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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35147¹

NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS, INC., ET AL.
– JOINT CONTROL AND OPERATING/POOLING AGREEMENTS –
PAN AM SOUTHERN LLC

Decided: March 10, 2009

The Board approves the joint control and ownership of Pan Am Southern LLC, a new rail carrier, by Norfolk Southern Railway Company, Pan Am Railways, Inc., and two of its rail carrier subsidiaries, Boston and Maine Corporation and Springfield Terminal Railway Company, and the related operation agreements.

In this proceeding, Norfolk Southern Railway Company (Norfolk Southern), Pan Am Railways, Inc. (PARI) (a noncarrier railroad holding company), and two of PARI's rail carrier subsidiaries, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (Springfield Terminal) (collectively, Applicants) seek Board approval under 49 U.S.C. 11322 and 11323: (1) for Norfolk Southern and B&M to jointly own and control Pan Am Southern LLC (PAS), a new rail carrier to be formed, and (2) for the agreements pursuant to which Springfield Terminal would operate the lines of PAS and establish rates for PAS. Together, the various component parts of the application and related filings (see note 1, above) are referred to collectively as the Transaction.

In this decision, we approve the primary application and related filings, subject to conditions, except that we deny the request for pooling authority under 49 U.S.C. 11322. We conclude that this end-to-end transaction is not likely to result in a substantial lessening of competition or the creation of a monopoly or restraint of trade and that the imposition of limited

¹ This decision also embraces Pan Am Southern LLC – Acquisition and Operation Exemption – Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1); Norfolk Southern Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between Mechanicville, NY and Ayer, MA, STB Finance Docket No. 35147 (Sub-No. 2); and Springfield Terminal Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between CPF 312 Near Willows, MA, and Harvard Station, MA, STB Finance Docket No. 35147 (Sub-No. 3) (collectively, the related filings).

competitive conditions can ameliorate any potential concerns. The Board also has engaged in a thorough environmental review. After carefully considering the results of the environmental analysis, we impose conditions to ameliorate the potential adverse environmental effects of the Transaction.

BACKGROUND

Pursuant to the Transaction, PAS would operate over approximately 437 miles of track (PAS Lines). The PAS Lines consist of 238.3 miles of rail lines to be owned by PAS, as well as 198.4 miles of track over which PAS would have trackage rights. The east-west main line section of the PAS Lines, called the Patriot Corridor, would be comprised of 139.7 miles of track to be owned by PAS extending from Mechanicville, NY, to CPF-312, near Ayer, MA, as well as 15.8 miles of trackage rights over track of the Massachusetts Bay Transportation Authority (MBTA) between Fitchburg and Willows, MA. The north-south section of the PAS Lines, extending from White River Junction, VT, to New Haven, CT, would be comprised of: (1) 72.8 miles of trackage rights over the New England Central Railroad (NECR) between White River Junction, VT, and East Northfield, MA; (2) 49.7 miles of track to be owned by PAS on the Connecticut River Mainline between East Northfield and Springfield, MA; and (3) 62.0 miles of trackage rights over a line of the National Railroad Passenger Corporation (Amtrak) between Springfield, MA, and New Haven, CT. The PAS Lines would also include several branch lines.²

The application states that Norfolk Southern would infuse \$87.5 million into PAS for improving infrastructure. PAS would use part of that capital to remove long-term slow orders along the Patriot Corridor and to add capacity and clearances along that line for better traffic flow. PAS would also use a portion of the capital to create new, or expand existing, transloading capacity at three locations: (1) a new intermodal and automotive facility at Mechanicville, NY (the Mechanicville Facility); (2) an expanded intermodal facility at Ayer, MA; and (3) a new automotive facility near Ayer at San Vel. According to Applicants, the Transaction would

² The branch lines consist of: (1) the Rotterdam Branch, which is approximately 30.5 miles between Rotterdam Junction and Mechanicville, NY (including 18.3 miles of trackage over Canadian Pacific Railway Company (CP) between Mohawk Yard in Schenectady, NY, and Mechanicville, NY); (2) the Adams Industrial Branch, which is approximately 4.6 miles between N. Adams and Adams, MA; (3) the Heywood Industrial Branch, which is approximately 1.2 miles between Gardner and Heywood, MA; (4) approximately 2.3 miles between Ayer and Harvard Station, MA; (5) the Groton Industrial, which consists of trackage rights over MBTA extending approximately 5 miles between Ayer, MA, and Groton, MA; (6) approximately 2.3 miles of trackage rights over MBTA between Willows, just east of Ayer and Littleton, MA; (7) approximately 42.9 miles between Berlin, CT, and Derby, CT (including 18.6 miles of trackage rights over Metro North Commuter Railroad (MNCR) between Waterbury and Derby, CT); (8) the Southington Industrial Branch, which is approximately 4.5 miles between Plainville and Southington, CT; and (9) approximately 3.7 miles of trackage rights over CSX Transportation, Inc. (CSXT) between North Haven and Cedar Hill, CT.

strengthen the existing Norfolk Southern/Springfield Terminal competitive alternative to the single-line service of CSXT into the Boston area by making PAS a more efficient competitor.

In addition to the primary application, which was submitted on May 30, 2008, Applicants filed three related notices of exemption. First, pursuant to 49 CFR 1150.35(a), Applicants filed a notice of intention to file (and did file on June 27, 2008) a notice of exemption in STB Finance Docket No. 35147 (Sub-No. 1), for PAS to acquire from B&M the 437 miles of rail lines and trackage rights involved in the Transaction and to operate over the lines as a common carrier. Second, Applicants filed a notice of exemption in STB Finance Docket No. 35147 (Sub-No. 2), for Norfolk Southern to acquire trackage rights over 151.33 miles of PAS track between Mechanicville, NY, and Ayer, MA. Finally, Applicants submitted a notice of exemption in STB Finance Docket No. 35141 (Sub-No. 3), for Springfield Terminal to acquire trackage rights over 6.4 miles of PAS track, to allow Springfield Terminal to continue to connect its remaining lines and to preserve connections to CSXT and Providence and Worcester Railroad Company (P&W).

By decision served in this proceeding on June 26, 2008, and published in the Federal Register on June 27, 2008, at 73 FR 36586, we accepted for consideration the primary application and related filings. Based on the information provided in the application, we classified the proposed Transaction as a “minor transaction” under 49 CFR 1180.2(c). Under 49 CFR 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if, based on the application itself, it appears that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. We determined that, on the face of the application, there did not appear to be a likelihood of anticompetitive effects resulting from this Transaction because the Norfolk Southern and Pan Am systems are entirely end-to-end and no shipper would appear to have fewer competitive rail alternatives as a result of the Transaction. We also observed that the Transaction would not appear likely to have adverse competitive effects on connecting short line and regional carriers because: (1) the Transaction would not impose interchange restrictions on PAS, and PAS would honor all of the existing interchange contracts with connecting carriers; (2) none of the eight short lines that would connect with PAS would lose a connecting alternative as a result of the Transaction; and (3) many short lines would simply be served by PAS instead of Springfield Terminal, and some would gain more direct access to Norfolk Southern via PAS. We explained that our findings regarding competitive impacts were preliminary and that we would give careful consideration to any claims that the Transaction would have anticompetitive effects that were not apparent from the application itself.

By decision served on July 21, 2008, we denied the petition of the Clarendon & Pittsford Railroad (CPR), Green Mountain Railroad (GMR), Vermont Railway (VR), and the Washington County Railway (WCR)—an affiliated group of Class III railroads known as the “Vermont Railway System” (VRS)—to reclassify the Transaction as “significant” under 49 CFR 1180.2(b) and to revise the procedural schedule. We also denied a petition for the same relief sought jointly by United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen (UTU/BLET).

Comments, protests, and/or requests for conditions were filed by the following parties of record: Batten Kill Railroad (Batten Kill); Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railroad Signalmen (jointly, BMWE/BRS); Captain Dirck Hecking and Locomotive Engineer William Remington;³ CaroVail, a division of Carolina Eastern, Inc. (CaroVail); Committee to Improve Rail Service in Maine (CIRSM);⁴ the Commonwealth of Massachusetts' Executive Office of Transportation and Public Works (EOTPW), also representing MBTA; Connecticut Department of Transportation (Connecticut DOT); GATX Corporation (GATX); International Association of Machinists and Aerospace Workers and International Brotherhood of Electrical Workers (IAMAW/IBEW); Milford-Bennington Railroad Company, Inc. (Milford-Bennington); Montreal, Maine & Atlantic Railway, Ltd. (MMA); Morristown & Erie Railway, Inc., d/b/a/ Maine Eastern Railroad (MER); Amtrak; New England Southern Railroad Company (NESR); New York State Department of Transportation (NYSDOT); Pioneer Valley Railroad Company, Inc. (Pioneer Valley); P&W; State of Maine; UTU/BLET; U.S. Clay Producers Traffic Association, Inc. (confidential and public versions) (U.S. Clay Producers); VRS; and Vermont Agency of Transportation (VTrans).⁵ The Board also received letters commenting on various environmental and other issues related to this transaction from Members of Congress, including: United States Senators Edward M. Kennedy (MA) and John F. Kerry (MA); and United States Representatives Kirsten Gillibrand (NY), John W. Olver (MA), James McGovern (MA), and Niki Tsongas (MA).

DISCUSSION AND CONCLUSIONS

Statutory Criteria. The acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires Board approval. 49 U.S.C. 11323(a)(3), (5). Because the proposed Transaction does not involve the merger or control of two or more Class I railroads, this Transaction is governed by 49 U.S.C. 11324(d), which directs us to approve the application unless we find 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 assessing transactions subject to section 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the transportation benefits or

³ The comments of Messrs. Hecking and Remington are not considered in this decision because they raise managerial fitness issues that are outside the scope of this proceeding.

