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SERVICE DATE – NOVEMBER 8, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY
—ACQUISITION AND OPERATION—
CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA, OSWEGO,
JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, N.Y.

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1 in Docket No. FD 36347; Notice of Acceptance of Application;
Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application filed on October 11, 2019, by Bessemer and Lake Erie Railroad Company (B&LE or Applicant).¹ The application seeks Board approval under 49 U.S.C. §§ 11323-25 for B&LE, an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (CNR), to acquire from CSX Transportation, Inc. (CSXT), and to operate approximately 236.3 miles of rail line in New York. This proposal is referred to as the Transaction.

The Board finds that the application is complete and that the Transaction is a minor transaction based upon the preliminary determination that the Transaction clearly would not have any anticompetitive effects and that, if any such anticompetitive effects were found to exist, they would clearly be outweighed by the Transaction's anticipated contribution to the public interest in meeting significant transportation needs. 49 C.F.R. § 1180.2(b)(1)-(2), (c). The Board makes this preliminary determination based on the evidence presented in the application. The Board emphasizes that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding. The Board will carefully consider any claims that the Transaction would have anticompetitive effects.

DATES: The effective date of this decision is November 8, 2019. Any person who wishes to participate in this proceeding as a Party of Record must file, no later than November 25, 2019, a

¹ Applicant initially submitted its application on October 10, 2019. On October 11, 2019, Applicant amended its original submission to correct a signature page that was inadvertently left blank. Accordingly, October 11, 2019 will be considered the filing date of the application for the purposes of this proceeding.

notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by December 9, 2019. Responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the primary application or related filings must be filed by January 8, 2020. See Appendix (Procedural Schedule). A final decision in this matter will be served no later than February 21, 2020. Further procedural orders, if any, would be issued by the Board, if necessary.

ADDRESSES: Any filing submitted in this proceeding must be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Applicant's representative, Claire M. Maddox, Dentons US LLP, 1900 K Street, N.W., Washington, DC 20006; and (4) any other person designated as a Party of Record on the service list notice. As explained below, the service list notice will be issued as soon after November 25, 2019, as practicable.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Applicant is an indirect wholly owned rail carrier subsidiary of CNR that owns and operates approximately 159 miles of railroad lines in Ohio and Pennsylvania. (Appl. 1, 19.) CSXT is a Class I railroad that owns and operates approximately 21,000 miles of railroad lines. (*Id.* at 19.) Applicant seeks the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 to acquire and operate certain CSXT lines, collectively known as the Massena Lines, from Woodard, N.Y., to the U.S.-Canadian border near Fort Covington, N.Y. (Appl. 1-2.) More specifically, these lines consist of CSXT's St. Lawrence Subdivision between CSXT milepost QM 3.0 at or near Woodard and CSXT milepost QM 183.1 at or near Fort Covington, on the U.S.-Canadian border, a distance of approximately 179.2 miles; CSXT's Fulton Subdivision between CSXT milepost QMF 7.2 at or near a connection to CSXT's St. Lawrence Subdivision near Woodard and CSXT milepost QMF 37.95 at or near Fort Ontario, N.Y., a distance of approximately 31 miles; CSXT's Balmat Industrial Track between CSXT milepost QMB 0 at or near a connection with CSXT's St. Lawrence Subdivision near CSXT milepost QM 107 and CSXT milepost QMB 9, a distance of approximately 9 miles; CSXT's Roosevelttown Industrial Track between CSXT milepost QMR 63 at or near a connection with the St. Lawrence Subdivision at Helena, N.Y., and CSXT milepost QMR 68 at or near Roosevelttown, N.Y., a distance of approximately 5 miles; and CSXT's Carthage Branch between CSXT milepost QMC 86.8 at or near a connection with CSXT's St. Lawrence Subdivision near Philadelphia, N.Y., and CSXT milepost QMC 74.7 at or near Regis, N.Y., a distance of approximately 12 miles and CSXT's connection with Mohawk,

Adirondack, and Northern Railroad Corporation. (*Id.* at 21-22.) The Transaction is part of a larger purchase agreement, under which CNR and B&LE have agreed to acquire from CSXT approximately 278.1 miles of rail line (including the 236.3 miles that comprise the Massena Lines) between Beauharnois, Que., and Woodard, pursuant to a Purchase and Sale Agreement (PSA)² that was executed on August 29, 2019.³ (*Id.* at 1-2, 7 & Ex. 2, Purchase & Sale Agreement.)

