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BY E-FILEMs. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024Re: *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* (Docket No. FD 36347)

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding are two versions of the Reply of Bessemer and Lake Erie Railroad Company in Support of its Minor Application (designated as “B&LE-5”). One version, marked as “PUBLIC,” and from which sensitive financial, commercial, and operating information has been redacted, is to be filed on the public record. The second, marked as “HIGHLY CONFIDENTIAL,” is an unredacted version to be filed under seal subject to the protective order entered in this proceeding by the Board’s stamp order served October 22, 2019.

Very truly yours,

/s/ Claire M. Maddox
Partner

Attachments

cc: All Parties of 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, NEW YORK**

**REPLY OF BESSEMER AND LAKE ERIE RAILROAD COMPANY
IN SUPPORT OF ITS MINOR APPLICATION**

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January 8, 2020

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TABLE OF ABBREVIATIONS

AAR	Association of American Railroads
Acquisition	The acquisition, pursuant to the PSA, of the Canadian Massena Lines by CNR and the U.S. Massena Lines by B&LE
Alcoa	Alcoa U.S.A. Corp.
ARU	Allied Rail Unions
Application	The Application for a Minor Transaction (designated as BLE-1) filed by B&LE in this proceeding
ASLRRA	American Short Line Railroad Association
Attis	Attis Ethanol Fulton, LLC
B&LE	Bessemer and Lake Erie Railroad Company
Board	Surface Transportation Board
Canadian Massena Lines	Those portions of the Massena Lines as are located in Canada, consisting of approximately 41.8 miles of CSXT's Montreal Subdivision between CSXT milepost QM 183.1 at or near the U.S.-Canada border and QM 226.1 at or near Beauharnois, Quebec (excluding the portion subject to the Beauharnois to Valleyfield Lease, which includes the Diageo Industrial Spur (MP QMD 0.10 to QMD 1.50) and the Valleyfield Industrial Track between milepost QMV 1.00 and QMV 1.80.
Closing	Closing of the Transaction, in accordance with the PSA.
CN	U.S. rail operating subsidiaries, including B&LE, of the Canadian National Railway Company.

CN/DMIR	<i>Canadian Nat'l Ry.—Control—Duluth, M. & I.R. Ry.</i>
CN/IC	<i>Canadian Nat'l Ry.—Control—Ill. Cent. Corp.</i>
CN System	The rail system operated by CN in the United States and by CNR in Canada, collectively.
CNR	Canadian National Railway Company
Conrail	Consolidated Rail Corporation
CSXT	CSX Transportation, Inc.
FGLK	Finger Lakes Railway Corp.
FRA	Federal Railroad Administration
Massena Lines	Approximately 278.1 miles of rail line (including branch lines) between Beauharnois, Quebec (near Montreal) and Woodard, New York (near Syracuse), including certain branch lines and spurs.
MHWA	Mohawk, Adirondack, and Northern Railroad Corporation
MSTR	The Massena Terminal Railroad Company
<i>New York Dock</i>	Labor protective conditions prescribed by <i>New York Dock Ry. – Control – Brooklyn E. District Terminal</i> , 360 I.C.C. 60, <i>pet. for review denied sub nom. New York Dock Ry. v. United States</i> , 609 F.2d 83 (2d Cir. 1979), <i>as modified by Wilmington Terminal R.R. –Purchase & Lease – CSX Transp., Inc.</i> , 6 I.C.C.2d 799 (1990), <i>modified</i> , 7 I.C.C.2d 60 (1990), <i>aff'd sub nom. Railway Labor Executives' Ass'n v. ICC</i> , 930 F.2d 511 (6th Cir. 1991)
<i>N&W/Illinois Terminal</i>	<i>Norfolk & W. Ry.—Purchase—Ill. Terminal R.R.</i> , 363 I.C.C. 882 (1981), <i>aff'd sub nom. Illinois v. ICC</i> , 687 F.2d 1047 (7th Cir. 1982).

NS	Norfolk Southern Corporation
<i>NS/D&H</i>	<i>Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Delaware & H. Ry.</i> , Docket No. FD 35873, slip op. at 14 (STB served May 15, 2015).
<i>NS/PAS</i>	<i>Norfolk S. Ry. – Joint Control & Operating/Pooling Arrangements –Pan Am S. LLC</i> , STB Finance Docket No. 35147 (STB served Mar. 10, 2009).
NYOG	New York and Ogdensburg Railway Company, Inc.
NYSDOT	The State of New York Department of Transportation
Port of Oswego	Port of Oswego Authority
PSA	Purchase and Sale Agreement, dated as of August 29, 2019, between CNR and B&LE and CSX Transportation, Inc., CSX Intermodal Terminals, Inc., and St. Lawrence and Adirondack Railway Company
PTC	Positive Train Control
PIH	Poison-by-inhalation hazardous materials
<i>RGI/CMW</i>	<i>Rio Grande Indus., Inc.—Purchase & Trackage Rights—Chicago, M & W. Ry. Line Between St. Louis, MO & Chicago, IL</i> , 5 I.C.C.2d 952 (1989).
RIA	Railroad Industry Agreement
SMART/TD-NY	The International Association of Sheet Metal, Air, Rail and Transportation Workers/Transportation Division
Transaction	The proposed acquisition and operation of the U.S. Massena Lines
TWU	The Transport Workers Union of America

U.S. Massena Lines Those portions of the Massena Lines (approximately 236.3 miles) as are located in the United States and are subject to the Board’s regulatory jurisdiction.