⁴ CIRSM has filed two documents in this proceeding, referring to itself by slightly different names in each. See Petition and Comments for Conditions Imposed, filed Aug. 11, 2008 (“Committee to Improve Rail Service in Maine”) and Response to Comments and Amended Request for Condition, filed Sept. 5, 2008 (“Committee for Better Rail Service in Maine”).

⁵ A table of abbreviations appears in Appendix A.

could be mitigated through conditions.⁶ The Board also has the authority to consider the potential environmental effects of the transaction and to impose appropriate conditions to mitigate adverse environmental impacts.

Based on the record here, we conclude that the Transaction is not likely to cause a substantial lessening of competition or to create a monopoly or a restraint of trade. The lines involved in the Transaction are end-to-end, with no parallel routes. This agency has long held that end-to-end transactions are unlikely to generate the types of competitive problems that often arise in parallel transactions.⁷ Applicants explain that no shipper on the line would have reduced competitive rail service options as a result of the Transaction.⁸ No party has identified any rail route or rail service option that would become unavailable to a shipper. Indeed, rather than adversely affecting competition, it appears that 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.

Our conclusion that the Transaction would not adversely affect competition is reinforced by our analysis of the comments of the participating parties.⁹ The commenting parties generally ask us to attach conditions upon our approval of the Transaction. Under 49 U.S.C. 11324(c), we have broad authority to impose conditions on a transaction subject to section 11324(d) to ameliorate competitive harm that would result from the transaction. See Kansas City Southern – Control – The Kansas City Southern Railway Company, et al., STB Finance Docket No. 34342 slip op. at 16 (STB served Nov. 29, 2004) (KCS-Tex Mex). However, most of the conditions sought by the parties in this case do not relate to the preservation of competition.

The requested conditions fall into three broad categories.¹⁰ The first broad category includes proposals to remedy perceived pre-existing problems, such as service failures, lack of

⁶ Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of section 11323 transactions. See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 899-900 (2000).

⁷ See e.g., Canadian Pacific Ry. Co. et al. – Control – Dakota Minnesota & Eastern R.R. Corp., et al., STB Finance Docket No. 35081, slip op. at 11 (STB served Sept. 30, 2008); Canadian National Ry. Co., et al. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co. and the Pittsburgh & Conneaut Dock Co., STB Finance Docket No. 34424, slip op. at 14 (STB served Apr. 9, 2004).

⁸ See V.S. John Williams.

⁹ We consider separately below the requests for environmental conditions.

¹⁰ For the sake of uniformity and clarity, our discussion of these conditions refers to Springfield Terminal as the current operator of the track at issue, even though the parties sometimes refer to B&M or PARI as the operator. Springfield Terminal is the regulated common carrier railroad that actually operates over the track, having acquired its operating authority via a series of leases from four carrier subsidiaries of Guilford Transportation Industries, Inc., that were approved by the Interstate Commerce Commission in the late 1980's. See, e.g., Delaware and Hudson Railway Company – Lease and Trackage Rights Exemption –

(continued . . .)

investment, failure to pay bills, and failure to establish interchanges with other carriers or to route enough traffic through the interchanges that already exist. We will not impose any of these conditions because none are based on a competitive effect of the transaction or would even address any kind of effect caused by the transaction.

The second broad category of conditions includes proposals designed to ensure that the Transaction would not result in the future re-routing of interline traffic away from connecting short line carriers. We decline to impose any conditions in this category. The proponents of conditions in this category have not shown that they are necessary to remedy any potential anticompetitive effect. Nor has any party given us reason to conclude that any new single-line movements created through the Transaction would lead the Applicants to vertically foreclose competition over efficient routes and refuse to cooperate with unaffiliated carriers.

The conditions in a third broad category were proposed to avoid service reductions over connecting Springfield Terminal lines that would not be transferred to PAS, such as reduced train service, maintenance, or investments on such lines. As described in greater detail below, we are not imposing any of those conditions here because none are based on competitive harm.¹¹ However, we will hold Applicants to all representations made on the record in this proceeding.

Conditions Sought

Batten Kill and CaroVail. Batten Kill and CaroVail have requested a related set of interchange conditions.¹² Batten Kill is a short line railroad in New York, NY, operating over approximately 34 miles of track. Its only connection with the national rail network is at Eagle Bridge, NY, where it connects with a Springfield Terminal line proposed for inclusion in the proposed PAS system and over which CP has trackage rights. Batten Kill maintains that neither Springfield Terminal nor CP has adequately pursued traffic that would interchange with it at Eagle Bridge. Batten Kill also objects to the fact that the haulage services granted to Norfolk Southern would apply to VR (at nearby Hoosick Junction), NECR, and P&W, but not to other connecting carriers (such as Batten Kill). To remedy its alleged lack of interchange opportunities, Batten Kill proposes two conditions: (1) require PAS to negotiate an agreement that would provide a level of interchange at Eagle Bridge at the same level of service frequency

(. . . continued)

Springfield Terminal Railway Company, 4 I.C.C.2d 322 (1988) (explaining that a series of notices from October 1986 through November 1987 were used by the subsidiaries of Guilford Transportation Industries, Inc., to lease their rail lines and transfer their trackage rights to Springfield Terminal). PARI is a parent holding company, not an operating railroad.

¹¹ We note that (1) the proponents of those conditions have not shown that Applicants plan to reduce service, maintenance, or investments on connecting lines that would not be transferred to PAS; and (2) the Transaction itself would be likely to increase, not decrease, service over these lines.

¹² As discussed infra, NYSDOT shares these parties' concerns and has proposed separate conditions to deal with them.

and competitive value as the interchange that VR has at nearby Hoosick Junction; and (2) require Norfolk Southern to negotiate a similar interchange agreement concerning the traffic that it would handle pursuant to its proposed trackage and haulage rights.

CaroVail, a bulk shipper of fertilizer products, has a plant at Salem, NY, that is directly served by Batten Kill. CaroVail states that, because service via Batten Kill and CP (via trackage rights) has been uneconomic in recent years, it has shipped its urea carloads to its plant at Salem via trucks that are transloaded from CSXT in the Albany, NY area. CaroVail asks us to impose “the condition that Pan Am Southern introduce reliable access to the Batten Kill Railroad at the Eagle Bridge, NY, both as a direct connection for the interchange of traffic between these two railroads, and as a connection point for traffic between Norfolk Southern and the Batten Kill Railroad via Pan Am Southern haulage.”¹³

We will not impose the conditions sought by Batten Kill and CaroVail. These conditions do not relate to any competitive harm caused by the proposed Transaction. Moreover, the problems cited by Batten Kill and CaroVail pre-date the Transaction and would not be exacerbated by the Transaction. The Transaction documents do not restrict interchange with the Batten Kill at Eagle Bridge; PAS would have the same ability and obligation to interchange with Batten Kill after the Transaction that Springfield Terminal currently has. Indeed, by improving the main Patriot Corridor line to which Batten Kill connects at Eagle Bridge, shippers on Batten Kill should benefit from improved joint line service involving that line.

CIRSM. CIRSM—a group of business, political and civic leaders—asks us to impose conditions that would (1) require PARI to implement an extensive upgrade of rail service and equipment within Maine, and (2) sequester the \$47.5 million that PARI would receive from Norfolk Southern for the payment of debts and improving service. In support of these conditions, CIRSM argues that: (1) Springfield Terminal has overdue debt to car leasing companies and railroads; (2) it is financially ailing; (3) its service has been the subject of complaints; (4) its locomotive fleet is old and unreliable; (5) its infrastructure in Maine is in poor condition; and (6) conditions are needed to ensure that PARI does not reallocate rail resources from its Maine operations to the new PAS system. As evidence of PARI’s inability to provide adequate service, CIRSM cites the Boston-Maine Airways Corporation airline certification proceeding (described in the comment of Captain Dirck Hecking and Locomotive Engineer William Remington) and PARI’s alleged management skills.

We will not impose the conditions requested by CIRSM. These conditions do not relate to any competitive harm caused by the proposed Transaction. Moreover, the service problems cited by CIRSM predate the Transaction and would not be made worse by the Transaction. CIRSM has given us no reason to believe that PARI would be less able to pay bills or would have less incentive to allocate resources to Maine after the Transaction than before. Indeed, the State of Maine argues that the Transaction would benefit that state by improving a corridor that

¹³ Comments of CaroVail, filed Aug. 14, 2008, at 1-2.

is a major shipping route for many Maine rail shippers and by enabling PARI to focus on infrastructure and operations in that state.¹⁴

Connecticut DOT. Connecticut DOT supports the proposal to create PAS, provided no competitive options are eliminated in Connecticut. To improve transportation within that state, Connecticut DOT requests that PAS establish interchange agreements or activate connections with several short lines, that PAS take steps to ensure that the Waterbury Branch develops its “significant rail freight potential,” and that Applicants develop a comprehensive business strategy to achieve Connecticut DOT’s goals in a prompt and reasonable fashion.

We will not impose the conditions requested by Connecticut DOT. Those conditions all relate to matters that have no connection to the Transaction and are not based on any alleged competitive harm. The inactive connections, lack of interchange agreements, and lack of traffic on the Waterbury Branch all pre-date the Transaction, and Connecticut DOT has not shown that any of these situations would be aggravated by the Transaction.

Nor will we grant Connecticut DOT’s request for additional time to study what it asserts is “the possible re-routing of traffic away from the newly-established interchange between the New England Central Railroad Company and the Providence & Worcester Railroad Company at Willimantic.” We have not received any information that would lead us to believe that Applicants might affect the alleged re-routing in a way that forecloses competition or advances any purpose other than the attraction of traffic to an upgraded, more efficient route over the Patriot Corridor, which is the purpose of the Transaction. Thus, we have no reason to believe the matter warrants a delay of this proceeding for further study.

