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VIA E-FILING

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: **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, New York**

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding are two versions of the reply comments of CSX Transportation, Inc. One version, marked “REDACTED – TO BE PLACED ON PUBLIC FILE,” and from which sensitive commercial and operating information has been redacted, is to be placed on the public record. The second version, marked “HIGHLY CONFIDENTIAL – TO BE FILED UNDER SEAL,” is an unredacted version to be filed under seal subject to the protective order entered in this proceeding.

Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton
Attorney for CSX Transportation, Inc.

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, NEW YORK

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

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Dated: January 8, 2020

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Verified Statement of Adam Smith

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, NEW YORK

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) submits these reply comments in the above-captioned matter to respond in opposition to requests by certain parties that the Surface Transportation Board (“Board” or “STB”) impose conditions on the STB’s approval of the minor application (the “Application”) by the Bessemer and Lake Erie Railroad Company (“B&LE”), an indirect and wholly owned subsidiary of Canadian National Railway Company (“CNR”), to acquire from CSXT and operate approximately 236.3 miles of rail lines in New York, including both the St. Lawrence Subdivision and the Fulton Subdivision (collectively, the “U.S. Massena Lines”).¹ These reply comments are supported by the attached Verified Statement of Adam Smith, CSXT’s Head of Operations Planning & Performance. CSXT previously submitted opening comments in this proceeding in support of the Application and acknowledging the applicable labor protective provisions.

The two commenting parties seeking non-labor related conditions—Finger Lakes Railway Corp. (“FGLK”) and the Port of Oswego (the “Port”)—do not oppose the Massena

¹ As noted in the Application, CNR is acquiring the Canadian portion of the Massena Lines from CSXT’s St. Lawrence and Adirondack Railway Company subsidiary, located entirely in Canada, generally between Beauharnois, Quebec (near Montreal) and the U.S./Canada border near Fort Covington, NY. See Application at 2 n.3.

Lines acquisition.² Indeed, the Board recognized in its November 8, 2019, decision in this case (“Dec. No. 1”) that B&LE’s acquisition of the U.S. Massena Lines will not likely have any anti-competitive effects. For traffic moving between the United States and Canada on the St. Lawrence Subdivision, the transaction will simply move the point of interchange between B&LE and CSXT further south—from Huntingdon, Quebec (a location near Montreal) to a location near Syracuse, NY. For traffic moving along the Fulton Subdivision, a branch of the St. Lawrence Subdivision, the transaction will simply replace B&LE for CSXT as the sole rail carrier on the line. The transaction will not create 2-to-1 shippers, nor will it cause any changes in the competitive options available to shippers served by CSXT or B&LE or rail carriers connecting to CSXT or B&LE.

FGLK and the Port nevertheless ask the Board to impose conditions on its approval of the acquisition. While the Board only uses its conditioning authority in minor transactions to address a reduction in competition caused by the transaction, the conditions sought by FGLK and the Port are not intended to ameliorate any reduction in competition caused by the transaction—there will be no reduction in competition. Neither party is worse off as a result of this transaction. Rather, the requested conditions are simply an opportunistic gambit to create new business opportunities for FGLK and the Port, without either party spending the resources necessary to change their competitive circumstances. FGLK wants to increase its opportunities to handle traffic moving to and from Canada by cutting CSXT out of the movements and by inserting itself as a second carrier, in addition to B&LE, on the Fulton Subdivision. The Port wants multi-carrier options, rate assurances, and new services that do not exist today. Neither

² CSXT and B&LE have reached a settlement agreement with Attis Ethanol Fulton, LLC (“Attis”) resolving its issues with the proposed transaction, withdrawing its comments, and withdrawing its support for conditions sought by other parties. Attis Letter (filed Jan. 8, 2020).

party has justified its requests. Both parties are asking for a regulatory handout that is unrelated to any change in competition that will be caused by the sale of the Massena Lines. The requested conditions are therefore not justified and inappropriate.

The requested conditions would also jeopardize the public benefits that are to be gained by the sale of the U.S. Massena Lines to B&LE. CSXT's sale of the U.S. Massena Lines will bring public benefits by conveying the lines to a party, B&LE, that has a stronger opportunity and incentive to improve operations and expand traffic. But the conditions sought by FGLK and the Port would undermine central assumptions of the sale. The economic terms of the line sale assume that the buyer of the U.S. Massena Lines will not have a direct connection with another rail carrier in the Syracuse area and that the buyer will not seek to establish such a direct connection. FGLK seeks to cut CSXT out of movements to and from Canada and asks the Board to insert FGLK as a competitor to B&LE in providing service over the Fulton Subdivision, thus changing key features of the line sale. If any of these key features of the line sale were eliminated or altered by conditions imposed by the Board, the parties to the transaction have a right to cancel the line sale. The Board should reject the proposed conditions and allow the sale to go forward as it has been structured by the parties.

Five labor-related parties submitted comments. The Transportation Workers Union of America (the "TWU"), and the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division (collectively the "Allied Rail Unions"), basically agreed with the imposition of labor protective conditions that B&LE and CSXT have agreed to implement. Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board ("SMART/TD-NY") argues that the labor protective conditions proposed

by B&LE are not applicable to transactions of the type at issue here and urges that more aggressive protective conditions are required.³ The Board has previously rejected SMART/TD-NY's argument and should do so again here.⁴

I. Background

A. The Proposed Transaction

The Application seeks Board approval of B&LE's acquisition of the U.S. Massena Lines from CSXT. The Massena Lines consist of rail lines connecting CNR's operations in Canada with CSXT's operations in the United States, including the St. Lawrence Subdivision, extending from Fort Covington, NY, on the border with Canada, south to Woodard, NY, near Syracuse, NY.⁵ The U.S. Massena Lines also consist of certain branch and spur lines off of the St. Lawrence Subdivision, including CSXT's Fulton Subdivision, which extends northwest from a point north of Woodard to Fort Ontario, NY. The Massena Lines are depicted on the map set out as Exhibit 1-Map C to the Application.

CSXT is selling the Massena Lines as part of a larger effort to rationalize its network and focus its attention on lines and facilities that are more directly related to its core operations. As

³ SMART/TD-NY argues that conditions set out in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway. v. United States*, 609 F.2d 83 (2d Cir. 1979), should be applied, not as those conditions were modified by *Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc.*, 6 I.C.C.2d 799, 814-26 (1990), *aff'd sub nom. Railway Labor Executives' Association v. ICC*, 930 F.2d 511 (6th Cir. 1991).

⁴ SMART/TD-NY filed two sets of Comments. Its labor-related comments were filed in an untimely Supplement to Evidence and Argument in Opposition filed on December 19, 2019, accompanied by a Petition for Leave to File Supplemental Filing. While the Board should reject SMART/TD-NY's untimely labor comments on procedural grounds, the substantive flaws in SMART/TD-NY's arguments are addressed below. In comments submitted under the Board's schedule on December 9, 2019, SMART/TD-NY claimed that the Board wrongly classified this transaction as a minor transaction. In that submission, SMART/TD-NY argued that the Board should have considered traffic flows and competition in Canada and in other markets outside of the area affected by the Massena Lines sale in determining how to classify the transaction. In addition to the fact that the discussion of competitive effects in the December 9 SMART/TD-NY submission is unintelligible, SMART/TD-NY ignores the limited scope of the transaction, which simply moves an existing interchange between CNR and CSXT from a point near Montreal to a point near Syracuse.

⁵ In accordance with B&LE's convention in the Application, "CN" refers to the U.S. rail operating subsidiaries (including B&LE) of CNR, and "CN System" refers collectively to the rail system operated by CN in the United States and by CNR in Canada.

seen on the map set out at Exhibit 1-Map B to the Application, CSXT has an important east-west line going through Syracuse, its “waterlevel route” connecting Chicago to New York, but the Massena Lines extend northward from that east-west line and are isolated from CSXT’s core network.

