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NASCA-3

ENTERED
Office of Proceedings
December 19, 2019
Part of
Public Record

Before the
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347



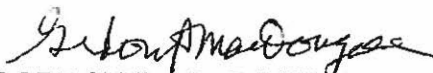
BESSEMER AND LAKE ERIE RAILROAD COMPANY
-ACQUISITION AND OPERATION-
CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA, OSWEGO,
JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, N.Y.

PETITION FOR LEAVE TO
FILE SUPPLEMENTAL FILING

Samuel J. Nasca, party of record in the captioned proceeding, petitions for leave to file the attached "Supplement to Evidence and Argument in Opposition"(NASCA-2) out-of-time. The opposition pleading was due December 9, 2019 but, due to extraordinary circumstances, described in his earlier NASCA-1, at pp. 3-4, was not accomplished.

It is believed neither applicant, nor any other party, will oppose this petition for leave to file NASCA-2.

WHEREFORE, for good cause shown, the attached NASCA-2 should be deemed filed instant.

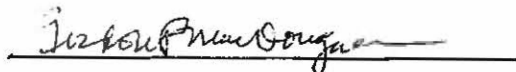

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

December 19, 2019

Attorney for Samuel J. Nasca

Certificate of Service

All parties of record shown on Decision No. 2, have been served by first class mail.



ORIGINAL

NASCA-2

Before the
SURFACE TRANSPORTATION BOARD

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.

SUPPLEMENT TO
EVIDENCE AND ARGUMENT IN OPPOSITION

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

Attorney for Samuel J. Nasca

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BESSEMER AND LAKE ERIE RAILROAD COMPANY
-ACQUISITION AND OPERATION-
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SUPPLEMENT TO
EVIDENCE AND ARGUMENT IN OPPOSITION

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), submits this supplement to his earlier, Evidence and Argument in Opposition, filed December 9, 2019, in the captioned proceeding.^{2/} The December 9, 2019 SMART/TD-NY pleading (NASCA-1) is incorporated herein by reference (ID300143), to avoid unnecessary repetition.

SMART/TD-NY opposes the proposed transaction, and urges that it be denied. The anticompetitive features shown by NASCA-1, have been intensified by the initial submissions of

^{1/} New York State Legislative Director for SMART-Transportation Division, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} For the cause for this supplement, see the earlier, December 9 filing (ID 300143), at 4.

other parties, particularly regarding the competitive forces involving rail movements to and from the CSXT Fulton subdivision.^{3/}

II. IF THE PROPOSED TRANSACTION IS NEVERTHELESS
APPROVED, DESPITE OPPOSITION, THE SO-CALLED
WILMINGTON MODIFICATION FOR EMPLOYEE NEW
YORK DOCK PROTECTION SHOULD NOT BE IMPOSED

The applicant has requested that the so-called "Wilmington Terminal" employee protection conditions be imposed by the STB in the event the agency should approve the transaction (Appl.17; Ex. 2, 27; Ex. 15, 11-12). However, the suggested employee conditions would be improper for this proceeding.

1. The Wilmington Terminal conditions were imposed for small carrier (Class III) acquisition of lines from major (Class I) carriers under the former statutory provisions of 49 USC 11343, et seq. The ICC's decision resolved a series of similar small carrier disputes involving employee claims over short line leases and sales by Class I carriers, as noted in the 1990 decision. Wilmington Term. RR, Inc.-Pur. & Lease-CSX Transp., Inc., 6 I.C.C.2d 799 (1990), rev. den. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

2. ICCTA The U.S. Congress dealt with this short line lease/sale situation, by enactment of a special provision as part of the 1995 termination of the ICC, and creation of its successor, the STB. ICC Termination Act of 1995, Pub. L. No. 104-88 (codified at 49 USC 10101 et seq.). The new provision, captioned, "Short line purchases by Class II and Class III rail carriers," was restricted to the two classifications of smaller carriers. 49 U.S.C. 10902. The Congress in ICCTA revised the mandatory employee protection provision to mandate lesser

^{3/} SMART/TD-NY anticipates it will respond to these other submission on the current January 8, 2020 due date, or as the same may be extended. See: Decision No. 1, at 9.

protection for Class I and Class II transactions. 49 USC 11326(b)& (c). The Class I rail employee conditions were essentially unchanged from the former §11347. 49 USC 11326(a).

3. STB Ex Parte 529. The STB responded to the new legislation by implementing the provisions of 49 USC 10902. Class Exem. For Acq. or Oper. Under 10902., 1 S.T.B. 95 (1996). Only Class III carriers were placed under the class exemption No protective conditions were imposed for Class III transactions, 1 S.T.B. at 104.

The courts upheld the ICCTA employee protective conditions, as applied by the STB, for transactions under the revised 49 USC 10901 & 10902. Assoc. Of American Railroads v. Surface Transp., 161 F.3d 58 (D.C. Cir. 1998); Association of American Railroads v. Surface Transp. Bd., 162 F.3d 101(D.C Cir. 1998).