Applicant states that more than 45% of current carload traffic on the Massena Lines is overhead traffic exchanged between the CN System⁴ and CSXT, for which the Massena Lines provide a direct connection and gateway. (*Id.* at 9.) By acquiring the Massena Lines, Applicant seeks to preserve the CN System's direct connection with CSXT for overhead traffic that currently moves over the Massena Lines and to ensure that traffic using the Massena Lines would continue to move directly between the two systems, rather than through an additional railroad. (*Id.*) Applicant also seeks to improve efficiencies of operations along the Massena Lines and work with customers on the Massena Lines to understand their rail service needs, develop efficient plans for rail operations to their facilities, and help them grow their future businesses. (*Id.* at 10.)

Financial Arrangements. According to Applicant, no new securities would be issued in connection with the Transaction. Applicant states that the only relevant financial arrangement is the payment of the purchase price by CNR and B&LE, as provided in the PSA. (*Id.* at 11.)

Passenger Service Impacts. Applicant states that the Transaction would have no impact on commuter or other passenger rail service, because no such services are provided on the Massena Lines, nor have there been any such services on the lines since at least the establishment of the National Railroad Passenger Corporation (Amtrak) in 1971. (*Id.*, Ex. 15 at 10.)

Discontinuances/Abandonments. Applicant states that it does not plan to abandon or discontinue service on rail lines in the United States as a result of the Transaction. (*Id.*, Ex. 15 at 10.) As discussed below, Applicant states that, before closing, it plans to seek formal discontinuance of its inactive 1989 trackage rights on CSXT's St. Lawrence Subdivision between Fort Covington and Massena, N.Y., under the Board's class exemption procedures at

² Applicant submitted a copy of the PSA with its application and designated the PSA as "highly confidential," thus subject to the provisions of the protective order issued by the Board on October 22, 2019.

³ Applicant identifies CSX Intermodal Terminals, Inc., and St. Lawrence and Adirondack Railway Company, together with CSXT, as "CSX Parties" to the PSA. (Appl. 7.)

⁴ Applicant defines "CN System" as the rail system operated in Canada by CNR and in the United States by CN, which it defines as CNR's U.S. rail operating subsidiaries, including B&LE. (Appl. iv.)

49 C.F.R. § 1152.50 for trackage rights that have not been utilized within the past two years. (Id. at 10-11.)

Public Interest Considerations. Applicant asserts that the Transaction would not result in the lessening of rail competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. (Appl. at 12.) Applicant states that the transaction is an end-to-end line acquisition, with a “principal effect” being the relocation of an interchange point between the CN System and CSXT from Huntingdon, Que., to Woodard, extending the length of the CN System’s haul and shifting operations on the Massena Lines from CSXT to B&LE. (Id.) Applicant notes that the Transaction would not render other trackage duplicative or redundant and that the CN System and CSXT have no network overlap in the United States in the vicinity of the Massena Lines. (Id.)

Applicant asserts that the Transaction would maintain the competitive status quo. According to the Applicant, customers on the Massena Line currently receive direct service from a single carrier, CSXT, and they would not see a reduction in the number of competitive rail options available by substituting direct B&LE service for direct CSXT service. (Id. at 12.) Applicant states that, in 1989, CNR retained trackage rights over the main line between Fort Covington and Massena in connection with the purchase by Consolidated Rail Corporation (Conrail) of what was previously CNR’s line between Massena and Huntingdon. (Id. at 12-13.) As part of that line sale, CNR retained certain limited trackage rights to exclusively serve “present industries [as of 1989] and their successors”; Conrail obtained the exclusive right (held by CSXT since 1999) to serve new industries. Thus, no individual industry on that line segment has ever been served by more than one carrier. (Id.) The 1989 trackage rights also permitted CNR to interchange with the Massena Terminal Railroad Company (MSTR) at Massena. (Id. at 13.) However, Applicant asserts that CNR has neither operated to Massena nor conducted any interchange with MSTR for at least 14 years and that the substitution of B&LE for CSXT as the owner of the Massena Lines would effectuate no meaningful change in the interchange and handling of traffic with MSTR at Massena. (Id. at 14 & V.S. Drysdale 7-8.) As noted above, Applicant states that, before closing, CNR plans to seek formal discontinuance of its inactive 1989 trackage rights under the Board’s class exemption procedures at 49 C.F.R. § 1152.50. (Id. at 13-14.)