While the Massena Lines are at the margin of CSXT’s network, the lines are much closer to the core of the CN System and are an important gateway for movements from CNR’s network into the eastern United States. The acquisition of the Massena Lines by B&LE (as to the U.S. portion) and CNR (as to the Canadian portion) will extend the CN System’s length of haul on movements to and from Canada. The U.S. Massena Lines acquisition will therefore give B&LE the opportunity and the incentive to improve the efficiency of operations on the U.S. Massena Lines (including lower total transit times and reduced yard switching activities) and to expand traffic using the lines. *See* Application at 8-11. Indeed, FGLK acknowledges that “the lengthening of CN’s line haul (given that most Canadian economic activities are within 50 miles of the border) should result in more business generation.” FGLK Comments at 3. Shippers moving freight between the United States and Canada will benefit from improved service as described by B&LE in the Application. *See* Application Ex. 15, Operating Plan. These benefits are reflected in the three letters of support that B&LE included with its Application from a diverse set of stakeholders, including a shipper, a shortline railroad in the area, and Members of the New York Congressional Delegation.

These benefits to shippers will not be offset by any anti-competitive effects. The transaction is a vertical, end-to-end acquisition that will simply change the interchange point for traffic moving between Canada and the United States from a location near Montreal to a location near Syracuse and substitute B&LE for CSXT for movements on the branch and spur lines to be

acquired. No competitive options that are currently available to any shippers using the U.S. Massena Lines will be reduced or affected in any way. No rail carrier connecting to the U.S. Massena Lines or operating in the area near the U.S. Massena Lines will have any change in their access to traffic moving over the U.S. Massena Lines. There are no 2-to-1 shippers or locations on the U.S. Massena Lines. Moreover, CSXT has ensured the continued efficiency of the interchange of traffic with B&LE by giving B&LE operating rights to move traffic directly between the end of the St. Lawrence Subdivision at Woodard, NY, and CSXT's DeWitt Yard near Syracuse or CSXT's Belle Isle Yard near Solvay, NY. *See* Adam Smith Verified Statement ("A. Smith VS") at 5-6; Application at 22, Ex. 1-Map E.

In the process leading to the sale of the Massena Lines, CSXT concluded that the best way to accomplish its network rationalization while preserving and strengthening the Massena Lines as part of the broader rail network was to sell the Massena Lines to entities operating within the CN System, rather than to another rail carrier that does not already participate in the Massena Lines traffic. *See* A. Smith VS at 4. By extending the CN System's haul on traffic moving between the United States and Canada, the CN System will have an incentive to improve and expand traffic using the Massena Lines. *Id.* at 4-5. Other carriers would not have the same incentive or ability to expand traffic or improve operations. For example, FGLK, which has minimal connection to traffic on the Massena Lines today, was one of the potential bidders for the Massena Lines, {{ }}.⁶ *Id.* at 3.

CSXT also concluded that a sale of the Massena Lines would only make economic sense if CSXT would continue to participate in traffic moving over the Massena Lines to and from

⁶ As explained below, the FGLK traffic on these lines averages only about {{ }} Material designated as Highly Confidential under the protective order entered in this proceeding and redacted in the Public Version are set off with double brackets (i.e., "{{ }}").

Canada and the purchaser would not take any actions to cut CSXT out of that traffic. *Id.* at 7. Therefore, CSXT offered to sell the Massena Lines between the northern terminus in Canada and Woodard, NY, a point north of any connection with other railroads in the Syracuse area. CSXT also required that the purchaser not seek to establish a direct connection to other railroads operating in the Syracuse area. These were essential elements of the sale. The sale of the Massena Lines would not have worked for CSXT without an assurance that the purchaser would not seek a direct connection with a shortline in Syracuse.

CSXT and B&LE executed a Purchase and Sale Agreement (“PSA”) for the Massena Lines on August 29, 2019. Application at 7. B&LE submitted the Application to the Board on October 10, 2019. On November 8, 2019, the Board accepted the Application and concluded that the transaction was a “minor transaction” under 49 C.F.R. § 1180.2(c), based on a preliminary determination that the transaction would not have any anti-competitive effects or that any such effects would clearly be outweighed by public benefits. Dec. No. 1, slip op. at 6. Comments on the Application were submitted by 11 parties.⁷

B. Requests for Conditions

Two parties, FGLK and the Port, sought non-labor related conditions while indicating that they did not oppose the Board’s approval of the transaction.⁸ The requested conditions by these two parties fall into two categories.

⁷ Samuel J. Nasca, for and on behalf of SMART/TD-NY; New York State Department of Transportation; CSXT; Attis; FGLK; the Port; TWU; the Allied Rail Unions; The Port Authority of New York and New Jersey; Canadian/American Border Trade Alliance; and North Country Chamber of Commerce.

⁸ The New York State Department of Transportation (“NYSDOT”) submitted comments stating that NYSDOT does not take a position on the proposed transaction but has concerns that the transaction “will render the B&LE a bottleneck carrier for traffic currently moving south through [CSXT’s] Syracuse gateway.” NYSDOT Comments at 2. NYSDOT encourages “B&LE to ensure that services, rates, an[d] routings through Syracuse remain competitive.” *Id.*

St. Lawrence Subdivision Conditions: FGLK seeks two conditions related to traffic moving between Canada and the United States on the St. Lawrence Subdivision between Woodard and Fort Covington. Both of these conditions are intended to improve FGLK's access to Massena Lines traffic that it does not participate in today by cutting CSXT out of the movement as an interchange carrier, not to address any reduction in competition. First, FGLK asks the Board to remove Section 5.14(b) of the PSA, in which B&LE has agreed not to seek a direct connection with another rail carrier in the Syracuse area through, for example, a build-out to FGLK. Second, FGLK asks that the Board grant FGLK trackage rights over the CSXT line between Solvay Yard and Woodard to make a direct connection with B&LE at Woodard.⁹

Fulton Subdivision Conditions: FGLK and the Port request an additional set of conditions relating to traffic moving on the Fulton Subdivision. Like the St. Lawrence Subdivision conditions, these proposed Fulton Subdivision conditions are not addressed to any reduction in competition caused by B&LE's acquisition of the U.S. Massena Lines but rather are designed to improve or expand commercial options for FGLK and the Port. First, FGLK and the Port ask the Board to grant FGLK trackage rights that would (1) allow FGLK to provide a shuttle service between the Port and Novelis, an aluminum manufacturer located near the Port, where no such shuttle service exists today, and (2) allow FGLK to provide movements between the Port and CSXT at Woodard, which would also be in competition with B&LE. In addition, the Port asks that the Board (1) impose certain pricing limits on movements involving the Fulton Subdivision, (2) order B&LE to assist in certain Port rail facility expansion plans, and (3)

⁹ FGLK mistakenly assumes that CSXT has agreed to grant trackage rights to B&LE to interchange traffic at Belle Isle Yard and DeWitt Yard. CSXT has not granted B&LE trackage rights. CSXT has granted B&LE limited operating rights for the sole purpose of interchanging traffic at the two CSXT yards with only CSXT. CSXT has not agreed to grant B&LE and B&LE has not requested rights over CSXT's lines to reach Solvay Yard.

prohibit Canadian grain imports by rail into the Port when the US/Canada dollar exchange rate exceeds a designated level.

Labor Conditions: On labor issues, TWU and the Allied Rail Unions have agreed to the employee protective conditions agreed to by CSXT and B&LE. The parties are currently engaged in the negotiation of implementing agreements. SMART/TD-NY challenges the applicability of these employee protective conditions. As discussed below, the requests for conditions, except for the employee protective conditions proposed by B&LE, should be denied.

II. The Board’s conditioning authority here is limited to addressing competitive harms caused by the transaction.

As the Board has acknowledged, Dec. No. 1, slip op. at 6, the Board’s review of the proposed transaction is governed by Section 11324(d), which requires the Board to approve the Application unless the Board finds 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.

