

ORIGINAL

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Before the
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347



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

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EVIDENCE AND ARGUMENT IN OPPOSITION

ENTERED
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December 9, 2019
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Public Record

GORDON P. MacDOUGALL
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December 9, 2019

Attorney for Samuel J. Nasca



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Preliminary Statement

Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY, submits this Evidence and Argument in Opposition in the captioned proceeding, in accordance with Surface Transportation Board (STB) Decision No. 1, decided November 4, 2019, served November 8, 2019; and Decision No. 2, decided December 3, 2019, served December 4, 2019.

The evidence submitted herein is the preliminary verified statement of Samuel J. Nasca. It is anticipated to be supplemented on or before December 19, 2019, owing to delay occasioned by the action of the STB in not promptly processing the Notice of Intent to Participate, on behalf of Nasca, for SMART/TD-NY, during a period of approximately 10 days.

This STB proceeding was instituted by its Decision No. 1, served November 8, 2019. The

full text was published in the Federal Register, 84 Fed. Reg. 60468-72 (Nov. 8, 2019). However, Decision No. 1 did not follow the applicant Bessemer & Lake Erie Railroad Company (B&LE)'s October 11, 2014 petition for establishment of a procedural schedule to govern the proceeding (BLE-3). The B&LE petition was based upon 180 days, with service of final decision April 7, 2020, even though the B&LE's schedule petition was unopposed. Instead, the STB, sua sponte, issued an expedited proceeding, providing for a 105 day schedule, so as to require STB conclude issuance of final decision on February 21, 2020, with shortened intermediate filing dates.

Of critical importance for SMART/TD-NY, the STB's Decision No. 1, required that persons desiring to become participants must file notices of intent due November 25, 2019, with any evidence and argument in opposition due 14 days later, on December 9, 2019. The Decision No. 1 said the notices filed November 25 would be used to provide the official service, and required each party of record to file a certificate it had served all its filings upon of all parties of record..

The STB did not acknowledge receipt of the November 25 notice of intent filing of SMART/TD-NY, and examination of the STB website did not indicate the filing.. However, telephone inquiry confirmed that the filing was received, along with a November 26 filing in non-related proceedings, Ex Parte 761/ Ex Parte 722, but that "party" issues were unresolved at the moment, preventing acceptance of the SMART/TD-NY notice, and its November 26 submission in the other proceeding.

Matters were resolved December 3, followed by telephone confirmation, with STB receipt of an additional copy of the notice of intent. The STB's December 4, 2019 Decision No. 2, acknowledged the SMART/TD-NY copy notice, and included SMART/TD-NY in the agency's

contemplated notice to the parties, served that day.

Owing to the short time between December 3-4, and the December 9 due date for opposition evidence and argument, SMART/TD-NY concluded to expedite its ultimate opposition submission by avoiding the delay involved in requesting an extension of the impossible December 9 due date, but to file a preliminary opposition on December 9, and supplement the same at a later date—suggesting December 19. This was mentioned at meeting with applicant counsel on December 3 during examination of the highly confidential application form.. Applicant counsel made no response—either for nor against this procedure.

I. THE PROCEEDING SHOULD BE CLASSIFIED
AS SIGNIFICANT; THE MINOR IS ERRONEOUS

Applicant, B&LE, in its petition for Establishment of Procedural Schedule (BLE-3), filed October 10, 2019, requested the 180-day procedural schedule, which is that normally imposed for a significant transaction. 49 CFR §1180.4(e)(2)(ii). Instead, inasmuch as B&LE sought formal classification as a minor transaction, the STB reduced the 180-day time frame agreeable to applicant and the parties, to a lesser 105-day schedule ordinarily imposed for minor transactions. 49 CFR §1180.4(e)(2)(iii). Decision 1, Appendix. The Board's decision gave absolutely no reason for not adopting the proposed 180-day schedule. Decision 1, merely states the Board has “considered Applicant's motion for a procedural schedule,” but provides only the statutory provision that a minor transaction requires it, citing the 105-day statutory provision, 49 USC 11325(d)(2), along with its 45-day envelope after the conclusion of the evidentiary proceeding. Decision 1, at 6-7. 84 Fed. Reg. at 60471.