Milford-Bennington. Milford-Bennington is a short line railroad that connects at Nashua, NH, with a segment of Springfield Terminal that would not be part of the PAS system. Milford-Bennington’s only customer is Granite State Concrete. The carrier serves Granite State by moving crushed stone approximately 5 miles from an excavation site on a segment leased from the State of New Hampshire to a processing facility on a connecting segment over which it operates pursuant to trackage rights over Springfield Terminal. Milford-Bennington alleges that

¹⁴ MER, a short line railroad operating two lines leased from the State of Maine, initially asked for conditions to ensure that PARI would not downgrade or de-market its joint service with CSXT due to its improved connections with Norfolk Southern. MER also asked us to ensure that Applicants would live up to the representations that they have made concerning the effect of the Transaction on connecting short line carriers. However, in its reply filed on September 5, 2008, MER states that it has reached agreement with Applicants over the issues raised in its initial comments and that it now supports the Transaction without any conditions for its benefit. Likewise, Pioneer Valley, a short line carrier connecting with the proposed PAS lines at a now inactive interchange at Holyoke, MA, has also reached an agreement with the Applicants relating to restoration of the Holyoke interchange. The Pinsky Railroad Company, the parent of Pioneer Valley, commented favorably on the Transaction on September 16, 2008, and stated that it should not be delayed.

its experience with Springfield Terminal has been fraught with problems, that the Transaction would render PARI less able to solve the alleged problems, and that the Transaction would adversely affect PARI lines that would not be part of the PAS system. To remedy its concerns, Milford-Bennington asks that we: (1) require PARI to meet its “pre-existing promises” to the State of New Hampshire and to Milford-Bennington to improve branch lines; (2) require PARI to meet its obligation to the State of New Hampshire to improve the main line between Nashua and Manchester; (3) require PARI to maintain a locomotive fleet sufficient to meet service requirements in New Hampshire; (4) direct PARI to enter into a trackage rights agreement with Milford-Bennington that is “consistent with standard industry terms and conditions”; and (5) retain jurisdiction to enforce these conditions.

We will not impose the conditions requested by Milford-Bennington. None of its conditions relate to any harm to competition and, in any event, they all seek to remedy matters that pre-date the Transaction and would not be made worse by the Transaction. The enforcement of any prior promises or obligations that Springfield Terminal may have made or undertaken concerning branch line service may be pursued in a different proceeding or forum, but such promises or obligations are not an appropriate subject for conditions in this proceeding.

MMA. MMA, a short line operating in Maine, Vermont and Canada, maintains that its interline business with Norfolk Southern is important. MMA connects with Norfolk Southern via three routings: (1) a CP route between Montreal, on the one hand, and Albany, NY, or Harrisburg, PA, on the other; (2) a Canadian National Railway Company (CN) route (not otherwise described in MMA’s statement); and (3) a Springfield Terminal route that connects with MMA at Northern Maine Junction, ME, and with Norfolk Southern near Albany, and that would not be included in the planned PAS system. According to MMA, the Springfield Terminal route would be the least efficient of the three routes because Springfield Terminal’s service has traditionally been poor over this route and PAS has no plans to upgrade the portion of the route that connects with MMA. MMA argues that the Transaction would adversely affect competition and essential services provided by MMA by giving Norfolk Southern an incentive to divert traffic from MMA’s connections with CP and CN in favor of the allegedly inefficient route with PAS. MMA argues that, in light of Applicants’ representations that the Transaction would not adversely affect competition or the well-being of connecting carriers or cause a shipper to lose any competitive rail service, the Board should adopt the following conditions to ensure that Applicants’ prediction is realized: (1) prohibit Applicants from taking any actions that would adversely impact non-PAS routes between MMA and Norfolk Southern; (2) grant haulage and trackage rights to Norfolk Southern to enable it to have a direct interchange with MMA; and (3) retain jurisdiction to monitor Applicants’ compliance with these conditions.

We will not impose the conditions requested by MMA. This agency has consistently rejected the notion that the creation of new single-line movements in an end-to-end acquisition necessarily would lead the acquiring carrier to vertically foreclose competition over efficient routes by refusing to cooperate with unaffiliated carriers.¹⁵ MMA has given us no reason to

¹⁵ Burlington Northern et al. – Merger – Santa Fe Pacific et al., 10 I.C.C.2d 661, 748-49 (1995).

believe that Norfolk Southern would find it in its interest to route traffic over an allegedly less efficient route involving PAS. Applicants have indicated that they do not plan any substantial re-routing of traffic or changes to any existing interchanges (with one exception not relevant to MMA). See Application at 9. Moreover, Applicants have pledged to honor all existing interchange contracts with other carriers and state that the Transaction does not impose interchange restrictions. We are requiring Applicants to adhere to their representations made on the record in this proceeding.

NESR. NESR is a Class III railroad operating between Manchester and Pennacook, NH, over 20 miles of track leased from B&M. NESR is currently in litigation over car hire and interline payments that are allegedly owed by B&M and/or Springfield Terminal. NESR states that the Transaction should increase competition and improve service for NESR shippers that interline with Springfield Terminal.

NESR, however, is concerned that the Transaction could adversely affect B&M's ability to satisfy its obligations to existing or future judgment creditors. While NESR recognizes that B&M's receipt of \$47.5 million from Norfolk Southern in return for the interest that Norfolk Southern would acquire in PAS could ordinarily be expected to improve NESR's ability to collect on debts allegedly owed by B&M, NESR is concerned that B&M might attempt to argue that Board approval of the Transaction prevents creditors from attaching the \$47.5 million payment. NESR asks us to clarify in our decision that no act of the Board could impede an effort by NESR to collect against the \$47.5 million payment. NESR also points to other pending litigation involving monetary claims against the PARI system.

Applicants have conceded on the record that third parties will retain the same rights to collect debts from B&M and/or Springfield Terminal as they had prior to the proposed Transaction. See Applicants' Response to Comments at 37. Accordingly, there is no need for further clarification from the Board on this issue, as we will hold the Applicants to their representations made on the record in this proceeding.

NYSDOT. NYSDOT supports the application as conferring a "significant benefit to the State of New York," subject to three conditions and any environmental concerns raised by the New York State Department of Environmental Conservation. The first condition proposed by NYSDOT concerns the Batten Kill. NYSDOT maintains that Applicants should either: (a) extend the same opportunity to Batten Kill for interchange with Norfolk Southern (through haulage rights) and PAS at Eagle Bridge that other short line railroads would have under the Transaction, or (b) explicitly state, pursuant to the regulations established in Disclosure of Rail Interchange Commitments, STB Ex Parte No. 575 (Sub-No. 1) (STB served May 29, 2008), that the agreement prohibits such interchange with that carrier. Applicants respond that, while they oppose the imposition of conditions for the benefit of Batten Kill, they do not object to the interchange of traffic between Batten Kill and PAS.

We will not impose the interchange condition for the benefit of Batten Kill, for the reasons stated above, in our discussion concerning that carrier. Moreover, the Transaction does not raise the type of notification issues addressed in Disclosure of Rail Interchange Commitments, as the Transaction documents contain no restrictions on the ability of Norfolk

Southern or PAS to interchange traffic with Batten Kill. Rather, the Transaction will merely grant Norfolk Southern haulage rights for traffic that would be interchanged with three other short lines—VR, NECR, and P&W. Nothing would prevent Applicants from adding Batten Kill to this list, and they would presumably do so if it became apparent that doing so would attract significant additional traffic.

The two additional conditions proposed by NYSDOT concern the circumstances under which Norfolk Southern may exercise its right to utilize trackage rights to haul intermodal and automotive traffic directly over PAS lines in the event of a “Major Service Standard Failure” as defined in the Agreement. First, NYSDOT asks us to condition approval on Norfolk Southern’s notifying the Board if it intends to exercise its trackage rights, arguing that this would be necessary because Norfolk Southern could exercise its trackage rights only upon future events that may or may not happen. Applicants respond that they agree to this request, and, therefore, we will condition approval of the Transaction on Norfolk Southern notifying the Board of its intent to exercise its trackage rights.

Second, NYSDOT points to what it considers to be two inconsistent provisions within the Agreement concerning the definition of a “Major Service Standard Failure.” According to NYSDOT, one provision seems to state that this would occur if trains do not operate according to prescribed service standards 85% of the time, measured with a 60-minute leeway in any given rolling 90-day period,¹⁶ and the other provision seems to state that such a failure would occur if trains do not operate according to prescribed service standards 90% of the time, measured with a 30-minute leeway in any given rolling 90-day period.¹⁷ NYSDOT urges us to require that Applicants clarify these provisions to hold PAS to the higher service measurement—operation according to prescribed service standards 90% of the time with a 30-minute leeway.

In their response, Applicants agree with NYSDOT’s recommendation that the higher standard should apply. Thus, no action is required on our part.

P&W. P&W connects with Springfield Terminal at Barbers and Gardner, MA, but the line segment at Barbers would not be transferred to PAS. Initially, P&W stated that it supported the Transaction conditioned upon Applicants’ representation that no competitive options would be eliminated. In a subsequent filing, P&W asked us to specifically condition approval of the Transaction upon maintenance of the Barbers interchange.

Applicants have indicated that the Barbers interchange will be maintained to permit Springfield Terminal to continue interchange with CSXT and that the Transaction should not affect the flow of interline traffic through Barbers. See Application at 37; see also Williams V.S. at 13 (explaining that the parties’ trackage rights agreement “will permit Pan Am to maintain its

¹⁶ See Section 2.(a) of Appendix B to the Master Norfolk Southern Joint Use Agreement (Exhibit 2E of the application).

¹⁷ See Section 2.(d) of Appendix B to the Master Norfolk Southern Joint Use Agreement (Exhibit 2E of the application).

current interchanges with P&W at Barbers, MA”). P&W has not shown that relief from the Board is warranted.