49 U.S.C. § 11324(d). Under the Section 11324(d) analysis, the Board’s “primary focus is on the anticipated competitive effects.” *Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.*, FD 35873, Dec. No. 6, slip op. at 14 (STB served May 15, 2015) (“*NSR/D&H*”). The Board “must approve” the Application unless it finds adverse competitive effects that are both “likely” and “substantial.” *Id.*

The Board may establish conditions on its approval of a transaction, but since the focus of the Board’s analysis under Section 11324(d) is competitive effects, its conditioning authority is also focused on competitive effects of the transaction. *See, e.g., CSX Corp. & CSX Transp., Inc.—Control—Ind. R.R. Co.*, FD 32892, slip op. at 5 (STB served Nov. 7, 1996) (noting that the

focus of any conditions request must be on competitive impacts, which is consistent with the scope of the STB’s reviewing authority under Section 11324(d)). The Board has noted that it has “broad authority to impose conditions to ameliorate competitive harm that might result from the proposed transaction.” *NSR/D&H*, slip op. at 22; *see also* Dec. No. 1, slip op. at 6. However, that “broad authority” has several recognized limits, described below.

A. Parties cannot seek trackage rights conditions here.

First, there is a limit on the *type* of conditions that a party can request in minor transactions. As relevant here, parties cannot seek trackage rights “conditions” in minor transactions. The statute only permits “applications inconsistent with an application” in proceedings regarding “significant” transactions, and not in proceedings related to “minor” transactions. 49 U.S.C. § 11325(c). And the Board has made it clear that “[n]o responsive applications shall be permitted to minor transactions.” 49 C.F.R. § 1180.4(d)(1). The Board defines “responsive applications” in this context as “those seeking affirmative relief either as a condition to or in lieu of the approval of the primary application,” including “inconsistent applications . . . and any other affirmative relief that requires [a] filing to be submitted to the Board (such as trackage rights . . .).” *Id.* § 1180.3(h). Accordingly, the Board has consistently rejected requests for trackage rights conditions in “minor” transactions. *See, e.g., NSR/D&H*, slip op. at 25 (denying a request for a trackage rights condition because it “essentially constitute[d] a responsive application that is prohibited in this minor transaction”).¹⁰

¹⁰ In a 2001 procedural decision involving the merger of CN and Wisconsin Central, the Board noted that relief (such as trackage rights) that would ordinarily be sought by responsive application would not be prohibited in that proceeding simply because the Board had designated the proposed merger as a “minor” transaction. *Can. Nat’l Ry. Co., Grand Trunk Corp. & WC Merger Sub, Inc.—Control—Wisc. Cent. Transp. Corp., Wisc. Cent. Ltd., Fox Valley & W. Ltd., Sault Ste. Marie Bridge Co., & Wisc. Chicago Link Ltd.*, FD 34000, Dec. No. 4 (STB served June 15, 2001) (“*CN/WC*”). The Board did not explain how its decision could be squared with the statute, Board regulations, and prior ICC/STB precedent. *See, e.g., R.R. Consolidation Procedures*, 366 I.C.C. 75, 83-84 (1982) (Congress intended to preclude inconsistent applications in “minor” cases); *Burlington N. Inc. & Burlington N. R.R. Co.—Control & Merger—Santa Fe Pac. Corp. & The Atchison, Topeka & Santa Fe Ry. Co.*, FD 32549, Dec. No. 16,

B. The Board does not use conditions to address pre-existing circumstances.

Second, the Board does not use its conditioning authority to address pre-existing competitive circumstances, but only to address any reduction in competitive options caused by a transaction. Thus, the Board distinguishes between harms related to the transaction and “pre-existing disadvantages that will neither be caused nor exacerbated” by the transaction. *Can. Nat’l Ry.—Control—Duluth, Missabe & Iron Range Ry.*, FD 34424, slip op. at 14 (STB served Apr. 9, 2004); *see also NSR/D&H*, slip op. at 22. The Board has expressly noted that “mitigation is not imposed to correct pre-existing conditions.” *Can. Nat’l Ry. Co. & Grand Trunk Corp.—Control—EJ&E W. Co.*, FD 35087, slip op. at 5 n.2 (STB served Apr. 28, 2008) (“*CN/EJ&E*”).

C. The Board does not use conditions to expand business opportunities for interested parties.

Third, as a corollary to the principle that the Board only addresses competitive harms caused by the transaction, the Board has made it clear that it does not use its conditioning authority to create new competitive options for parties seeking conditions or to expand business opportunities. The Board uses conditions “to preserve competitive options (not to expand them).” *NSR/D&H*, slip op. at 23 (quotation omitted). The Board “has not historically acted to increase shippers’ competitive options.” *Id.*, slip op. at 17-18 (citation omitted).¹¹ Even in mergers involving Class I railroads, where the Board does require applicants to include “provisions for enhanced competition,” 49 C.F.R. § 1180.1(c), the Board made it clear that “conditions should not be sought to fix competitive and other longstanding problems that have

1995 WL 232781, at *9 (ICC served Apr. 20, 1995) (interested party must file a responsive application in order to request trackage rights condition); *Rio Grande Indus., Inc., et al.—Purchase & Related Trackage Rights—Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, FD 31505, Dec. No. 8, 1989 WL 246976, at *2 (ICC served Dec. 11, 1989) (same). In any event, the Board’s subsequent ruling in *NSR/D&H*, slip op. at 25, discussed above, effectively superseded *CN/WC* regarding the ability of interested parties to request trackage rights conditions in reviews of “minor” transactions.

¹¹ Also, “the harm must be to competition, not to a particular competitor.” *NSR/D&H*, slip op. at 22.

no nexus” to the proposed transaction. *Major Rail Consolidation Procedures*, EP 582 (Sub-No. 1), slip op. at 31 (STB served June 11, 2001).

D. The Board examines competitive effects from a pre-transaction perspective.

The Board looks at competitive effects of a proposed transaction from a pre-transaction perspective and asks whether there has been a reduction of competitive options from the level that existed prior to the transaction. In *Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company*, FD 32766, slip op. at 5-6 (STB served October 15, 1997), the Board addressed the competitive effects of provisions in a line lease by a Class I railroad to a shortline that “for all practical purposes require [the shortline] to route its traffic over [the Class I carrier].” The Board concluded that the arrangement was not anti-competitive because “these provisions do not reduce the level of competition that existed in this market before the lease since [the Class I carrier] was free to route the traffic it originates over its own lines The pre-lease competitive setting essentially has been preserved, not altered.” *Id.*; see also *Review of Rail Access & Competition Issues—Renewed Petition of the W. Coal Traffic League*, EP 575 (Sub-No.1), slip op. at 9 (STB served Oct. 30, 2007) (“*Interchange Commitments*”) (rejecting an *ex post* analysis of the competitive effects of interchange commitments that does not look at the change in competition from pre-transaction levels).

E. The Board only imposes conditions addressed to competitive changes caused by the transaction.

Finally, for the Board to grant a condition “there must be a sufficient nexus between the condition imposed and the transaction before the agency.” *CN/EJ&E*, slip op. at 5 n.2. Thus, requested conditions relating to rates and service terms cannot be based on vague or speculative concerns over future conduct but must be based on specific anti-competitive effects of a

transaction. For example, in *CSX Transp., Inc. & Del. & Hudson Ry. Co., Inc.—Joint Use Agreement*, FD 35348, Dec. No. 6, slip op. at 7 (STB served Oct. 22, 2010) (“*CSXT/D&H*”), a third-party carrier asked the Board to require one of the applicants in a joint use application “to maintain, for a period of 5 years, the existing rate and existing revenue division” for certain traffic interchanged with the third-party carrier. The Board denied the condition request, noting that the applicant and the third-party carrier already “have incentive to set viable levels for rates and divisions” for the traffic at issue, and nothing in the terms of the transaction justified a change from the Board’s “general practice [] not to use its conditioning authority to freeze in place the contractual terms, such as rate and revenue divisions, which have been voluntarily bargained for independent of a transaction.” *Id.*, slip op. at 8.

