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Via Electronic Filing

301267

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
November 6, 2020
Part of
Public Record

Re: Docket No. FD 35147, Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC (“2009 NSR/Pan Am Proceeding”)

Dear Ms. Brown:

I am writing on behalf of Norfolk Southern Railway Company (“NSR”) in connection with the 2009 NSR/Pan Am Proceeding, in which the Board approved the joint control and ownership of Pan Am Southern LLC (“PAS”) by NSR and Pan Am Railways, Inc. (“Pan Am”).

NSR understands that Pan Am may enter into an agreement with CSX Transportation, Inc. (together with its parent, subsidiaries and affiliates, “CSXT”), to establish a voting trust as described in 49 C.F.R. Part 1013 with regard to the acquisition of Pan Am, and, by consequence, its subsidiaries (including Boston & Maine Corporation and Springfield Terminal Railway Company), and its affiliates, including PAS.

NSR is concerned with CSXT’s potential acquisition of Pan Am, specifically its interest in PAS, and is further concerned with CSXT’s potential use of a voting trust to acquire Pan Am. One of the main benefits of NSR’s and Pan Am’s joint control and ownership of PAS was to strengthen competition with CSXT. Indeed, as the Board noted in its approval of the 2009 NSR/Pan Am Proceeding, the transaction “would significantly increase competition between railroads by providing an upgraded east-west main line route to compete with a parallel main line route operated by CSXT.” STB Finance Docket No. 35147, 2009 NSR/Pan Am Proceeding, slip op. at 5 (STB served Mar. 10, 2009). Any CSXT effort to acquire Pan Am would threaten to materially undermine this existing competition, thus impacting not only NSR, but also rail

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shippers and other railroads. We recognize that the Board would address these competitive harms in a proceeding to authorize CSXT to control Pan Am.

However, the competitive harm in this case would begin as soon as Pan Am is placed into a voting trust. NSR believes CSXT could not use a voting trust in this transaction without obtaining Board authority. Under 49 U.S.C. § 11323(a)(4), Board authority is required for a person that is not a rail carrier to acquire control of at least two rail carriers. In establishing a voting trust, the CSXT trustee would be acquiring control of at least two rail carriers that do not operate as a single system, specifically Pan Am and PAS by way of its joint control with NSR. *See also Reliance Group Holdings, Inc.*, 366 I.C.C. 446, 452 n.7 (1982) (“To transfer the shares of Hall’s and Warren to a single voting trust would result in placing the independent trustee in the position of controlling two motor carriers without appropriate authorization”); *GWI Voting Trust – Control Exemption – RailAmerica, Inc.*, FD 35660 (STB served Aug. 17, 2012) (notice of filing verified notice of exemption for a trustee to acquire control of RailAmerica and the 41 rail carriers that RailAmerica indirectly controlled).

Regardless of whether CSXT seeks Board approval for the trustee to acquire control of Pan Am and PAS, NSR respectfully requests that if CSXT seeks Board review of a proposed voting trust pursuant to 49 C.F.R. § 1013.3(a), the Board immediately open a proceeding to consider the deleterious effects such a transaction would have on competition. *Cf. Ill. Cent. Corp. – Common Control – Ill. Cent. R.R. & The Kansas City S. Ry.*, 1994 WL 575784 (ICC served Oct. 21, 1994) (requesting public comment on the proposed use of a voting trust).

In the agreements governing the joint ownership and control of PAS, NSR was given certain rights in the event of a “change of control” of Pan Am. NSR and Pan Am acknowledged the potential need for further approval from the Board if a change of control occurs. One of the change of control events specifically includes the establishment of a voting trust. Given the uncertainty surrounding whether CSXT will be permitted to establish a voting trust, NSR is deferring its change of control rights until the Board’s resolution of that issue.

Thank you for your consideration of this urgent matter. Please do not hesitate to contact me for additional information should you have any questions.

Sincerely,

/s/ Michael L. Rosenthal

Michael L. Rosenthal
Counsel for Norfolk Southern
Railway Company

cc: Parties of Record