RailAmerica. On September 5, 2008, RailAmerica submitted a statement supporting the Transaction subject to the imposition by the Board of a condition adopting a settlement agreement attached to the statement. Pursuant to that settlement agreement, (1) NECR (a RailAmerica subsidiary) and PAS would establish an interchange at Millers Falls, MA; (2) NECR would consent to the assignment from the PARI system to PAS of the trackage rights over NECR’s Connecticut River Line that were granted and approved in Amtrak – Conveyance of B&M in Conn River Line in VT & NH, 4 I.C.C.2d 761 (1988), and Amtrak – Conveyance of B&M in Conn River Line in VT & NH, 6 I.C.C.2d 539 (1990); and (3) NECR would provide haulage services for PAS, at PAS’s option, over NECR’s Connecticut River Line between Millers Falls and White River Junction, VT.

The settlement agreement is reasonable and no party has submitted comments opposing it. It resolves NECR’s competitive issues related to the Transaction and facilitates the Transaction by providing for the assignment of trackage rights necessary to implement it. Therefore, as requested by the parties, we will impose the terms of the settlement agreement as a condition to our approval of the Transaction.

U.S. Clay Producers. U.S. Clay Producers expresses concern over future service to its members located on PARI system lines that would not be transferred to PAS. U.S. Clay Producers asks us to consider imposing conditions to ensure that shippers served by PARI system lines that would not be transferred to PAS will have the “same options for alternative service” as shippers served by PARI system lines that would be transferred to PAS, arguing that this is necessary to keep traffic increases that they expect to result from the Transaction from degrading PAS’ ability to serve them. Alleging that PARI carriers have been failing to pay mileage allowance compensation allegedly owed to private car owners, U.S. Clay Producers also asks us to impose conditions to ensure that overdue compensation is paid prior to consummation of the Transaction, and to establish certain procedures to ensure that such compensation is paid in the future, including a provision for joint and several liability by PAS and Norfolk Southern for payment of car compensation.

We will not impose the conditions requested by U.S. Clay Producers. With regard to its requests for the same service alternatives for shippers on non-PAS lines, we do not impose conditions merely to attempt to equalize options of shippers that benefit from an acquisition with those who do not. With regard to collecting private car compensation, we note that Applicants have conceded on the record that third parties will retain the same rights to collect debts from PARI and its subsidiaries as they had prior to the proposed Transaction. See Applicants’ Response to Comments at 37.

VTrans. VTrans supports the Transaction in light of the general representations made by Applicants that the Transaction would not eliminate any competitive options and would not have any adverse effects on commuter or other passenger service, including efforts to upgrade or restore passenger service over certain lines, and other specific representations on the record. In view of certain specific representations made by Applicants, VTrans proposes the following

conditions: (1) require PAS to “maintain connections at existing gateways”; (2) require PAS to surrender its exclusive right (as the successor to Springfield Terminal) to serve shippers over the route along the Brattleboro-Windsor segment of the Connecticut River Line over which Springfield Terminal operates via trackage rights should PAS fail to comply with the minimum 3 days per week service standard that the ICC imposed when it granted the trackage rights to B&M in 1990;¹⁸ and (3) require PAS to honor existing PARI system commitments to restore rail passenger service between Springfield and East Northfield, MA, as well as between Mechanicville and Hoosick Junction, NY.

As previously discussed, we will hold Applicants to the representations that they have made on the record in this proceeding regarding existing interchange and contractual relationships. See [p. 6], supra. VTrans has failed, however, to show that any further relief is proper. Any service issues may be pursued through an appropriate proceeding under the appropriate statutory provisions or the proceeding in which the ICC imposed service obligations.

VRS. VRS is a group of affiliated carriers that operate almost entirely in Vermont. VRS carriers connect with: Springfield Terminal at Hoosick Junction, NY; Springfield Terminal (operating over NECR via trackage rights) at White River Junction (Hartford), Claremont Junction, and Bellows Falls, VT; NECR at Burlington, White River Junction, Claremont Junction, Bellows Falls and Montpelier Junction, VT; CP at Whitehall, NY; and MMA at Newport, VT. VRS reaches CSXT indirectly at Palmer, MA, via a haulage agreement with NECR between White River Junction and Palmer (although some traffic must be re-routed over a Springfield Terminal route that parallels NECR in certain areas). VRS reaches Norfolk Southern primarily through its connection with CP at Whitehall, NY.

VRS requests that the Transaction be approved, but only with conditions.¹⁹ According to VRS, Springfield Terminal has not been providing adequate service as a connecting carrier to VRS carriers. VRS also maintains that Applicants intend to downgrade service on routes that are not included in the east-west Patriot Corridor main line that is slated for upgrading, in particular the route along the Connecticut River Line over which Springfield Terminal operates via trackage rights. VRS states that Bellows Falls and White River Junction are gateways between Springfield Terminal and VRS’s carriers GMR and WCR and that weakening those interchanges would weaken their ability to maintain competitive service at those points and would place NECR in a position to exercise monopoly power along the Connecticut River Line. To address these perceived harms, VRS proposes that we: (1) require Springfield Terminal to assign to GMR the haulage or trackage rights that Springfield Terminal now holds over the NECR line along the Connecticut River Line or, at a minimum, (2) retain jurisdiction for 5 years to monitor Springfield Terminal’s service over that line.

We will not impose the conditions sought by VRS. VRS’s service complaints do not relate to competition and they predate the Transaction. We also reject the premise that the Transaction would result in the downgrading of service over the Connecticut River Line simply

¹⁸ See National Railroad Passenger Corp., 6 I.C.C.2d 539, 559-67 (1990).

¹⁹ VRS’s request for conditions is supported by Omya, Inc., a shipper of limestone.

because other track would be upgraded.²⁰ The main purpose of the Transaction is to upgrade service over a main line route, allowing Norfolk Southern, via expanded haulage rights, to better compete with CSXT in New England. It is possible that the lines that are not slated for upgrading would also benefit from the attraction of new through traffic as a result of the Patriot Corridor upgrade, leading to better service over those lines. Because Norfolk Southern, and not Springfield Terminal, would be funding the proposed improvements, there is no reason to assume that upgrading would cause Springfield Terminal to reduce service levels over the remaining portions of its system.

VRS also defends its proposed conditions as necessary to ensure that the Transaction would not shift vital traffic from the lines of VRS carriers to the lines of other carriers. While Applicants state that they do not expect any major shift in traffic flows, rehabilitation of the Patriot Corridor should make that rail corridor more efficient, thereby allowing it to attract traffic from the competing CSXT line. Thus, some shippers may ultimately make less use of competing VRS/CSXT interline routes. But the possibility of two efficient interline options for shippers is a competitive benefit of the Transaction, even if VRS and CSXT see a reduction in volume.²¹ The conditions proposed by VRS would defeat the purpose of this Transaction—by attempting to ensure that traffic continued to move over VRS routes that do not involve the Patriot Corridor when it would move more efficiently over the Patriot Corridor. VRS has not established that the Transaction would foreclose its ability to compete with PAS or render it unable to compete.

²⁰ According to VRS, “[a]pplicants have stated their intent to terminate service and end interchange with some existing short lines, including those parties to this proceeding.” (Comments of VRS, at 4.) We find no such statement in the record of this proceeding, and no other short line makes such an allegation. Indeed, Applicants have indicated just the opposite. VRS also points to a statement allegedly made in August 2007, by PARI official David Fink to the effect that B&M wanted to be “off” the NECR’s Connecticut River Line, over which Springfield Terminal operates via trackage rights. However, the PARI system’s prior intentions in this respect, even as characterized by VRS, is no longer dispositive because NECR has agreed to assign the trackage rights to PAS. Moreover, Applicants point out that the Connecticut River Line is largely owned by NECR and the portion still owned by the PARI system would be a key component in the PAS system.

²¹ As discussed above, the Board has consistently rejected the notion that new single-line movements created through a transaction would lead the acquiring carrier to vertically foreclose competition over efficient routes by refusing to cooperate with unaffiliated carriers. See p. [5-6], supra. Thus, a carrier connecting to the VRS system would have no incentive to route traffic over the Patriot Corridor, rather than over a competing VRS route involving CSXT, unless the route involving the Patriot Corridor were more efficient.

Labor Protection Conditions

As required under 49 U.S.C. 11326(a), we will impose the standard New York Dock²² labor protection conditions on our approval of the primary application in STB Finance Docket No. 35147 and the N&W labor protection conditions on our approval of the related notices of exemption for the grant of trackage rights in STB Finance Docket No. 35147 (Sub-Nos. 2 and 3).²³ Under 49 U.S.C. 10901(c), we are expressly precluded from imposing any labor protection conditions on our approval of an acquisition of a line by a noncarrier—the subject of the related notice of exemption in STB Finance Docket No. 35147 (Sub-No. 1).

The unions argue that the entire Transaction is subject to the agency's standard labor protection conditions because all of the transactions, including the transaction in the Sub-No. 1 proceeding, are related to, and part of, a greater transaction requiring approval under 49 U.S.C. 11323.²⁴ They also argue that PAS's acquisition of the Springfield Terminal lines is subject to section 11323, rather than section 10901, and that we therefore must dismiss the Sub-No. 1 notice and approve the Transaction under section 11323 alone.²⁵

The unions argue that employees need labor protection for the entire Transaction because PAS's acquisition of the lines from Springfield Terminal could adversely affect Springfield Terminal employees in the future, notwithstanding Applicants' plan to have Springfield Terminal operate the lines under contract, using its existing employees working under their existing

²² See New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). These conditions are imposed, pursuant to 49 U.S.C. 11326(a), on consolidation, merger, control, or line acquisition transactions that are subject to 49 U.S.C. 11323 and involve at least one Class I railroad.

²³ See Norfolk and Western Ry. Co. – Trackage Rights – BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc. – Lease and Operate, 360 I.C.C. 653 (1980) (N&W). These conditions are imposed on lease or trackage rights transactions and provide for the same substantive benefits as New York Dock. The primary difference is that the N&W conditions do not require an implementing agreement before the parties can implement an authorized grant of trackage rights.