III. The St. Lawrence Subdivision conditions sought by FGLK should be rejected because they seek to create new competitive options rather than ameliorate competitive harms created by the proposed transaction.

FGLK’s request for conditions related to the St. Lawrence Subdivision is a transparent effort to improve its own commercial position following acquisition of the U.S. Massena Lines by B&LE. There is no rationale or authority for the Board to confer unwarranted benefits on FGLK. B&LE’s acquisition of the U.S. Massena Lines will make no change in FGLK’s or its shippers’ existing opportunities to participate in traffic using the St. Lawrence Subdivision (referred to by FGLK as the “Montreal Secondary”). Both today and after the acquisition, FGLK must interchange with CSXT to reach the St. Lawrence Subdivision and the other Massena Lines. FGLK claims that it would like to expand its traffic using the St. Lawrence Subdivision (although it points to no specific new business opportunities) by obtaining direct access to B&LE, and it seeks to do so through regulatory mandate rather than the expenditure of its own

resources.¹² But the conditions it requests are inappropriate under the well-established law described above. No conditions would be appropriate here because FGLK’s competitive options for the movement of traffic using the St. Lawrence Subdivision will be exactly the same after the transaction is consummated as they are today.

FGLK seeks two conditions related to the St. Lawrence Subdivision: (1) removal of Section 5.14(b) from the PSA, and (2) trackage rights on CSXT for FGLK and B&LE to have a direct interconnection in the Syracuse area. Neither condition relates to a reduction in competition caused by the transaction. FGLK does not, and cannot, show that the transaction reduces its competitive options from those available today. Both requests should be denied.

A. The Board should not remove Section 5.14(b)

1. FGLK mischaracterizes the scope of Section 5.14(b).

As a preliminary matter, FGLK mischaracterizes and overstates the restriction in Section 5.14(b) by claiming it is a “prohibition on access to FGLK.” FGLK Comments at 7. FGLK’s President, Mr. Michael V. Smith, wrongly claims that the PSA “expressly prohibits B&LE/CN from interchanging directly with FGLK.” FGLK Comments, M. Smith VS at 3. In fact, Section 5.14(b) does not prohibit an interchange with FGLK; it only restricts actions by B&LE, not FGLK, and it only restricts B&LE from *seeking* to create a direct connection with FGLK.

Section 5.14(b) states that “Buyer will not seek, directly or indirectly . . . access to the New York, Susquehanna and Western Railway (“NYSEW”) or the [FGLK]” Section 5.14(b) is set out at pages 32-33 of the PSA, included in the Application as Exhibit 2. The provision

¹² In fact, FGLK handles very little traffic today that moves on the Massena Lines. As explained by Mr. Adam Smith, FGLK incorrectly states that 291 carloads of FGLK traffic move on the Massena Lines, but in fact the number of carloads is {{ }} A. Smith VS at 3-4. FGLK does handle traffic on the Fulton Subdivision but as a “non-carrier switching service[] for Attis Fulton Ethanol, LLC.” FGLK Comments, M. Smith VS at 3. FGLK indicates that all of the traffic it handled in 2019 was “switch traffic.” FGLK Comments at 4.

imposes no restriction whatsoever on FGLK seeking access *to B&LE* through, for example, a build-out. If FGLK wants to spend its own resources to create a direct connection with B&LE, 49 U.S.C. § 10742 would require B&LE to allow the interchange, and Section 5.14(b) would not prevent it. Similarly, if FGLK believes there are grounds under the Board’s competitive access regulations for a Board order establishing a direct connection between FGLK and B&LE, nothing in Section 5.14(b) would prevent FGLK from bringing such a claim or prevent B&LE from complying with a Board order requiring such a connection.

FGLK also incorrectly characterizes Section 5.14(b) as “singling out FGLK” by imposing restraints on interchanges that do not apply to other shortline railroads that will have a direct interchange with B&LE after ownership of the U.S. Massena Lines is transferred to B&LE. FGLK Comments at 7-9. FGLK again misconstrues the provision. Where FGLK or any other shortline physically interconnects as a carrier with the U.S. Massena Lines (now or in the future), 49 U.S.C. § 10742 requires B&LE to allow the interchange and Section 5.14(b) would not prevent it. For example, FGLK describes a switching service that it provides for Attis along the Fulton Subdivision. FGLK Comments at 5. FGLK has already established a direct connection with the Fulton Subdivision at that location. Section 5.14(b) does not prevent B&LE from handling Attis traffic that is switched by FGLK. Section 5.14(b) only precludes B&LE from seeking to create a new physical connection with FGLK.

FGLK similarly mischaracterizes Section 5.14(b) in claiming that it “would go so far as to negate the rights of FGLK” under the Railroad Industry Agreement (“RIA”). FGLK Comments at 8. FGLK’s reference to the RIA is a red herring.¹³ If the RIA did give FGLK any

¹³ The RIA addresses “restrictions on interchange imposed by contract at the time of creation of the Short Line.” See RIA at 3. The proposed transaction here involves the extension of the CN System, not the creation of a new shortline railroad.

rights that are relevant here, Section 5.14(b) would have no effect at all on those rights. If FGLK had grounds to seek relief under the RIA, nothing in Section 5.14(b) would prevent it from doing so.

2. The narrow restriction in Section 5.14(b) is central to the economics of the transaction.

The economic terms of the line sale are based on CSXT's expectation that B&LE will not take measures that would cut CSXT out of its participation in traffic moving on the Massena Lines. A. Smith VS at 7. If CSXT had expected the buyer of the Massena Lines to eliminate or restrict CSXT's ability to participate in movements to and from Canada over the Massena Lines, CSXT would not have agreed to sell the lines. Accordingly, by asking the Board to remove Section 5.14(b), FGLK is asking the Board to upset one of the central economic elements of the transaction.

To prevent CSXT from being cut out of participating in movements using the U.S. Massena Lines by the purchaser of the lines, the PSA has two central features. First, CSXT sold the St. Lawrence Subdivision only to Woodard, a point several miles from any direct connection with other shortline railroads in Syracuse. Second, through Section 5.14(b), B&LE agreed not to use its newly obtained proximity to Syracuse to seek a direct connection to any railroads other than CSXT operating in the Syracuse area and thereby exclude CSXT from Massena Lines traffic. In addition to the purchase price, Section 5.14(b) is part of the consideration provided by B&LE to CSXT to acquire the U.S. Massena Lines. It is an important part of the commercial rationale on which the line sale is based.

The Board is well aware that line sales in the railroad industry are often based on agreements between the buyer and seller that permit the seller to retain participation in the traffic after the line sale. In the context of shortline spin-offs, the Board has noted that the selling

railroad has often been “willing to sell or lease these lighter-density lines at reduced prices because it was assured of retaining a portion of the revenues from the traffic on those lines.”

Interchange Commitments, slip op. at 4. The trade-off is obvious—if a seller expects to lose all participation in traffic using the line to be sold, it will either not sell the line or demand a higher price to compensate for the loss of traffic.

For that reason, even in the context of a shortline spin-off, the Board does not preclude interchange restrictions but rather asks whether any party will be “worse off as a result of the interchange commitment.” *Interchange Commitments*, slip op. at 8. *Interchange Commitments* does not apply here.¹⁴ But even if it did apply, no party is “worse off” as a result of the narrow restriction in Section 5.14(b). No competitive option available today to any party, including FGLK or its shippers, is being reduced or inhibited in the least by Section 5.14(b).

3. Section 5.14(b) is not anti-competitive.

FGLK also claims that Section 5.14(b) is “anti-competitive” because it restricts actions that B&LE can take in the future. FGLK Comments at 15. Section 5.14(b) does not affect any competitive options available to FGLK or its shippers today, which is the focus of the Board’s analysis under Section 11324(d). Moreover, the antitrust case law recognizes that restrictions such as Section 5.14(b) in sales agreements are often pro-competitive. The Board and its predecessor “believe that antitrust factors have a special place in our analysis.” *Burlington N., Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 933 (1980); *see also* 49 C.F.R. § 1180.1(c)(2) (“[W]e must consider, but are not limited by, the policies embodied in the antitrust laws.”).