The STB's procedural schedule, imposed contrary to the wishes, we believe, of all parties, is

erroneous and particularly irrational in view of the holiday period and, especially, in light of the numerous and expedited ex parte proceedings being conducted virtually simultaneously during the 105-day period.

However, in addition to practical concern for orderly procedures at this time, the STB's termination of minor classification, by itself, is incorrect. (Decision 1, at 5-6). Clearly, the proposed transaction is significant. Division 1, at 1, recognized that its minor determination was preliminary and subject to revision.

1. Regional/National Significance. The transaction is critical to the railroad movement of overhead traffic, in addition to local business. Some 45 percent of the carload traffic on the Massena lines is estimated to be overhead traffic interchanged between CN and CSXT. (Decision 1, at 3). The V.S. Nasca describes the US-Canada traffic routes along the Montreal-New York corridor in eastern New York State. The participation in this proceeding by the Port Authority of New York & New Jersey (Decision 2, at 3), along with its notice of intent, are an important indication of regional and national importance, as is the late-filed (Dec. 6) notice of intent by the New York State Dept. of Transportation.

To the extent the STB's Decision 1 has thus far confined its interest to railroad transportation within the U.S, to or from U.S.-Canada border points, such limited concern is error. Where U.S.-Canada or U.S.-Mexico transportation is involved, the STB must look at the entire railroad rate and its transportation. See: News Syndicate Co. v. New York C.R., 275 U.S. 179 (1927); Lewis-Simas-Jones v. Southern P. Co., 283 U.S. 654 (1931); Great Northern v. Sullivan, 294 U.S. 458 (1935); Porter Co. V. Central Vermont Ry., 366 U.S. 1961; Canada Packers, Ltd. v. Atchison, T. & S.F. Ry., 385 U.S. 182 (1966).

2. Public Interest. There is no showing of any substantial public interest to offset the reduction in competition. CSXT and CN are competitive in serving shippers/receivers located off the Massena lines, although it is believed CSXT serves more customers in the U.S. than does CN. Accordingly, the loss of local business for CSXT will be a loss for CSXT traffic for movement to and from the Massena line. SMART/TD-NY is unaware of any agreement for CN to revise its interchanges and routing off the Massena line in favor of CSXT.

3. Anti-Competitive Effects. There can be no finding that the proposed transaction clearly will not have any anticompetitive effects. There would be a change in the competitive movements for overhead business between U.S. and Canadian ports, not merely between railroad carriers themselves, but also the competition between shippers/receivers over markets and export/import traffic. This marked competition is an important characteristic of carrier competition. This form of carrier competition is demonstrated by V.S. Nasca's reference to the competition between the Massena route and that over Rouses Point Jct. in serving eastern New York State and the North Atlantic ports.


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Samuel J. Nasca

December 9, 2019

VERIFIED STATEMENT
OF SAMUEL J. NASCA

1. My name is Samuel J. Nasca, with offices at 35 Fuller Road, Albany, NY 12205. I serve as New York State Legislative Director for International Association of Sheet Metal, Air, Rail and Transportation Workers/Transportation Division (SMART/TD-NY). SMART/TD is the recent successor to United Transportation Union (UTU), by merger implemented in August 2014, for which I had served the latter as New York State Legislative Director (UTU-NY) at the same address.

2. I have served in a full-time UTU position, and now full-time SMART position, which have been and are now elective offices, continuously since March 1984. My railroad seniority commenced in 1967 on the former Erie-Lackawanna Railroad Company.

3. I am fully familiar with railroad operations in New York State, and with the lines involved in the captioned proceeding, along with connecting railroad operations in adjacent territories.

4. I have read the application, dated October 10, 2019. However, I have been

unable to complete my review, owing to inability to timely consult with counsel concerning certain issues due to uncertainty about SMART/TD-NY participation in the STB proceeding. Our work on the initial evidence, due December 9, had been scheduled, by written correspondence with counsel, to begin November 27, shortly after the November 25 deadline, indicating participants to the proceeding. However, SMART/TD-NY participation was not clarified until the STB's decision served December 4. During the period November 25-December 4, I and counsel suspended work for the proceeding .

Accordingly, I anticipate his verified statement may be supplemented no later than December 19, a ten-day period, with additional evidence.