²⁴ BMW/BRS cite to Texas & Pacific Ry., 247 I.C.C. 285, 293-97 (1941); Oklahoma Ry. Co., Trustees – Abandonment of Operation, 257 I.C.C. 177, 194 (1944); Gulf, Mobile & Ohio Railroad Co., 282 I.C.C. 311, 337 (1951); Louisiana & Arkansas Railway Co. – Abandonment, 290 I.C.C. 434 (1954); Seaboard Air Line Railroad Co., Trackage Rights, Atlantic Coast Line Railroad Co., 312 I.C.C. 797 (1962); and Delaware and Hudson Ry. Co. – Springfield Terminal Ry., 4 I.C.C.2d 322, 327-334 (1988).

²⁵ UTU/BLET cite to Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company, STB Finance Docket No. 35063, et al. (STB served Dec. 10, 2007). BMW/BRS likewise argue that PAS's acquisition of the PARI lines is subject to section 11323 because Norfolk Southern, due to its control over PAS, will be effectively acquiring control over lines of another railroad.

collective bargaining agreement, for the foreseeable future. According to the unions, the Transaction agreements provide no guarantee that Springfield Terminal will continue to operate the lines for PAS under contract; UTU/BLET maintain that Springfield Terminal could become unable to serve PAS under contract due to its current financial condition and its extensive involvement in litigation that could affect its financial status.²⁶ The unions argue that Applicants' statements that they expect to operate PAS's lines using Springfield Terminal employees working under their existing collective bargaining agreement should constitute a binding representation that they will continue to do so; BMW/BRS further ask us to require that either (1) Springfield Terminal continue to operate the line for PAS, or (2) Applicants give hiring priority to all Springfield Terminal employees and maintain their collective bargaining agreement with that carrier if there is a change of operators on PAS.

UTU/BLET also allege that Springfield Terminal and its corporate family have improperly refused to meet with them to negotiate or to discuss an implementing agreement under New York Dock, on the grounds that no agreement is necessary because no employees will be adversely affected by the Transaction. UTU/BLET ask us to require that Applicants either (1) negotiate an implementing agreement under New York Dock before the Transaction may be implemented, or (2) give hiring priority to all Springfield Terminal employees and maintain their collective bargaining agreement with that carrier if there is a change of operators on PAS.

Applicants, while disputing the unions' view of the scope of our labor protection conditions, nonetheless offer a concession. Applicants state that “. . . they will not contend that a claimed adverse effect is attributable to the asset acquisition alone and not to any other element of the Transaction.”²⁷ This voluntary concession by the Applicants on the record resolves the issue between the parties and we need not address it further, as we are holding the Applicants to all representations made on the record in this proceeding.

UTU/BLET also ask us to direct Springfield Terminal and its corporate family to negotiate an implementing agreement under New York Dock before closing on the Transaction. The requirement in New York Dock that an implementing agreement be negotiated prior to consummation of a transaction presumes that the carrier is capable of making the required “full and adequate statement” of the expected labor changes before the transaction is consummated, including an “estimate of the number of employees in each class to be affected by” the transaction.²⁸ In some consolidation proceedings subject to New York Dock, the effect of the

²⁶ By letter filed September 29, 2008, Applicants notified the Board that a dispute between Springfield Terminal and the Greenbrier Companies, Inc., and Greenbrier Management Services, LLC (Greenbrier Companies), has been settled and that the Greenbrier Companies have withdrawn their request for appointment of a receiver for Springfield Terminal and B&M. The civil complaint in that dispute was attached to UTU/BLET's comments.

²⁷ Applicants' Reply, at 6. Applicants point out that employees would not be entitled to anything further even if we were to accept the labor parties' view that the entire Transaction must be considered as a whole for the purpose of applying our labor protection conditions.

²⁸ See New York Dock, 360 I.C.C. at 85 (Article I, section 4(a) of the conditions).

transaction on employees is readily apparent, allowing carriers to provide statements of labor changes and use them as a basis for negotiating an implementing agreement prior to closing the transaction. Here, however, for the foreseeable future, there will be no adverse effect because work will continue to be performed under contract by the same Springfield Terminal employees who are performing it now. Because we see no basis for negotiation of an implementing agreement until Applicants decide to implement labor changes that are related to the Transaction, we will not require that Applicants commence negotiations now. If such a decision is made, Applicants will be required to proceed in good faith under the notification and negotiation provisions of Article I, section 4 of the New York Dock conditions before they implement the employment changes. At such a time, issues involving hiring priority and the preservation of collective bargaining rights agreement will be resolved, either in the implementing agreement or by arbitration under the New York Dock conditions.

Passenger Service

Amtrak supports the Transaction. According to Amtrak, the Transaction would help passenger service by: (a) improving a line between Mechanicville and Hoosick Junction, NY, which would be part of a planned passenger service route between Albany, NY, and Rutland, VT; and (b) facilitating the introduction of passenger service over Springfield Terminal's line between Springfield and East Northfield, MA, by transferring that line to PAS with its enhanced financial resources. Amtrak has not objected to PAS's plan to assume Springfield Terminal's right to operate over Amtrak's line between Springfield, MA, and New Haven, CT.

EOTPW/MBTA and Applicants have settled issues arising out of PAS's plan to assume the rights of Springfield Terminal and B&M to operate over certain state-owned lines used for passenger service in Massachusetts. Under the Transaction, PAS would assume B&M's easement for freight service over two connecting segments of track owned by MBTA at the eastern end of the Patriot Corridor: (1) the Fitchburg Main Line between Fitchburg and Ayer (15.8 miles) and between Ayer and Littleton (2.3 miles); and (2) the Greenville Branch (a/k/a Groton Industrial Track) between Ayer and Groton (5.0 miles). PAS would also assume B&M's easement to operate in a railroad yard in East Deerfield, MA, that is owned by EOTPW. By letter filed on October 20, 2008, Norfolk Southern, on behalf of EOTPW/MBTA and itself, notified us that: (1) those parties have agreed on "the issues deemed essential to each party"; and (2) EOTPW/MBTA have withdrawn their objections to the Transaction provided that the settlement agreement described in that letter is imposed as a condition for approval of the Transaction. The terms of their agreement (the Settlement Agreement of October 20, 2008) are incorporated into our decision by reference.²⁹

²⁹ EOTPW/MBTA consented to the assignment to PAS of Springfield Terminal's and B&M's easements to operate over the two connecting segments of track and the East Deerfield Yard. In return, Applicants agreed to: (a) compliance with all of Springfield Terminal's and B&M's obligations under those easements; (b) participation in joint capacity studies of the investments that may have to be made to allow for increases in the numbers of both freight and passenger service trains that (i) both parties agree will take place at a minimum and (ii) may
(continued . . .)

We encourage the settlement of such issues through negotiations. We will impose the terms of the Settlement Agreement of October 20, 2008, as a condition to our approval of the Transaction because the parties have requested it. The trackage rights granted by EOTPW/MBTA permit PAS to operate over lines necessary for it to offer service that is more efficient and competitive with the single-line service offered by CSXT.

Related Notices of Exemption

We are also allowing the exemptions proposed in the related notices of exemption to take effect on the effective date of this decision.³⁰ The actions proposed in these notices satisfy the exemption criteria and, as discussed in this decision, are consistent with the statutory criteria that apply to the overall Transaction. As discussed above, we will impose the standard N&W labor protection conditions on the related Sub-No. 2 and Sub-No. 3 exemptions.

STB Finance Docket No. 35147 (Sub-No. 1). On June 27, 2008, PAS filed a notice of exemption pursuant to 49 CFR 1150.35(a) for authority to acquire and to operate the lines and trackage rights that are at issue in this proceeding. In particular, B&M would contribute certain railroad lines in Massachusetts, New York, Vermont, New Hampshire and Connecticut, totaling approximately 238 route miles. Springfield Terminal would assign to PAS trackage rights Springfield Terminal currently holds over certain lines of MBTA, NECR, CP, Amtrak, CSXT, and MNCR, totaling approximately 198 route miles.

STB Finance Docket No. 35147 (Sub-No. 2). On May 30, 2008, Applicants filed, as part of their primary application, a notice pursuant to the class exemption at 49 CFR 1180.2(d)(7) and 1180.4(g) for Norfolk Southern to acquire overhead trackage rights over approximately 151.33 miles of track that would be owned or operated by PAS between Mechanicville, NY, and Ayer, MA. According to Norfolk Southern, these trackage rights would enable Norfolk Southern to provide direct rail transportation of intermodal traffic to and from the existing intermodal terminal at Ayer and the new automotive terminal that the Applicants propose to construct at nearby San Vel, MA, in the event that PAS fails to provide haulage services at the service level required under the Transaction Agreement. Norfolk Southern would not exercise any of the trackage rights until the later of (1) the effective date of the notice of exemption (including compliance with any conditions imposed on the exemption by the Board) or (2) the closing of the agreements for which the Board's approval is being sought in the primary application. As

(. . . continued)

eventually exceed the numbers to which they have agreed; and (c) continued negotiation in good faith over the conveyance of passenger trackage rights over, and/or the sale of, certain rail lines owned by PARI subsidiaries and other issues. The parties also settled the issue of Springfield Terminal's arrearages.

³⁰ We have taken this approach to related notices of exemption in other consolidation transactions. See, e.g., Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178 (STB served Feb. 3, 2003).

discussed above, we are imposing the standard N&W labor protection conditions on this exemption.

STB Finance Docket No. 35147 (Sub-No. 3). On May 30, 2008, Applicants filed, as part of their primary application, a notice pursuant to the class exemption at 49 CFR 1180.2(d)(7) and 1180.4(g), for Springfield Terminal to acquire overhead trackage rights over approximately 6.4 miles of track that would be owned by PAS between Willows and Harvard Station, MA. These trackage rights would enable Springfield Terminal to provide direct rail transportation for its own account between its current lines east of CPF 312 and its current line south of Harvard Station. These trackage rights also would enable Springfield Terminal to continue to interchange traffic on its own account directly with CSXT and the P&W at points south of Harvard Station. Springfield Terminal would not exercise any of the trackage rights until the later of (1) the effective date of the notice of exemption (including compliance with any conditions imposed on the exemption by the Board) or (2) the closing of the agreements for which the Board's approval is being sought in the primary application. As discussed above, we are imposing the standard N&W labor protection conditions on this exemption.