¹⁴ In *Interchange Commitments*, the Board’s concern was that many “line spin-off transactions that created or built up these new short line railroads contained contractual provisions that limited the incentive or ability of the short line railroad to interchange traffic with other connecting carriers that could compete with the seller or lessor carrier for the long-haul portion of the movement.” Slip op. at 4. Those circumstances do not apply here. This is not a shortline spin-off transaction, and the provision at issue is unrelated to a shortline spin-off. This transaction is between CSXT and the CN System for the extension of the existing CN System, essentially to change the interchange location between the two carriers.

Commercial sale agreements often include restrictions on future conduct, and the courts and antitrust agencies have repeatedly found such restrictions to be reasonable when they promote pro-competitive transactions, particularly when they do not reduce competition from pre-transaction levels. *See, e.g., Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1195-98 (10th Cir. 2009) (finding that it was not an antitrust violation for a property seller to restrict the property buyer from operating a competing business on the property); *see also* U.S. Dep’t of Justice, Antitrust Div. and Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property at 5 (Jan. 12, 2017) (stating that “field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends”).¹⁵ As the Tenth Circuit has explained, “when a landowner divides his property and sells part to a third party while retaining the rest, attachment of a restrictive covenant to one of the two parcels can promote competition by enabling the owner of the other parcel to start a business without potentially crippling competition on its doorstep.” *Christy Sports*, 555 F.3d at 1196. Further, “[j]ust as a property owner who operates a business on his land has no obligation to sell part of his property to a person who intends to open a competing facility, he generally has no obligation, if he sells part of the property, to allow a competing facility to be opened there.” *Id.*

As discussed above, Section 5.14(b) allows this transaction and the procompetitive benefits that come along with the transaction to be realized. It allows CSXT to protect its legitimate interests while simultaneously allowing B&LE to generate more business over the line. And, there is no change in competition—this is a vertical, end-to-end transaction that will

¹⁵ There is broad consensus across federal courts that restrictive covenants imposed by sellers on buyers of property or businesses can have procompetitive effects. *See, e.g., Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-91 (7th Cir. 1985) (finding that a restrictive covenant prohibiting a competitor from selling certain products on property owned by the defendant was not anticompetitive and had allowed the parties to work together in a manner that increased productivity and output); *see also Sound Ship Bldg. Corp. v. Bethlehem Steel Corp.*, 387 F. Supp. 252, 255-257 (D.N.J. 1975) (finding that a property seller was justified in restricting the types of businesses that could be operated on the land after sale).

simply change the interchange point for traffic moving between Canada and the United States and substitute B&LE for CSXT for movements on the lines to be acquired.

4. Removal of Section 5.14(b) is improperly intended to create new competitive options rather than address a reduction in competition.

FGLK acknowledges that the Board has authority to impose conditions in transactions under 49 U.S.C. § 11324(d) to “ameliorate competitive harm that would result from the transactions.” FGLK Comments at 13. FGLK further recognizes that the Board does not use conditions to address “pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not ‘merger-related.’” *Id.* at 12 (citing *NSR/D&H*, slip op. at 14). “The Board will impose conditions when the concern is to the preservation of competition and essential services” *Id.* at 13 (citing *Kan. City S.—Control—The Kan. City S. Ry.*, FD 34342, slip op. at 16 (STB served Nov. 29, 2004)).¹⁶

Yet, having acknowledged that the Board does not use its conditioning authority to create new competitive options that did not exist before the acquisition or to address pre-existing competitive circumstances, FGLK then ignores the legal standard in explaining why it seeks removal of Section 5.14(b). FGLK justifies its request for conditions on grounds that “FGLK believes that there would be additional traffic opportunities if there were a direct connection between FGLK and B&LE and the CN system” FGLK Comments at 5. But FGLK itself concedes that the Board does not use its conditioning authority to create “additional traffic

¹⁶ The Board’s limited authority to address only *transaction-specific* competition issues is consistent with the general approach of U.S. antitrust law. Federal courts and agencies consistently apply Section 7 of the federal Clayton Act to prohibit transactions based only on their own alleged competitive effects—not based on allegations about pre-existing competitive conditions, nor competitive issues that are unrelated to the transaction in question. 15 U.S.C. § 18; *see, e.g., Fjord v. AMR Corp. (In re AMR Corp.)*, 527 B.R. 874, 888-89 (Bankr. S.D.N.Y. 2015); *United States v. Int’l Tel. & Tel. Corp.*, 324 F. Supp. 19, 53-54 (D. Conn. 1970).

opportunities.” The Board’s objective is to preserve existing competitive opportunities and prevent any degradation or reduction in existing competitive circumstances.

For example, in *NSR/D&H*, the Board denied a request from Saratoga & North Creek Railway (“S&NC”) that the Board condition its approval of NSR’s acquisition of a rail line from D&H upon the elimination of a contractual provision that prevented S&NC from interchanging with carriers other than D&H (such as NSR) at a particular rail yard. *See NSR/D&H*, slip op. at 31-33. The Board noted that S&NC’s inability to interchange with carriers other than D&H “existed prior to this proceeding.” *Id.*, slip op. at 32. Therefore, the Board found that the condition was “unrelated to the competitive effects of the proposed transaction.” *Id.* The Board concluded that “S&NC may not use this transaction to improve its ability to attract customers and conduct business on its line, and the Board may not use its conditioning power to expand S&NC’s competitive options.” *Id.*, slip op. at 33.

The same reasoning and result apply here. The proposed transaction has no effect at all on FGLK’s existing competitive circumstances or competitive opportunities. Today, FGLK must interchange with CSXT for the traffic it handles to reach the St. Lawrence Subdivision, and after the transaction it will continue to interchange with CSXT to reach the St. Lawrence Subdivision. Today, the CN System has no feasible build-out opportunity to FGLK because the CN System is located over 230 miles from FGLK’s lines near Syracuse, and Section 5.14(b) maintains the status quo by precluding B&LE from pursuing a build-out to FGLK after the transaction (while leaving FGLK free to pursue a build-in if it wants to dedicate the resources to it). Today, there is no plausible basis for the CN System or B&LE to seek a competitive access remedy from the Board, and Section 5.14(b) merely provides that B&LE will not pursue

regulatory intervention to create a direct connection with FGLK after the transaction (while leaving FGLK free to pursue a regulatory access order if it believes such relief is warranted).

In short, nothing changes with the acquisition of the U.S. Massena Lines by B&LE that would justify the removal of Section 5.14(b) as a condition to the Board's approval. FGLK's request for the elimination of Section 5.14(b) is intended to create competitive options for FGLK that do not exist today. This contravenes the STB's repeated ruling that "[w]e do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation." *Canadian Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, FD 35081, Dec. No. 11, slip op. at 12 (STB served Sept. 30, 2008).

B. The Board should not impose trackage rights on CSXT to Woodard or Solvay

FGLK also asks the Board to impose trackage rights on CSXT so that FGLK and B&LE can have a direct interchange in the Syracuse area, either at Woodard or at CSXT's Solvay Yard. The first, and ultimately fatal, problem with this request is that it is a request for "affirmative relief that requires [a] filing to be submitted to the Board," 49 C.F.R. § 1180.3(h), and such requests are not permitted in proceedings related to "minor" transactions. 49 C.F.R. § 1180.4(d)(1); *see NSR/D&H*, slip op. at 25 (denying a request for a trackage rights condition because it "essentially constitute[d] a responsive application that is prohibited in this minor transaction"); *see also* 49 U.S.C. § 11325(d) (not including responsive applications in the schedule for minor transactions).