Moreover, Applicant asserts that the Transaction would cause no reduction in the number of transloading or intermodal service options. (Id. at 14.) Applicant states that, by maintaining the existing CN System-CSXT gateway over the Massena Lines, without the need for an added interchange with a third rail carrier, the Transaction would preserve existing levels of competition for rail transportation to and from the northeastern United States. (Id. at 15.)

Applicant further states that, following B&LE’s acquisition of the Massena Lines, it would have opportunities to improve the efficiencies of operations along the Massena Lines, such as eliminating two CSXT transfer assignments now operating between Massena and Huntingdon. (Id. at 10.) Applicant contends that elimination of these two transfer assignments

would avoid delays and improve overall efficiency of operations by reducing estimated total transit time by approximately 24 hours. (Id.)

Time Schedule for Consummation. Applicant states that the Transaction is scheduled to be consummated immediately upon satisfaction of all conditions precedent set forth in the PSA, including Board approval of B&LE's application and the Board's approval decision becoming effective. (Id. at 8.)

Environmental Impacts. Applicant states that, pursuant to 49 C.F.R. § 1105.6(c)(1), the Transaction is exempt from environmental reporting requirements because the environmental impacts of the Transaction fall below the thresholds established in 49 C.F.R. § 1105.7(e)(4) and (5). (Id. at 23-25.)

Historic Preservation Impacts. Applicant states that no historical reporting is required under 49 C.F.R. § 1105.8, as rail operations would continue after Applicant's purchase of the Massena Lines, and Applicant has no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. (Id. at 25.)

Labor Impacts. Applicant states that CSXT currently employs 50 employees on the Massena Lines who may be adversely affected by the Transaction. (Id. at 17.) Applicant states that no current CN employees in the United States would be adversely affected by the Transaction. (Id.) B&LE states that it does not have employees in New York and would therefore be hiring an estimated 53 employees to operate the Massena Lines. (Id., Ex. 15 at 11.) B&LE plans to offer priority hiring consideration to CSXT employees working on the Massena Lines in New York. (Id. at 17 & Ex. 15 at 11.)

Applicant states that any employees adversely impacted by the Transaction would be entitled to labor protective conditions in accordance with New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C. 2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

PRIMARY APPLICATION AND RELATED FILINGS ACCEPTED. The Board finds that the proposed Transaction would be a "minor transaction" under 49 C.F.R. § 1180.2(c), and the Board accepts the application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. §§ 11321-26; 49 C.F.R. pt. 1180. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

When a transaction does not involve the merger or control of two or more Class I railroads, the Board's treatment differs depending upon whether the transaction would have "regional or national transportation significance." 49 U.S.C. § 11325. Under 49 C.F.R.

§ 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as “minor”—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as “significant” if neither of these determinations can be made.

Nothing in the record thus far suggests that the Transaction would have anticompetitive effects. The Transaction is an end-to-end acquisition involving approximately 236.3 miles of rail line in the state of New York. As Applicant notes, the Board has held that end-to-end transactions are unlikely to raise competitive concerns. See Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC, FD 35147 et al., slip op. at 5 (STB served Mar. 10, 2009). The application indicates that the Transaction would maintain the competitive status quo, as local customers located on the Massena Lines are exclusively served by CSXT now and would be exclusively served by B&LE following the Transaction. Additionally, it appears that the Transaction would not cause a reduction in the number of transloading or intermodal service options.

