a sale of CSX's stake in PAS. A targeted structural remedy would likely address competition concerns while allowing the parties to move forward with their proposed transaction. Indeed, the agreement between CSX and NS already contemplates such a sale to NS within the first seven years after consummation of the CSX-Pan Am transaction, and an ongoing right of first refusal for NS. *See* Application at 419. A structural remedy at this juncture would merely accelerate this process while preserving competition between the Patriot Corridor and CSX's parallel track.

A structural remedy could also address the Department's robustness and durability concerns regarding the proposed remedial contractual arrangements between CSX and NS. The buyer would have greater freedom to operate on the PAS line without involvement, or interference, of its primary competitor on that route. The entanglement with CSX would cease rather than persist or grow over time.

A structural remedy involving an appropriate purchaser would also avoid creating new competition issues in the Knowledge Corridor. The Board could select a divestiture buyer unaffiliated with G&W, and thus could maintain the independent competition between G&W and PAS on the NECR line. *See id.* at 26.

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[9] *See* Christensen Assocs., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, Revised Final Report,* Vol. 2 at 9-29 (Nov. 2009) ("CSX and NS are about the same size and dominate the eastern corridor freight traffic. In fact, many of the shippers we interviewed suggested that the U.S. railroad industry functions like two duopolies. Theories of oligopoly suggest that parallel behavior (whether coordinated or not) is more likely in situations where the industry has only a few firms, each offering a fairly standard product and facing a similar cost structure. Our cost analysis indicates that BNSF and UP face similar cost structures, and the same is true for CSX and NS. In particular, the similarities in marginal cost, because of its fundamental relationship to price, suggest conditions favorable for parallelism."). The Department is not aware of any changes to the market structure since the *Christensen Report* was issued that might alter this assessment.

[10] *See* Remedies Manual at 13.

[11] *See* Remedies Manual at 21 ("Ongoing entanglements between the merged firm and the purchaser may put the purchaser in the position of having to rely on its rival in order to compete, and therefore call into question the purchaser's position as a truly independent competitor.").

The Department understands that no remedy and no remedial process is one-size fits-all. Any remedy requires a fact-specific inquiry to determine the best way to address competition concerns that arise from a transaction. The Department knows that the Board will undertake a characteristically exacting inquiry to make that determination. If the Board determines a remedy is required, the Department counsels that a carefully crafted structural remedy has a much greater likelihood of successfully preserving competition than contractual or conduct commitments.

Respectfully Submitted,

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Dated: August 26, 2021

CERTIFICATE OF SERVICE

I certify that on August 26, 2021, I caused a copy of the forgoing Comment of the United States Department of Justice to be served via email on the parties of record in this docket.

/s/ Seth Wiener

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