Even if FGLK's trackage rights conditions were not precluded under 49 U.S.C. § 11325(d) and the Board's regulations, they would not be justified for the reasons discussed above. FGLK seeks trackage rights to establish a direct connection with B&LE to "explore new business opportunities with the CN System." FGLK Comments at 15. But the Board imposes

conditions only to address reductions in competition caused by a transaction, not to place a competitor in a better position competitively than it was before the transaction. FGLK's ability to "explore new business opportunities with the CN System" will be no different after the transaction than it is today. After the transaction, FGLK will need to interchange with CSXT for the traffic it handles to reach the Massena Lines, as it does today. FGLK will continue to be able to pursue new business opportunities with B&LE to the same extent it is able to do so today—CSXT will simply need to participate in those movements, as it does today. FGLK is no worse off after the transaction, so there is no justification for the proposed trackage rights condition, even if the Board's rules permitted FGLK to seek a trackage rights condition.

IV. The Fulton Subdivision conditions should be rejected because they are unrelated to any alleged competitive effects from the proposed transaction.

FGLK and the Port also request conditions related to traffic moving on the Fulton Subdivision. Like the St. Lawrence Subdivision condition requests discussed above, these Fulton Subdivision condition requests do not relate to any reduction in competition caused by the transaction. Shippers on the Fulton Subdivision have access today to a single rail carrier, CSXT, and after the transaction they will continue to be served by a single rail carrier, B&LE. The only change is that B&LE will substitute for CSXT on movements to and from the Syracuse area on the Fulton Subdivision or to and from Canada on the St. Lawrence Subdivision.

FGLK nevertheless complains that shippers on the Fulton Subdivision "will see the introduction of B&LE as an intermediate carrier between themselves and CSXT." FGLK Comments at 10. The Port argues that "[t]his additional interchange will require coordination and participation of a third carrier, which will lead to reduced operating efficiency, increased costs and increased transit times." Port Comments at 2-3.

Even if these concerns were supported or valid—and they are neither supported nor valid—they would not justify imposition of conditions because they are unrelated to any change in competitive circumstances. The Board does not use its conditioning authority in rail line transactions to optimize the network structure. Instead, as discussed in detail above, the Board only imposes conditions to address specific instances where competition is reduced as a result of the transaction. None of the proposed Fulton Subdivision conditions is addressed to a reduction in competition, so they all must be denied.

A. The Board should not grant FGLK trackage rights over the Fulton Subdivision.

FGLK and the Port ask for FGLK trackage rights in two areas. First, FGLK and the Port ask for trackage rights so that FGLK can provide a “switching” service for shippers on the Fulton Subdivision to reach CSXT in Syracuse, essentially becoming a competitor to the purchaser of the Massena Lines, B&LE, on the line segment that it has purchased. FGLK Comments at 4; Port Comments at 5-6, ¶ 2. Second, FGLK and the Port ask the Board to give FGLK trackage rights over B&LE lines to support a non-existent shuttle service between the Port and a nearby aluminum ingot receiver, Novelis. FGLK Comments at 4; Port Comments at 5, ¶ 1.

As noted above, requests for trackage rights conditions are not permitted in minor transactions. In any event, those requests would be without any justification here. FGLK’s request to switch traffic on the Fulton Subdivision and compete with B&LE on the line it has purchased is based only on speculation that prices may increase or service levels decline because of the costs associated with introducing an additional carrier into the route. But CSXT has agreed to provide B&LE with operating rights to CSXT’s Belle Isle and DeWitt Yards near Syracuse to minimize any operational inefficiencies that could result from B&LE’s participation in traffic moving on the Fulton Subdivision. Moreover, the possibility of service declines or

price increases that are unrelated to any change in competition are outside the scope of the Board's conditioning authority. *See NSR/D&H*, slip op. at 27 (denying request for conditions noting that "[w]hile the termination of the haulage, marketing, and rate agreements on the Southern Tier might increase the complexity of GWI's routing options by adding another carrier, GWI has not presented evidence that this change is actually anticompetitive"). As to the Port's request for FGLK trackage rights to establish a shuttle service to a nearby shipper, Novelis, that request is clearly unrelated to any reduction in competitive options since there is not even a shuttle service in effect today connecting the Port with Novelis. As explained above, the Board does not impose conditions that are designed to create new business opportunities.

B. There is no basis for the Board to impose conditions setting pricing guarantees, requiring facility improvements, or prohibiting Canadian grain imports.

The Port also asks that the Board condition approval of the transaction "on current pricing being maintained on all commodities listed in the Application," and for new commodities, that the Board "impose a fixed rate of \$600/freight car including track spot placement." Port Comments at 6, ¶ 3. The Port cites no authority for the Board's imposition of such pricing constraints, and it points to no competitive harm that the proposed condition is supposed to remediate. The mere possibility that a transaction will result in price increases is not grounds for imposing price constraints as a condition for approval of a minor transaction where the price increase is not related to any identified change in competition. *See CSXT/D&H*, slip op. at 7, discussed *supra* at 13.

The Port asks the Board to condition approval of the Application "on a requirement that CN[R] work with the Port to correct any deficiencies" in certain Port facilities and on designation of the Fulton Subdivision "as an Intermodal Line." Port Comments at 6, ¶ 4. While it is uncertain what exactly the Port is requesting, it is clear that there is no competitive basis for

the Port to seek a condition relating to improvements in the state of the Port's facilities, and therefore there is no basis for considering the requested condition.

Finally, the Port suggests that changes in the currency exchange rate between the U.S. and Canadian dollar might have a future impact on the movement of grain through Port facilities, and it asks that the Board condition approval of the Application on a condition that would prohibit "Canadian Grain Imports into the Port whenever the exchange rate of \$1.00/CA is greater than \$0.80/US." *Id.* at 6, ¶ 5. Again, the requested condition is not based on any alleged reduction in competition caused by the transaction, but rather is based on unexplained concerns over future currency exchange fluctuations. More important, the Port points to no authority that would support such an unprecedented interference by the Board in international trade with Canada.

V. The Board should impose the *New York Dock* labor protective conditions, as modified by *Wilmington Terminal*.

B&LE acknowledged in the Application that employees adversely affected by the transaction will be entitled to labor protective conditions in accordance with *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd*, *New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) ("*New York Dock*"), as modified by *Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc.*, 6 I.C.C.2d 799, 824-26 (1990) ("*Wilmington Terminal*"), *aff'd sub nom. Railway Labor Executives' Association v. ICC*, 930 F.2d 511 (6th Cir. 1991). *See* Dec. No. 1, slip op. at 5. CSXT acknowledged the same in its comments filed on December 9, 2019, and also stated that CSXT has begun the process of negotiating implementing agreements with representatives of affected employees. TWU and the Allied Rail Unions also acknowledged that the *New York Dock* conditions, as

modified by *Wilmington Terminal*, “should be imposed by the Board if it approves the proposed transaction.” TWU Comments at 2; Allied Rail Unions Comments at 2.

SMART-TD/NY argues, however, that the Board should impose the *New York Dock* conditions unmodified by *Wilmington Terminal*.¹⁷ While the argument is less than clear, apparently SMART-TD/NY contends that the ICC/STB only intended the *Wilmington Terminal* modifications to apply to transactions involving Class III carriers acquiring or leasing lines from Class I carriers, and that Congress somehow superseded *Wilmington Terminal* through enactment of provisions in the ICC Termination Act of 1995 (“ICCTA”) that streamlined the STB approval process for acquisition of rail lines by smaller carriers (49 U.S.C. § 10902) and provided for lesser employee protections for certain transactions involving smaller carriers (49 U.S.C. §§ 11326(b) & (c)). SMART-TD/NY December 19 Supplement at 3-4.