Request for a Declaratory Order Under 49 U.S.C. 11321

Section 11321 provides that a rail carrier participating in a transaction approved by the Board under section 11323 is exempt from all other law to the extent necessary to carry out the transaction and operate the assets acquired in the transaction. This agency has interpreted section 11321 as giving carriers the right to abrogate existing contractual terms if necessary. In their application (at 38, citation omitted), Applicants made the following request:

PAS's use of the trackage rights now held by Springfield Terminal and to be assigned by it to PAS is essential to the Transaction and the realization of its benefits. While Applicants expect to obtain consents to all such assignments from the owners of the lines in question, Applicants request that the Board's order approving the Application include a declaratory order pursuant to 49 U.S.C. § 11321(a) that PAS and any contract operator of PAS Lines will have authority to conduct operations over the trackage rights lines as fully and to the same extent as Springfield Terminal could, notwithstanding any clauses in any such trackage rights agreements limiting or prohibiting Springfield Terminal's unilateral assignment of its operating rights to another person.

As discussed earlier, NECR and Applicants have reached an agreement under which NECR will consent to the assignment from the PARI system to PAS of trackage rights over NECR's Connecticut River Line. See p. [12], supra. EOTPW/MBTA have also settled the issues relating to the assignment of B&M and Springfield Terminal easements. Accordingly, the request for a declaratory order has been rendered moot with respect to the assignments referred to in the aforementioned two settlement agreements. To the extent that Applicants seek a declaratory order with respect to other assignments, we will grant it. The assignments proposed in the Transaction are necessary to carry out a Transaction that is being approved under the statutory provisions covered by section 11321(a) and to operate the PAS lines.

Pooling Authority

In their application (at 38-39), Applicants describe the Divisions Agreement by which Springfield Terminal would establish rates and transportation contracts and ancillary charges for PAS, including rates and contracts for through movements interlined with other carriers, Norfolk Southern and Springfield Terminal. They seek approval under the pooling provisions of 49 U.S.C. 11322 to the extent that such approval may be needed.

It is not apparent from the face of the Application or the Transaction documents why pooling authority would be necessary to effectuate the Transaction. This agency has long held that pooling authority is necessary only for arrangements between parties that would otherwise be competitors. See Canadian Nat'l Ry, Grand Trunk et al.—Control—IL Central Corp. et al., 4 S.T.B. 122 (1999). Here, it does not appear that the Transaction is an arrangement between parties that would otherwise be competitors but for the Transaction. The purpose and effect of this end-to-end Transaction is merely to improve the flow of traffic interchanged between the parties over the Patriot Corridor, and Applicants have not explained how Springfield Terminal's operation of PAS under contract with that carrier could alter this purpose and effect. Parties can easily return to the Board to request approval if a pooling agreement is needed in the future.

Environmental Issues

The Requirements of NEPA. The National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), requires that the Board examine the environmental effects of proposed federal actions and inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Under NEPA, the Board must consider potential beneficial and adverse environmental effects in reaching its decision. The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential negative environmental impacts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, the Board may conclude that other values outweigh the environmental costs. Id.

Under both the regulations of the President's Council on Environmental Quality and our own environmental rules, actions are separated into classes that prescribe the level of documentation required in the NEPA process depending on the likelihood of significant environmental effects. Actions that generally have significant effects on the environment require the preparation of a full Environmental Impact Statement (EIS).³¹ Actions that may, or may not, have a significant impact ordinarily require the preparation of a more limited Environmental Assessment (EA).³² Finally, actions whose environmental effects are ordinarily insignificant

³¹ See 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a)(1).

³² See 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b).

normally may be excluded from NEPA review across the board, without a case-by-case review (“categorical exclusion”).³³

The Board generally prepares an EA in mergers, acquisitions or changes of control under 49 U.S.C. 11323 where the proposal would exceed certain thresholds -- generally an increase in rail traffic of at least 3 or 8 trains a day or 100% in traffic (measured in gross ton miles annually). 49 CFR 1105.6(b)(4); 49 CFR 1105.7(e)(4), (e)(5). There normally is no formal environmental review in mergers or acquisitions that do not meet these thresholds, 49 CFR 1105.6(c)(2)(i), although the Board may reclassify a particular transaction if the circumstances warrant it, 49 CFR 1105.6(d).

The Environmental Review Process Here. In their application, Applicants stated that the Transaction would have only insignificant environmental effects and therefore would not require a formal environmental review under NEPA. In June 2008, after consultation with the Board’s Section of Environmental Analysis (SEA), Applicants prepared and circulated for public review and comment an Environmental Appendix providing additional details and explanation in support of their assertion. In response, a number of parties filed comments expressing environmental concerns. In light of these concerns, Applicants consulted with SEA again and proposed that an EA be prepared that would address all relevant environmental issues raised by the proposed Transaction. In a decision served September 25, 2008, the Board agreed that an EA was warranted.

SEA served an EA on November 14, 2008, that thoroughly evaluated the potential environmental impacts of the Transaction (including activities related to the construction and operation of the two new rail facilities that are planned—the Mechanicville Facility at Mechanicville, NY (near Albany), and the San Vel Automotive Facility, in Ayer, MA),³⁴ as well as the no-action alternative.³⁵ The EA concluded that the Transaction would have no significant environmental effects with the environmental mitigation that SEA recommended. Notice of the EA was published in the Federal Register, and copies were sent to approximately 360 recipients, including federal and state agencies, government entities and other interested parties. Comments were received from United States Senators Edward M. Kennedy (MA) and John F. Kerry (MA), United States Representatives Kirsten Gillibrand (NY), Niki Tsongas (MA), John W. Olver (MA), and James McGovern (MA), the U.S. Environmental Protection Agency, 1 town in New

³³ See 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

³⁴ The EA addressed effects on the local road network, grade crossing delay and safety; land use; socio-economics; geology and soils; water, biological, energy and cultural resources; environmental justice populations; air quality and climate; noise and vibration; and existing hazardous waste sites. The EA also included an analysis of potential cumulative effects.

³⁵ Under the no-action alternative, SEA assessed rail operations that would take place on the existing rail infrastructure if the proposed Transaction did not occur.

York, 2 towns in Massachusetts,³⁶ 3 state agencies,³⁷ and 2 members of the general public.³⁸ The comments sought various clarifications and proposed mitigation conditions.

On January 30, 2009, SEA issued a Post EA that specifically responds to the public comments (Chapter 1), revises and updates certain information in the EA (Chapter 2), and sets forth SEA's final recommended mitigation, including additional mitigation developed in response to comments on the EA (Chapter 3).

Our Conclusions on the Environmental Issues. After reviewing the entire environmental record, we adopt all of SEA's analysis, recommendations, and conclusions, including those not specifically discussed here. We are satisfied that SEA took the requisite "hard look" at potential environmental impacts and accurately identified and independently evaluated the potential environmental effects associated with the project. Based on the environmental record, we conclude that, with the environmental mitigation conditions set forth in the Post EA, all of which we adopt (see Appendix B), the proposed Transaction will have no significant environmental impacts. Therefore, preparation of an EIS is not required.

As the EA and Post EA show, the Transaction should produce substantial transportation benefits. According to applicants, the Transaction will enhance the Patriot Corridor in New England on the heavily used main line between Mechanicville and Ayer. Rail service in New England currently is constrained by the capacity of certain rail lines, lack of needed yard facilities, and speed restrictions on sections of some lines. By enhancing the existing rail infrastructure on the main line running from Mechanicville across Massachusetts to Ayer, the Transaction should allow rail traffic in the New England region to move faster and more safely and reliably. See EA at 1-2; Chapter 2; Post EA at S-4.

The environmental impacts associated with the Transaction are expected to be minimal. As the EA explains, no substantial changes in railroad operations or rail traffic patterns are anticipated. Effects on local roadways and intersections in the vicinity of the two new proposed rail facilities and the existing intermodal facility in Ayer (where improvements are planned) should be minor. EA at S-2. The Transaction is expected to decrease truck traffic in the area by 19,000 trucks per year by 2012 as shippers choose to ship their goods using the more efficient rail service that would be available to them as a result of the Transaction. EA at 3.8-5. Because there is a substantial fuel efficiency advantage to rail versus truck transportation (railroads are, on average, at least 3 times more fuel efficient than trucks on a ton-mile basis), the Transaction likely would result in a decrease in overall energy consumption and, thus, an overall reduction in air pollution emissions from current operations. EA at 3-85 to 3-86. Existing conditions for grade-crossing delay and safety also are expected to improve. EA at S-2.

³⁶ The Town of Halfmoon, NY, the Town of Ayer, MA, and the Town of Royalton, MA Board of Selectmen.

³⁷ NYSDOT, Connecticut DOT, and the Vermont Historic Preservation Office.

³⁸ Comments were also received from the CIRSM, which do not relate to environmental issues.

The primary potential environmental impacts are related to the proposed new Mechanicville Facility and the San Vel Automotive Facility. But as explained in more detail in the EA, the Mechanicville Facility would occupy a currently unused site in an industrial area that was primarily used as rail yards some years ago. The site of the San Vel Automotive Facility has already been designated for development of an automobile transload facility and is the subject of a consent decree entered into with the Town of Ayer (“Ayer Consent Decree”), which includes extensive environmental mitigation conditions.³⁹ Therefore, the environmental impacts of the construction and operation of these facilities and planned improvements to the Ayer Intermodal Facility are not expected to be significant.