4. Present Wilmington Term. Status. The “Wilmington Terminal” provisions are wholly inapplicable to the present Bessemer-CSXT proposed transaction. Both carriers are to be classified as Class I carriers. Bessemer is part of the Canadian National system, and it is thus a Class I carrier. (Appl. 1n.2).

The statutory directive is clear. Although the Board’s rules for “major” transactions require merger or control of two class I carriers, Congress has provided that the full employee conditions are applicable where approval is sought under §11324, §11325, and not otherwise provided in that section. Thus, the full New York Dock conditions would apply in the event of approval of the proposed transaction herein, without modification. §11326(a).

Accordingly, the Wilmington modification should not be imposed. The modification was only applicable to class III carrier lease or acquisition from Class I carrier, and has been superseded by Congress’s provision for specialized treatment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gordon P. MacDougall", written in a cursive style.

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

December 19, 2019

Attorney for Samuel J. Nasca

ORIGINAL

NASCA-2

SUPPLEMENTAL
VERIFIED STATEMENT
OF SAMUEL J. NASCA

1. My name is Samuel J. Nasca. I previously submitted a verified statement in this proceeding, dated December 9, 2019 (NASCA-1).

2. I was an active participant in STB Docket No. 35873, Norfolk Southern Railway Company-Acquisition and Operation-Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., upon which the current applicant has apparently claimed its basis for support for its position here. (Appl. 5n.6)

3. The Delaware & Hudson Ry.(D&H) was a class II rail carrier, whereas the current Bessemer & Lake Erie Railroad Company (B&LE) is a Class I carrier, as conceded in its application. (Appl. 2n.2). Moreover, I note that the STB in a recent decision recognizes B&LE's status as a class I carrier. Railroad Revenue Adequacy-2018 Determination. EP552 (Sub -No. 23), served September 5, 2019, at pages 3-4.

4. In the event the STB does approve the application, over my objections and those of others, the New York Dock employee protective conditions should be the absolute minimum protection for this proposed transaction.

5. The applicant states, in support of the transaction, not that it may provide priority for hiring consideration to current CSXT employees working on the U.S. Massena lines, but that B&LE has plans to so provide such priority; further, that any required pre-consummation implementing agreements will be reached before Closing. I point to the agreement between applicant and CSX for applicant to share the STB labor protection costs imposed upon CSX. (Appl. Ex. 2, §5.06(b), at 27).

6. The Wilmington Terminal modification to the New York Dock employee protective conditions is wholly unacceptable to train and engine service personnel represented by SMART/TD. The New York Dock conditions are necessary for the selection of forces and rearrangement of services. The critical issues in the Wilmington Terminal situation, as summarized by its reviewing court, surround preferential hiring and negotiation between the buyer and the selling carrier's affected employees; and the collective bargaining rights of the seller carrier's employees. I call attention to the Wilmington Terminal case on judicial review. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511, 513 (1991):

“The issues in this case are whether the ICC exceeded its statutory authority (1) in declining to require WTR to hire CSXT's employees on a preferential basis, (2) in declining to require WTR to recognize and adhere to whatever contractual and collective bargaining rights the former CSXT employees had negotiated with CSXT, and (3) in

declining to impose a requirement that WTR negotiate with CSXT's affected employees concerning their employment on WTR's lines."

Clearly, the above matters are appropriate for inclusion if New York Dock conditions would be imposed here, especially since applicant has pledged support in urging such would be agreeable to gain STB approval in the public interest, and by contract with seller CSXT. Unfortunately, it frequently occurs that carrier statements or impressions, may fail to be borne out in practice once consummation occurs. Accordingly, the STB must mandate New York Dock upon any approval. Moreover, any dispute in the implementing agreement process is subject to mandatory expedited arbitration. 360 I.C.C, 60, 84-90.

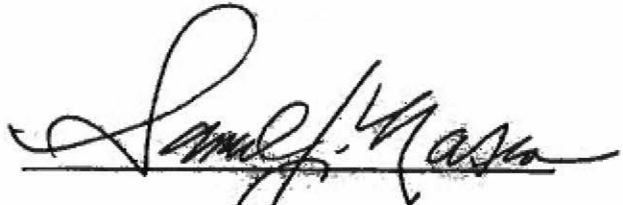
7. B&LE's line runs from Conneaut, OH on Lake Erie to the Pittsburgh, PA area. It is associated with the steel industry, historically handling iron ore originating from Minnesota via Great Lakes vessels to Conneaut, for B&LE rail movement to Pittsburgh. I understand CN acquired B&LE in 2004. B&LE has an extension to Erie, PA, and has been capable of interchange with CSXT (former Erie-Lackawanna Ry.) at Shenango, PA.

SMART/TD represents B&LE employees. However, I have been unable to discuss current matters in conjunction with this proceeding. However, I expect to do so in time for the January 8, 2020 filing date.

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

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

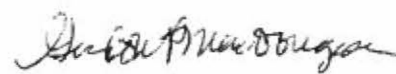


SAMUEL J. NASCA

Dated at
Albany, NY
December 19, 2019

Certificate of Service

I hereby certify I have served a copy of the foregoing two NASCA-2 materials upon all parties of record by first class mail postage-prepaid.



Washington DC

Gordon P. MacDougall