The Board considered and properly rejected similar arguments made by SMART-TD/NY in connection with a similarly situated transaction. In *NSR/D&H*, slip op. at 27-29, the Board applied the *New York Dock* conditions, as modified by *Wilmington Terminal*, to the acquisition of a line by a Class I carrier (NSR) from the wholly owned subsidiary of another Class I carrier (D&H). The Board explained that *Wilmington Terminal* would apply because the transaction was a line sale under 49 U.S.C. § 11323(a)(2), and not a “consolidation[]” in which “at least one entity will cease to exist as a separate entity.” *Id.*, slip op. at 28. The Board cited a number of cases decided after the enactment of ICCTA where the Board applied *Wilmington Terminal* to similar line sale transactions. *Id.*, slip op. at 29. Importantly, the Board explained that “[c]ontrary to SMART/TD-NY’s suggestion, [*Wilmington Terminal*] is the applicable standard

¹⁷ SMART-TD/NY submitted its comments on labor conditions in an untimely filing. The Board should reject the filing and decline to address the substance of SMART-TD/NY’s arguments. In the event the Board accepts the filing, CSXT requests that the Board deny all requested relief.

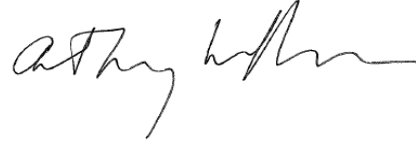
regardless of the size of the railroads involved or the bargaining status of their employees.” *Id.* (citing *Can. Pac. Ltd.—Control—Davenport, Rock Island & N.W. Ry.*, FD 32579, slip op. at 6-7 (ICC served Feb. 10, 1995); *Wilmington Terminal*, 6 I.C.C. 2d at 815-16).

For all purposes material to the labor protective analysis, the transaction at issue here is the same as the transaction at issue in *NSR/D&H*. Despite SMART-TD/NY’s inferences otherwise, the alternative approval process for smaller carriers set out at § 10902 and the alternative labor protective conditions for transactions involving smaller carriers set out at § 11326(b) & (c) simply have no relevance here. This transaction is clearly a line sale under § 11323(a)(2), and not a consolidation. Indeed, “[t]hough [CSXT’s] rail footprint will shrink as a result of the sale of the [Massena Lines] . . ., [CSXT] will continue to exist as a common carrier, separate from [B&LE].” *NSR/D&H*, slip op. at 29. Therefore, the *New York Dock* conditions, as modified by *Wilmington Terminal*, are appropriate for this transaction.

VI. Conclusion

The requested conditions are an opportunistic attempt by FGLK and the Port to improve their commercial position following acquisition of the U.S. Massena Lines by B&LE. Their requested conditions are unrelated to a change in competitive circumstances caused by the proposed transaction. The transaction itself is limited, essentially changing the point of interchange between CSXT and the CN System, and the Board should allow it to go into effect under the terms negotiated by the parties. The Board should approve the Application and deny the requests for conditions, other than the employee protective conditions proposed by B&LE, as unwarranted and unauthorized.

Respectfully submitted,



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Dated: January 8, 2020

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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, NEW YORK

VERIFIED STATEMENT OF ADAM SMITH

My name is Adam Smith. I currently am Head of Operations Planning & Performance for CSX Transportation, Inc. (“CSXT”), a role I have held since February 2018 and encompassing the time period in which the rail lines that are at issue in this case, called the Massena Lines, were put out for bid by CSXT, when the bids were analyzed, and when the agreements for the sale of the Massena Lines were negotiated with Canadian National Railway Company (“CNR”) and Bessemer and Lake Erie Railroad Company (“B&LE”), CNR’s indirect wholly-owned subsidiary. In my position described above, I was closely involved in CSXT’s overall efforts to comprehensively evaluate its rail system and to restructure its business through the lease and sale of certain railroad lines that do not compose the core of the CSXT rail system and can be operated more efficiently by third parties. My team and I were responsible for analyzing the lines, preparing packages sent to potential bidders for the lines, analyzing the bids received, making recommendations to CSXT’s senior management on which bids to accept, and negotiating final agreements.

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The purpose of this statement is to provide factual background relevant to the request by the Finger Lakes Railway Corp. (“FGLK”) that the Surface Transportation Board (“Board” or “STB”) impose certain conditions on its approval of the purchase of the U.S. portion of the Massena Lines (the “U.S. Massena Lines”) by B&LE. CSXT opposes the FGLK conditions. In support of CSXT’s opposition, I describe the nature of the transaction, which simply moves the point of interchange between CSXT and the CN System closer to Syracuse, NY, and the benefits for shippers that will result from the sale of the U.S. Massena Lines to B&LE. I explain that the proposed sale will have no anti-competitive effects. I also explain that the sale of the Massena Lines will have no effect at all on FGLK or on FGLK’s access to traffic moving between the United States and Canada on the Massena Lines.¹ Finally, I explain that FGLK’s requested conditions, if imposed, would jeopardize the entire transaction by undermining economic analyses that were central to the terms of the proposed line sale.

CSXT’s sale of the U.S. Massena Lines to B&LE will benefit shippers.

In June 2018, CSXT announced that it was offering for sale the Massena Lines, which include railroad lines in the United States and Canada, essentially between Woodard (near Syracuse), NY, and Beauharnois (near Montreal), Quebec, Canada. As relevant here, the United States portion of the 236.3-mile Massena Lines consists of (1) the St. Lawrence Subdivision between Woodard, NY, milepost QM 3.0, and the US-Canadian border, milepost QM 183.1, a distance of approximately 179.2 miles, which includes the nine-mile Balmat Industrial Track, the

¹ FGLK relies, in part, on purported concerns of Attis Ethanol Fulton, LLC (“Attis”) and the Port of Oswego (the “Port”) regarding the replacement of CSXT by B&LE on the Fulton Subdivision. CSXT and B&LE have reached a settlement agreement with Attis resolving its issues with the proposed transaction. While my statement focuses on conditions requested by FGLK, I also address the purported concerns of the Port below.

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five-mile Rooseveltown Industrial Track, and the 12-mile Carthage Branch; and (2) the Fulton Subdivision between the connection with the St. Lawrence Subdivision, milepost QMF 7.2, and the end of the line at or near Ft. Ontario, milepost 37.95, a total distance of approximately 31 miles. The map included as Exhibit 1-Map C in the Application submitted by B&LE to the Board on October 10, 2019 for approval of the line sale depicts the relevant line segments and branch lines.²

In designing its plant rationalization program, CSXT generally determined that rail lines and the branches on those rail lines would be offered as a unit since they would generate more traffic and offer a greater opportunity for success for the new operator. In selling the Massena Lines, CSXT similarly determined that including the Fulton Subdivision with the St. Lawrence would allow the new operator of the Massena Lines to provide more efficient service, and have a larger service area from which to generate traffic for itself and CSXT.

CSXT solicited bids from numerous parties. CSXT invited FGLK to bid for the purchase of the Massena Lines {{ }}. In fact, FGLK's connection to the Massena Lines is minimal. FGLK's President Michael V. Smith states that "FGLK handled 291 carloads of pulpboard, corrugated cuttings/clippings, scrap paper, Canadian field dried peas, talc and liquified petroleum gas of Canadian traffic." I have reviewed CSXT's records and have discovered that only {{ }} of the 291 carloads noted by FGLK are actually routed over the railroad lines involved in the proposed transaction, {{

² *Bessemer and Lake Erie R.R. Co.—Acquisition & Operation—Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Ctys., N.Y.*, FD 36347, slip op. at 6 (served Nov. 8, 2019).

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}} The remaining carloads are routed to the west on FGLK, not over the lines that are at issue here.

CSXT reviewed all of the bids that were received and selected CNR as the bidder with which it would commence negotiations. CNR was a logical partner given that the Massena Lines have already been used for years to connect the CN System in Canada with the CSXT network in the United States and given the proven ability of the CN System to operate over a long line that often experiences difficult operating conditions in winter. CSXT and CNR then negotiated a Purchase and Sale Agreement (Exhibit 2 to the Application) governing the transaction, which was executed on August 29, 2019 by CSXT, two CSXT affiliates (owners of property in Canada included in the deal), CNR, and B&LE. The PSA provided that B&LE would acquire and operate the U.S. Massena Lines.³

The sale of the Massena Lines will provide numerous benefits to shippers. As a result of the sale of a line that is peripheral to CSXT's core network, CSXT will reduce its maintenance-way-costs by eliminating 236.3 miles from its system, thus allowing CSXT to improve service to its shippers by focusing its attention and maintenance resources on its core lines. At the same time, the CN System can be expected to devote substantial resources to maintaining and improving the Massena Lines, given the importance to the CN System of the access to the United States over those lines. Moreover, the CN System's experience in maintaining and operating lines in difficult winter conditions will likely improve operations and service over those lines. The CN System will be able to coordinate its maintenance activities and capital investment on the Massena Lines with its core Canadian lines to better support traffic moving between the

³ I refer to the CN and B&LE collectively as the "CN System."