As explained in the Post EA, our environmental conditions are reasonable and feasible mitigation to address the environmental concerns that have been raised about the various facilities. Condition 18 requires the Applicants to abide by the conditions set forth in the Ayer Consent Decree. In addition, as requested by New York State authorities, Applicants must consult with NYSDOT in designing proposed highway access at the Mechanicville Facility and must comply with all applicable regulations of the New York State Department of Environmental Conservation (NYSDEC) in the event that hazardous waste sites subject to NYSDEC oversight are encountered during construction of the facility.⁴⁰ In response to concerns expressed by the Town of Halfmoon, Condition 2 requires the Applicants to incorporate appropriate measures into the design of the Mechanicville Facility to minimize the impacts of the facility’s lighting on adjacent residential areas.

There is also extensive mitigation (Conditions 4 to 13, 18) to protect water resources during the construction and operation of the Mechanicville and San Vel facilities (including conditions involving wetlands and stormwater pollution prevention, and the requirement that Applicants comply with the provisions of the Ayer Consent Decree related to prevention of seepage of contaminants into the soil and groundwater). We agree with SEA’s conclusion (Post EA at S-8) that, with this mitigation, impacts to water resources will be minor.

In sum, we conclude that the mitigation conditions in the Post EA are adequate to prevent the planned construction and operation of the Mechanicville and San Vel facilities from having any significant environmental impacts.

³⁹ Guilford Rail Systems (the prior name for PARI) and the Town of Ayer entered into the Ayer Consent Decree on July 24, 2003, after lengthy litigation before the Board and the United States District Court for the District of Massachusetts in No. 06-11191-DPW, Boston and Maine Corp. v. CSX Transportation, Inc. The Ayer Consent Decree includes a comprehensive set of environmental mitigation measures for the construction and operation of the San Vel Automotive Facility and provides that the Town of Ayer will not interfere with the railroad’s development of the site.

⁴⁰ Conditions 1 and 3. See also Condition 16 (requiring the Applicants, in planning for the construction of the Mechanicville Facility, to address relevant provisions of NYSDOT’s manual on environmental procedures concerning precautionary measures to avoid the spread of invasive species during construction).

It is ordered:

1. The application is approved, subject to the following conditions:

(a) The applicable New York Dock and N&W labor protection conditions;

(b) Terms of the settlement agreements between Applicants and RailAmerica, and Applicants and EOTPW/MBTA;

(c) Applicants must adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision;

(d) Norfolk Southern must notify the Board 30 days before exercising its trackage rights to haul intermodal and automotive traffic directly over PAS lines in the event of a “Major Service Standard Failure” as defined in the Master Norfolk Southern Joint Use Agreement; and

(e) The environmental conditions set forth at Appendix B.

2. The following related transactions are exempted from regulation under 49 U.S.C. 10502:

(a) In STB Finance Docket No. 35147 (Sub-No. 1), the acquisition and operation referenced in the notice filed on June 27, 2008, pursuant to the class exemption at 49 CFR 1150.35.

(b) In STB Finance Docket No. 35147 (Sub-No. 2), the trackage rights referenced in the notice filed on May 30, 2008, pursuant to the class exemption at 49 CFR 1180.2(d)(7) and 1180.4(g), subject to the N&W labor protection conditions.

(c) In STB Finance Docket No. 35147 (Sub-No. 3), the trackage rights referenced in the notice filed on May 30, 2008, pursuant to the class exemption at 49 CFR 1180.2(d)(7) and 1180.4(g), subject to the N&W labor protection conditions.

3. Pursuant to 49 U.S.C. 11321(a) and subject to the settlement agreements between (a) Applicants and EOTPW/MBTA and (b) Applicants and NECR, PAS and any contract operator of PAS Lines will have authority to conduct operations over the trackage rights lines as fully and to the same extent as Springfield Terminal could, notwithstanding any clauses in any such trackage rights agreements limiting or prohibiting Springfield Terminal’s unilateral assignment of its operating rights to another person.

4. Applicants’ request for pooling authority under 49 U.S.C. 11322 is denied.

5. Applicants must comply with all the conditions imposed in this decision whether or not such conditions are specifically referenced in these ordering paragraphs.

6. Any conditions that were requested by any party in this proceeding that have not been specifically imposed in this decision are denied.

7. This decision is effective on April 9, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

Appendix A

ABBREVIATIONS

Amtrak	National Railroad Passenger Corporation
AUL	Activity and Use Limitation
Batten Kill	Batten Kill Railroad
B&M	Boston and Maine Corporation
BMWE/BRS	Brotherhood of Maintenance of Way Employes Division/IBT and Brotherhood of Railroad Signalmen
CaroVail	CaroVail, a division of Carolina Eastern, Inc.
CIRSM	Committee to Improve Rail Service in Maine
CN	Canadian National Railway Company
CP	Canadian Pacific Railway Company
CPR	Clarendon & Pittsford Railroad
Connecticut DOT	Connecticut Department of Transportation
CSXT	CSX Transportation, Inc.
EOTPW	Commonwealth of Massachusetts' Executive Office of Transportation and Public Works
GATX	GATX Corporation
GMR	Green Mountain Railroad
IAMAW/IBEW	International Association of Machinists and Aerospace Workers and International Brotherhood of Electrical Workers
LSP	Licensed Site Professional
MBTA	Massachusetts Bay Transportation Authority
MDEP	Massachusetts Department of Environmental Protection

MER	Morristown & Erie Railway, Inc., d/b/a Maine Eastern Railroad
MNCR	Metro North Commuter Railroad
Milford-Bennington	Milford-Bennington Railroad Company, Inc.
MMA	Montreal, Maine & Atlantic Railway, Ltd.
NECR	New England Central Railroad
NESR	New England Southern Railroad Company
Norfolk Southern	Norfolk Southern Railway Company
NYSDEC	New York State Department of Environmental Conservation
NYSDOT	New York State Department of Transportation
PARI	Pan Am Railways, Inc.
PAS	Pan Am Southern, LLC
Pioneer Valley	Pioneer Valley Railroad Company, Inc.
P&W	Providence and Worcester Railroad Company
SEA	The Board's Section of Environmental Analysis
Springfield Terminal	Springfield Terminal Railway Company
SWPPP	Storm Water Pollution Prevention Plan
U.S. Clay Producers	U.S. Clay Producers Traffic Association, Inc.
UTU/BLET	United Transportation Union/Brotherhood of Locomotive Engineers and Trainmen
VR	Vermont Railway
VRS	Vermont Railway System
VTrans	Vermont Agency of Transportation
WCR	Washington County Railway

Appendix B

ENVIRONMENTAL CONDITIONS

Transportation

- 1) Applicants shall consult with NYSDOT to address NYSDOT's concerns about the construction of the proposed highway access to Route 67 at the proposed Mechanicville Facility.

Land Use

- 2) Applicants shall incorporate into the final design for the proposed Mechanicville Facility appropriate measures, including the use of down-lighting, to minimize the impacts of the facility's lighting onto residential areas adjacent to the proposed Mechanicville Facility.

Hazardous Waste Sites

- 3) Applicants shall comply with all applicable NYSDEC regulations in the event that any hazardous waste sites subject to NYSDEC oversight are encountered during construction of the proposed Mechanicville Facility.

Water Resources

- 4) Applicants shall complete delineation of all wetlands in the area of potential impact associated with the proposed Mechanicville Facility and the proposed San Vel Automotive Facility before final design of the respective facility, and shall negotiate compensatory mitigation to compensate for unavoidable impacts to jurisdictional wetlands, if any, as part of the Clean Water Act Section 404 permit for placement of fill in wetlands, to be issued by the United States Army Corps of Engineers.
- 5) As part of the Section 404 Clean Water Act process, Applicants shall comply with requirements of a Section 401 Water Quality Certification, if such certification is found to be necessary, from NYSDEC (for the Mechanicville Facility) and the Massachusetts Department of Environmental Protection (MDEP) (for the San Vel Automotive Facility).
- 6) Applicants shall design the proposed Mechanicville Facility and the proposed San Vel Automotive Facility to avoid and minimize impacts to wetlands, to the extent practicable.
- 7) Applicants shall implement and comply with the terms and conditions of Stormwater Pollution Prevention Plans (SWPPPs) for the proposed Mechanicville Facility, consistent with applicable State Pollutant Discharge Elimination System requirements, and the proposed San Vel Automotive Facility, consistent with applicable National Pollutant Discharge Elimination System requirements under the Clean Water Act. The final SWPPP and Stormwater Management Report for the San Vel Automotive Facility shall include specific parameters for the monitoring well

network including at a minimum: chloride, volatile organic compounds, dissolved metals, and basic field parameters such as pH, conductivity, and temperature.

- 8) Applicants shall use silt fences during construction of the proposed Mechanicville Facility and the proposed San Vel Automotive Facility, to minimize or avoid the potential erosion of exposed soils/stockpiles and the delivery of fine sediments to surface waters and to avoid impacts to waters beyond the respective project footprints.
- 9) During construction of the proposed Mechanicville Facility and the proposed San Vel Automotive Facility, Applicants shall use water as needed to control fugitive dust emissions.
- 10) During construction of the proposed Mechanicville Facility and the proposed San Vel Automotive Facility, Applicants shall conduct land clearing activities only in areas where earthwork is necessary; shall reuse topsoil wherever practicable, and stockpile topsoil for application during reclamation of disturbed areas; and shall restore disturbed areas as soon as practicable after construction ends. Applicants shall also use stabilization fabric on created earthen slopes having a slope steeper than 2:1 to control erosion.
- 11) During construction of the proposed Mechanicville Facility and the proposed San Vel Automotive Facility, Applicants shall preserve existing vegetation where practicable, especially near wetlands and other waters. If weather or season precludes the prompt reestablishment of vegetation, Applicants shall implement temporary erosion control measures.
- 12) During or after construction of the proposed Mechanicville Facility and the proposed San Vel Automotive Facility, Applicants shall revegetate the bottom and sides of drainage ditches using natural recruitment from native seed sources in the stockpiled topsoil or a seed mix free of invasive plant species. Such restoration is for the rapid and permanent reestablishment of native ground cover on disturbed areas, to prevent soil erosion and minimize delivery of fine silt particles to surface waters.
- 13) Applicants shall store any hazardous substances related to construction in a secure location when not in use, and shall dispose of all construction waste at approved disposal facilities.