5. SMART/TD represents persons employed by CSXT on the lines involved that perform work as engineers, conductors, brakemen, and switchmen. My investigation of employment loss, and that estimated by the application's operating plan, is approximately 24 jobs. However, jobs lost on the lines and yards proposed for acquisition by B&LE or other CN System facilities, would not be the total job loss or adverse effect, for they may displace other CSXT employees working on other connecting lines and yards, due to the proposed transaction, and such other CSXT employees on other lines also may stand to be adversely affected by the loss of connecting traffic now flowing over the affected

lines. Moreover, the instant application does not involve the entire transaction set forth in the purchase and sale agreement (PSA). (Appl., p. 21). My understanding of the PSA is that the application seeks STB approval only for 236 miles in New York State, and excludes CSXT operations for some 42 miles between the US-Canada border and Montreal, PQ. It is my further understanding from the Application at pp. 1-2, that CNR is acquiring the Canadian portion of the Massena Lines from the CSX's St. Lawrence & Adirondack Railway Company, located entirely in Canada, generally between Beauharnois, PQ (near Montreal) and the US-Canada border near Fort Covington, NY. I note that the St. Lawrence & Adirondack Railway Company is a party to the PSA.

6. CSXT trains operate over CSXT lines between the Montreal area via Fort Covington, NY and Syracuse and over CSXT lines to the New York, Philadelphia, and Baltimore port areas. The substantial CSXT operations are mentioned, in part, in the operating plan described and projected in the application, at pp. 2-4, 6-10.

7. This CSXT line operation between Fort Covington, NY-New York, NY via DeWitt (Syracuse), is competitive with the parallel D&H-CSXT lines between Rouses Point Jct. NY-New York, NY. Both CN and CP serve the Montreal area, and have operations to and from U.S. Border points. Although both routes serve

local traffic, there is understood to be keen competition between the two parallel routes with respect to overhead business. The predecessor to SMART/TD-NY, the former UTU/NY, participated in FD 35348, CSX Transportation, Inc. and Delaware and Hudson Railway Company, Inc.-Joint Use Agreement, decided and served October 22, 2010. The STB's decision recognized the competition between the Massena line overhead traffic, with the Rouses Point-New York, overhead business. I was a participant for UTU-NY, in that case, as the State Legislative Director. Protective conditions were imposed, not to the extent I desired for employees, but conditions were to an extent issued for the Massena line. The competition for overhead business exists today.

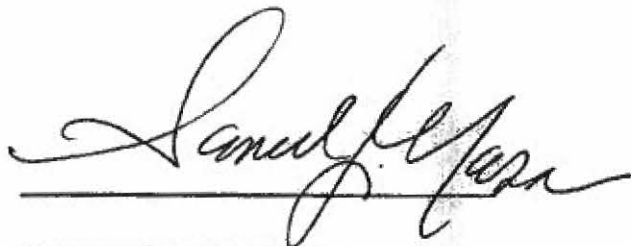
8. The application suggests that Bessemer & Lake Erie (B&LE) plans to offer priority hiring consideration to employees currently employed by CSXT on the U.S. Massina lines, but no current CN employees in the U.S. will be adversely affected. The application asks the STB impose the New York Dock, as modified by Wilmington Terminal, for employee protection.(App. 17). I am opposed to Wilmington Terminal as appopriate in the event the application is approved. I will deal with the matter of employee conditions in my supplemental verified statement. Moreover, the B&LE is an improper candidate for CN's proposed purchase. The B&LE does not operate in New York State, and its collective

bargaining agreements may not be suitable for the railroad operations and traffic in the eastern New York State railroad corridor. I am further investigating the subject of B&LE agreements, particularly in light of a recent change in the SMART/TD leadership on that carrier.

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

Under the penalties of perjury, I affirm the foregoing verified statement ~~is~~ ^{is}
true and correct as stated.

A handwritten signature in cursive script, appearing to read "Samuel J. Nasca", written over a horizontal line.

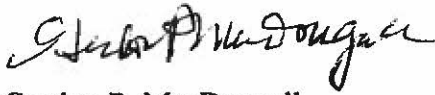
SAMUEL J. NASCA

Dated at
Albany, NY
December 9, 2019

.CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon all parties of record by
first-class mail postage-prepaid.

Washington DC


Gordon P. MacDougall