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United States and Canada. CSXT also expects that the new operating plan offered by B&LE will provide improved service to customers and therefore be able to attract additional volume to the Massena Lines. There will be better routing and connectivity regarding intermodal traffic moving between east coast ports and CNR-served markets that historically have not been competitive with the current CSXT/CNR service product.

The sale of the U.S. Massena Lines to B&LE will not have any anti-competitive effects.

Since the sale of the Massena Lines to the CN System simply changes the point of interchange between CSXT and the CN System on traffic moving between the United States and Canada, the line sale will have no anti-competitive effects. While operations and service will likely improve, as I discussed above, no competitive conditions will change as a result of the line sale to the CN System. The sale of the St. Lawrence Subdivision and the Fulton Subdivision are end-to-end between CSXT and B&LE. On none of the lines to be sold will any shipper see service reduced from two railroads to one; B&LE will merely replace CSXT. No gateways will be closed.

In addition, the change in location of the interchange between CSXT and the CN System will not have any adverse impacts on operations or service for traffic moving between the United States and Canada on the Massena Lines. B&LE's ownership of the Massena Lines will end at Woodard, NY, but CSXT has granted operating rights to B&LE so that the physical exchange of traffic can take place at the most efficient locations, CSXT's DeWitt Yard for carload traffic moving east and west and unit train traffic moving east of Syracuse and at CSXT's Belle Isle Yard for unit train traffic moving west of Syracuse. See Exhibit 1-Map D attached to B&LE's

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Application for the configuration of yards in the Syracuse area.⁴ The traffic will continue to move the same way through Syracuse after the proposed transaction as it does today.

Most important, the Massena Lines sale will have no competitive or operational impact at all on FGLK. Today, FGLK does not have a direct connection to the CN System or any prospect of a direct connection to the CN System, which is over 230 miles away from FGLK's eastern terminus. FGLK relies on CSXT to handle traffic between the CN System and FGLK. After the sale, FGLK will still rely on CSXT to handle traffic between the CN System and FGLK. The only difference will be that CSXT's haul will be shorter and the CN System's will be longer. FGLK's access to traffic moving between the United States and Canada will be unchanged. Nothing will prevent FGLK from seeking to expand its shipment of traffic to and from Canada, if there is a prospect of new business. As always, CSXT would be pleased to work with FGLK in the future to develop new business.

FGLK's requested St. Lawrence Subdivision conditions would undermine the central analyses of the sale.

While FGLK is completely unaffected by the Massena Lines sale, FGLK nevertheless asks the Board to impose conditions on the sale that could jeopardize the entire transaction. FGLK asks the Board to impose two conditions on the sale of the Massena Lines that relate to traffic moving over the St. Lawrence Subdivision. First, FGLK asks the Board to remove from the sale agreement a provision that prevents B&LE from seeking to establish a direct connection with FGLK in the Syracuse area (Section 5.14(b)). Second, FGLK asks the Board to impose

⁴ Throughout its Comments, FGLK refers to "trackage rights" granted by CSXT to B&LE to interchange traffic. In fact, CSXT has agreed to grant B&LE *operating* rights for the sole purpose of moving traffic to or from either Belle Isle Yard or DeWitt Yard for interchange as agreed by CSXT and B&LE.

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trackage rights that would allow FGLK to connect directly with B&LE at either Woodard or Solvay Yard. Both conditions, if granted, would undermine central elements of the commercial agreement between CSXT and B&LE on which the lines sale is based.

In negotiating the terms of the sale of the Massena Lines, CSXT's analysis was based on its conclusion that it would continue to participate in the movement of traffic to and from Canada over the lines to be sold and that the purchaser, the CN System, would not take any actions to cut CSXT out of that traffic. Therefore, CSXT decided to sell the Massena Lines only to Woodard, NY, which is a point north of Syracuse and short of a direct connection with shortline railroads in the Syracuse area, including FGLK. CSXT also required that the purchaser in the line sale agree not to use its new proximity to Syracuse to seek a direct connection with a shortline in the Syracuse area and thereby cut CSXT out of traffic moving over the Massena Lines. The sale of the Massena Lines to the CN System would not have worked for CSXT without this assurance that the CN System would not seek a direct connection with a shortline in Syracuse.

However, FGLK asks the Board to eliminate these central elements of the line sale agreement by imposing trackage rights that would allow the CN System to connect directly with FGLK and by eliminating Section 5.14(b) of the sales agreement. If CSXT had expected that the sale of the Massena Lines to the CN System would result in the potential loss of CSXT's participation in traffic using the Massena Lines, CSXT would not have sold the lines. The economic terms of the line sale are based on the conclusion that the CN System will not directly connect with another rail carrier in the Syracuse area and that the CN System will not seek to establish such a direct connection. Indeed, Section 5.14(b) was so important to CSXT in

negotiating the commercial terms of the line sale that we reserved the right to cancel the transaction if Section 5.14(b) were removed or altered.

FGLK's Fulton Subdivision conditions are unnecessary and unjustified.

FGLK's President, Michael Smith, has stated in an attachment to FGLK's comments that shippers on the Fulton Subdivision are concerned "that they will not receive the same level of service and competitive rates as is currently provided by CSXT." Smith VS at 3. In particular, FGLK is concerned that B&LE will become an intermediate carrier between CSXT and FGLK for traffic on the Fulton Subdivision, and that the addition of B&LE to the movement will affect service and pricing. These concerns are unfounded for several reasons.

First, for traffic moving from the Fulton Subdivision east into Canada, the sale of the Massena Lines will actually reduce the number of carriers in the route. The Fulton Subdivision connects to the St. Lawrence Subdivision north of Woodard, so B&LE will be able to provide single-line service between the Fulton Subdivision and points on the St. Lawrence Subdivision and eastern Canada, instead of the joint-line service between CSXT and the CN System today.

Second, for traffic to and from the Fulton Subdivision west of Syracuse, the actual handling of the traffic will not change in any significant manner. Today, CSXT handles that traffic through Belle Isle Yard. After the proposed transaction closes, CSXT will exchange traffic physically with B&LE at Belle Isle Yard. Both pre- and post-transaction operations will involve the traffic moving through Belle Isle Yard for movement to and from the west, so the shippers on the Fulton Subdivision should not incur a reduction in service. By comparison, FGLK's proposed solution is to insert itself into the route and take the traffic to Solvay Yard to interchange to CSXT, and then have CSXT take the traffic to Belle Isle Yard, adding another

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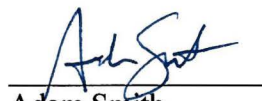
interchange into the movement of Fulton Subdivision traffic. This would actually be far less efficient than the current operation or the operation proposed by B&LE.

Third, B&LE has made it clear that it “will work with customers on the U.S. Massena Lines (which includes the Fulton Subdivision) to understand their rail service needs, develop efficient plans for rail operations to their facilities, and help them grow their future business.” See Application, Drysdale VS at 7. There is no reason to believe that shippers on the Fulton Subdivision will experience any decline in service or any reduction in commercial opportunities as a result of the line sale.

VERIFICATION

I, Adam Smith, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on January 8, 2020.

A handwritten signature in blue ink, appearing to read 'Adam Smith', is written over a horizontal line.

Adam Smith
Head of Operations Planning & Performance
CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I certify that I have, on January 8, 2020, served copies of these reply comments on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton
Attorney for CSX Transportation, Inc.