Biological Resources

- 14) Applicants shall consult with the Massachusetts Natural Heritage and Endangered Species Program to address its concerns about the state-protected threatened Blanding's Turtle, and shall abide by all reasonable terms and conditions, if any, that may result from the Massachusetts Natural Heritage and Endangered Species Program review process for construction activity within a Priority Habitat.
- 15) Applicants shall design the proposed San Vel Automotive Facility to avoid and minimize impacts to potential habitat for the Blanding's Turtle, to the extent practicable.
- 16) During the final design process for the proposed Mechanicville Facility, Applicants shall address relevant provisions of NYSDOT's Environmental Procedures Manual

in connection with issues related to appropriate precautionary measures to avoid the spread of invasive species during construction.

Cultural Resources

- 17) Applicants shall not initiate construction in areas potentially affected by historical properties within the proposed Mechanicville Facility footprint, or take any steps to alter the historic integrity of historic properties, including sites, buildings, structures, and objects within the project Area of Potential Effect that are eligible for listing or listed in the National Register of Historic Places, until the Board's responsibilities under the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, have been satisfied.

Consent Decree

- 18) Applicants shall abide by the conditions set forth in the Consent Decree between Guilford Rail Systems and the Town of Ayer, dated July 24, 2003, with respect to construction and operation of the proposed San Vel Automotive Facility.

A negotiated Consent Decree was previously entered into by Guilford Rail Systems (“Guilford,” a prior name of Pan Am Railways Inc.’s [PARI] railroad operating group) and the Town of Ayer that resolved litigation to address potential environmental impacts. The proposed Transaction now pending before the Board does not alter any terms of that Consent Decree or otherwise alter the relationship between those entities. PARI is the holding company for the railroad operating group formerly known as Guilford Rail Systems, and Pan Am Southern, LLC (PAS) would be a successor to PARI as to the terms of the Consent Decree. As such, Applicants do not dispute that PAS would be bound by the terms of the Consent Decree. Similarly, the proposed Transaction now pending before the Board does not alter the Consent Decree as it applies to the Town of Ayer.

The Town of Ayer and Guilford, after lengthy litigation both before the Board and the U.S. District Court for the District of Massachusetts, entered into a Consent Decree, lodged in the U.S. District Court on July 24, 2003. By the terms of the Consent Decree, the Town of Ayer agreed not to interfere with railroad development on the site of the proposed San Vel Automotive Facility, and Guilford⁴¹ agreed to comply with the terms agreed to in Exhibit A of the Consent Decree. After approval and consummation of the proposed Transaction, PAS would be a successor to these entities. The conditions imposed on Guilford as set forth in the Consent Decree are as follows:⁴²

- CD1. In constructing an Auto Unloading Facility (hereinafter “the Facility”) in Ayer, Massachusetts at what is known as the San Vel site, Guilford Transportation

⁴¹ The terms of the Consent Decree concern only the following entities: Boston and Maine Corporation, Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. (now known as PARI).

⁴² Once the Transaction is approved and consummated, PAS will assume the obligations noted below on behalf of Guilford.

Industries Inc., Boston and Maine Corporation, and Springfield Terminal Railway Company (hereinafter “Guilford”) will install catch basins designed for a minimum infiltration rate of 0.5 inches per hour, with oil-gas separator hoods, consistent with design drawing Sheet 6 of 7 dated 1/11/2000, titled Willow Park, Ayer, Massachusetts, Miscellaneous Details.

- CD2. Guilford will conduct test pits in the vicinity of the retention basins to confirm that the soils are consistent with test borings previously submitted to the Town of Ayer (see prior test results). The test pit results will be submitted to the Town of Ayer (hereinafter “Ayer”) within one week of receipt by Guilford.
- CD3. Guilford will install a monitoring well network around the facility and will measure groundwater quality twice a year for as long as the facility is in operation and groundwater quantity twice a year for four years after completion of the facility. These test results will be submitted to Ayer within one week of receipt by Guilford.
- CD4. Guilford will comply with all applicable requirements of the Massachusetts Contingency Plan with regard to any releases of hazardous materials at the site.
- CD5. Guilford will develop a Stormwater Pollution Prevention Plan consistent with EPA stormwater regulations.
- CD6. Guilford agrees to continue to plow that portion of the emergency access road provided to Wagon Road residents that is on Guilford property.
- CD7. Guilford will continue to honor its agreements with Wagon Road residents regarding use of that private crossing and emergency access issues.
- CD8. Guilford will comply with applicable building, electrical, fire, and plumbing codes except to the extent that such codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unreasonably burdens interstate commerce.
- CD9. In operating the Facility, Guilford will comply with applicable Federal noise control requirements.
- CD10. Guilford will comply with applicable state best management practices during construction of the Facility.
- CD11. Guilford will provide Ayer with informational copies of construction plans and precautions being taken for the construction of the Facility not less than 60 days before initiation of construction of the Facility.
- CD12. Guilford will provide Ayer with informational copies of as-built plans for the Facility not more than 60 days after completion of construction of the Facility.
- CD13. Should Guilford develop the San Vel site for alternative uses, Guilford will provide Ayer with informational copies of construction plans and precautions being taken for any additions, improvements, or changes to the San Vel site. Guilford will provide this information to Ayer no less than 60 days prior to initiation of construction and will comply with those conditions set forth herein

that are material to the alternative uses. Ayer may object, however, Guilford does not agree that Ayer has the right to do so.

- CD14. Should Guilford develop the San Vel site for alternative uses, Guilford will provide Ayer with informational copies of as-built plans and precautions being taken for any additions, improvements or changes to the San Vel site. Guilford will provide this information to Ayer no more than 60 days after completion of construction.
- CD15. Guilford will install a septic system at an appropriate location at the site and may connect to the Town sewer system in the future. Any septic system must comply with Title 5 regulations.⁴³
- CD16. Guilford will install a geomembrane liner under the locomotive area. Testing of the integrity of the liner will be performed at Guilford's discretion. The test results will be provided to Ayer within one week of Guilford's receipt of the test results.
- CD17. Guilford will not remove snow from the site except for emergency situations.

Notice of Activity and Use Limitation

- 19) Applicants shall abide by the conditions set forth in the Notice of Activity and Use Limitation (AUL) filed with the Middlesex County Registry of Deeds on January 27, 1999, and amended on May 24, 2002, regarding the process to be followed if any disturbance of the Notice of Activity and Use Limitation area is anticipated to occur as part of the development of the proposed San Vel Automotive Facility.

A portion of the proposed San Vel Automotive Facility property is subject to an AUL that was the result of a release of oil and/or hazardous material in January 1998 at the "B&M Property" on the east side of Willow Road (former San Vel Sand and Gravel Quarry), owned by Guilford Transportation, Inc., a prior name of PARI's railroad operating group. The area covered by the AUL is 12,439 square feet (AUL Area) and is located within the footprint of the proposed San Vel Automotive Facility. MDEP has identified the disposal site as Release Tracking Number 2-12082. Applicants acknowledge that they are obligated to abide by the conditions in the AUL if any disturbance of the AUL Area is anticipated to occur as part of the development of the proposed San Vel Automotive Facility.

Permitted Activities and Uses Set Forth in the AUL

The AUL permits the following uses and activities to occur in the AUL Area:

- (i) Retail or commercial uses (including office space, excluding daycare);
- (ii) Industrial uses; and

⁴³ Under current plans, San Vel Automotive Facility would be connected to the Town of Ayer's sewer system immediately, with no septic system.

- (iii) Such other activities or uses which, in the opinion of a Licensed Site Professional (LSP), shall present no greater risk of harm to health, safety, public welfare or the environment than the activities and uses set forth in this paragraph.

Activities and Uses Inconsistent with the AUL

The AUL identifies activities and uses that are inconsistent with the objectives of the AUL, as follows:

- (i) Residential, agricultural, recreational activities, day care, or school uses;
- (ii) Activities and/or uses which are likely to involve the removal and/or disturbance of the pavement in the AUL Area and/or the disturbance of the impacted soil in the AUL Area without prior development of a Soil Management Plan and a Health and Safety Plan in accordance with Obligations (i) and (ii) of this Opinion; and
- (iii) Relocation of the impacted soil in the AUL Area, unless such activity is first evaluated by an LSP who renders an Opinion that states that such relocation is consistent with maintaining a condition of No Significant Risk.

Obligations and Conditions Under the AUL

In accordance with the AUL, the following obligations and/or conditions must be maintained within the AUL Area in order to maintain a condition of No Significant Risk:

- (i) A Soil Management Plan must be prepared by an LSP and implemented prior to commencement of any subsurface activity that is likely to disturb impacted soil within the AUL Area. The Soil Management Plan should describe appropriate soil excavation, handling, storage, transport, and disposal procedures and include a description of the engineering controls and air monitoring procedures necessary to ensure that workers and receptors in the vicinity are not affected by fugitive dust or particulates. On-site workers must be informed of the requirements of the Soil Management Plan, and the plan must be available on-site throughout the course of the project.
- (ii) A Health and Safety Plan must be prepared by a qualified individual sufficiently trained in worker health and safety requirements and implemented prior to the commencement of any activity that is likely to disturb impacted soil within the AUL Area, rendering it more accessible. The Health and Safety Plan should clearly describe the location of the petroleum-impacted soil and specifically identify the type of personal protection (*i.e.*, clothing, respirators), engineering controls, and environmental monitoring necessary to ensure that workers are not exposed to petroleum-contaminated soil through dermal contact, ingestion, and/or inhalation. Workers who may come in contact with impacted soil within the AUL Area must be informed of the location and depth of impacted soil and the requirements of the Health and Safety Plan, and the plan must be available on-site throughout the course of the project.