Moreover, if anticompetitive effects resulting from the Transaction should later be shown to be likely, they would appear, from the face of the application, to be clearly outweighed by the Transaction’s contribution to the public interest in meeting significant transportation needs. As noted in the application, CSXT announced in June 2018 that it was rationalizing its system by selling several lines, including the Massena Lines, that CSXT identified as not being core to its business and that could be more valuable to other operators well positioned to further improve the lines and better serve local customers. (See Appl. 8-9.) With B&LE acquiring the Massena Lines, the Transaction would ensure that overhead traffic currently moving over the Massena Lines between the CN System and CSXT would continue to move directly between the two systems on that route, rather than via a third, bridge carrier on that route or via a different direct CN System-CSXT gateway that likely would be longer and less efficient than the current route.

Therefore, based on the information provided in the application, the Board finds the proposed Transaction to be a minor transaction under 49 C.F.R. § 1180.2(c). Such a categorization does not mean that the proposed Transaction is insignificant or not of importance. Indeed, after the record in the proceeding is fully developed, the Board will carefully review the proposed Transaction to make certain that it does not substantially lessen competition, create a monopoly, or restrain trade and that any anticompetitive effects are outweighed by the public interest. See 49 U.S.C. § 11324(d)(1)-(2). The Board may also impose conditions to mitigate or eliminate any anticompetitive impacts of the transaction.

PROCEDURAL SCHEDULE. The Board has considered Applicant’s motion for a procedural schedule, filed October 10, 2019. Applicant’s proposed procedural schedule provides 30 days for comments from all parties on the application and 32 days for the concurrent filing of

replies to comments and rebuttal in support of the application. The proposed procedural schedule then provides 85 days after the close of the evidentiary period for the Board to issue its final decision. The Board will adopt a procedural schedule that will allow 31 days for comments on the application and 30 days for replies to comments and rebuttal in support of the application. The Board is required to issue “a final decision by the 45th day after the date on which it concludes the evidentiary proceedings,” 49 U.S.C. § 11325(d)(2), and will do so here.⁵

For further information regarding procedural dates, see the Appendix (Procedural Schedule) to this decision.

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a Party of Record must file with the Board, no later than November 25, 2019, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, and Applicant’s representative.

If a request is made in the notice of intent to participate to have more than one name added to the service list as a Party of Record representing a particular entity, the extra name(s) will be added to the service list as a “Non-Party.” Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 C.F.R. § 1180.4 and any other requirements set forth in this decision.

SERVICE LIST NOTICE. The Board will serve, as soon after November 25, 2019, as practicable, a notice containing the official service list (the service list notice). Each Party of Record will be required to serve upon all other Parties of Record, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each Party of Record will also be required to file with the Board, within 10 days of the service date of the service list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a Party of Record after the service date of the service list notice must have its own certificate of service indicating that all Parties of Record on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not Parties of Record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a Party of Record.

⁵ This notice will be published in the Federal Register on November 8, 2019; all subsequent deadlines will be calculated from this date. Deadlines for filings are calculated in accordance with 49 C.F.R. § 1104.7(a).

SERVICE OF DECISIONS, ORDERS, AND NOTICES. The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the official service list as a Party of Record or Non-Party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at www.stb.gov.

ACCESS TO FILINGS. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). The application and other filings in this proceeding will be furnished to interested persons upon request and will also be available on the Board's website at www.stb.gov.⁶ In addition, the application may be obtained from Applicant's representative at the address indicated above.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application is accepted for consideration.
2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix to this decision. The parties to this proceeding must comply with the procedural requirements described in this decision.
3. This decision is effective on November 8, 2019.

Decided: November 4, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.

⁶ Applicant has submitted a public version and highly confidential version of its application. The public version is available on the Board's website. The highly confidential version may be obtained subject to the provisions of the protective order issued by the Board on October 22, 2019.

**APPENDIX
PROCEDURAL SCHEDULE**

October 10, 2019	Motion for Protective Order and Motion for Establishment of Procedural Schedule filed.
October 11, 2019	Application (amended) filed.
November 8, 2019	Board notice of acceptance of application served and published in the <u>Federal Register</u> .
November 25, 2019	Notices of intent to participate in this proceeding due.
December 9, 2019	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings of DOJ and DOT, due.
January 8, 2020	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the application due.
February 21, 2020	Date by which a final decision will be served.
March 22, 2020 ⁷	Date by which a final decision will become effective.

⁷ The final decision will become effective 30 days after it is served.