Wilmington Terminal Modification of *New York Dock* labor protective conditions by *Wilmington Terminal R.R. –Purchase & Lease – CSX Transp., Inc.*, 6 I.C.C.2d 799 (1990), *modified*, 7 I.C.C.2d 60 (1990), *aff’d sub nom. Railway Labor Executives’ Ass’n v. ICC*, 930 F.2d 511 (6th Cir. 1991)

The standard two-letter postal abbreviations (in particular, “NY” for New York and “QC” for Quebec) are used for U.S. states and Canadian provinces.

BEFORE THE
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BESSEMER AND LAKE ERIE RAILROAD COMPANY

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**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN
ONONDAGA, OSWEGO, JEFFERSON, SAINT LAWRENCE,
AND FRANKLIN COUNTIES, NEW YORK**

**REPLY OF BESSEMER AND LAKE ERIE RAILROAD COMPANY IN SUPPORT OF
ITS MINOR APPLICATION**

Bessemer and Lake Erie Railroad Company (“B&LE”)¹ hereby submits its responses to comments and requests for conditions filed in this proceeding, and its rebuttal in support of its minor Application requesting Board’s approval of its acquisition from CSX Transportation, Inc. (“CSXT”) and operation of the U.S. Massena Lines. The record demonstrates, as the Board preliminarily concluded in Decision No. 1 (served November 8, 2019), that the proposed Transaction clearly met the statutory approval standards and is in the public interest. Other than standard employee protective conditions that B&LE and CSXT have already asked the Board to impose, conditions have been requested by two commenters – Finger Lakes Railway Company (“FGLK”) and the Port of Oswego Authority (“Port of Oswego”) – but these conditions are not

¹ Abbreviations and short forms have the meanings set forth in the Table of Abbreviations found at pages v-viii.

rooted in any claim of anticompetitive effects. Instead, they are efforts by these parties to promote their own commercial interests. For the reasons discussed below and described further in the attached Reply Verified Statement of Janet Drysdale, Vice-President, Financial Planning, B&LE respectfully asks the Board to approve the Transaction, conditioned only by standard labor protective conditions. B&LE looks forward to providing safe and reliable rail operations to customers over the U.S. Massena Lines.

FACTUAL BACKGROUND

A. CSXT's Agreement to Sell the U.S. Massena Lines to B&LE, Including the Fulton Subdivision

In June 2018, CSXT announced that it was rationalizing its system by divesting six lines in the United States, including the Massena Lines. Those lines including certain branch lines and spurs, such as the Fulton Subdivision, lie generally between Beauharnois, QC (near Montréal) and Milepost 3.0 south of Woodard, NY (near Syracuse).² CSXT invited potentially interested parties to bid for the Massena Lines as an integrated whole.

CSXT organized a bidding process for the Massena Lines. The shortline FGLK, which has sought conditions that would effectively add it as a second railroad operating on approximately 35 miles of track included in the Massena Line package, could have submitted a bid. Canadian National Railway Company ("CNR"), B&LE's indirect parent, submitted the winning bid and negotiated with CSXT to execute a Purchase and Sale Agreement ("PSA").³

² Press Release, CSXT, CSX Solicits Bids on Six Additional Rail Segments (June 6, 2018), <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-solicits-bids-on-six-additional-rail-segments/>.

³ See Application for a Minor Transaction (BLE-1) ("Application") at 2 & n.3.

B. The B&LE Application Seeking Board Approval for the Minor Transaction

On October 11, 2019, B&LE submitted its Application for a Minor Transaction, seeking the Board's approval of its acquisition and operation of the U.S. Massena Lines. The Application explained that the proposed Transaction was an end-to-end transaction that would substitute B&LE for CSXT as the railroad serving local customers on the U.S. Massena Lines, without reducing the competitive service options for any customer or connecting short line and without any other anticompetitive effect.

The Application also discussed various ways in which the Transaction would contribute to the public interest in meeting significant transportation needs. B&LE explained that it looks forward to providing safe and effective rail service on the U.S. Massena Lines after Closing. It explained, among other things, that the Transaction would ensure that, following CSXT's divestiture of the Massena Lines (including the portion of the Massena Lines in Canada), traffic moving between the CN System and CSXT over those lines will continue to require only one interchange. This means that the efficiency of the CN System-CSXT interline route would not be impaired by the insertion of a third rail carrier and a second interchange. It further explained that the Transaction would improve the efficiency of operations over the Massena Lines because B&LE has planned to operate one pair of through trains to replace the transfer assignments CSXT currently operates between Massena, NY and Huntingdon, QC, reducing total estimated transit time by approximately 24 hours.⁴

⁴ Application, BLE-1, Exhibit 15 (Operating Plan-Minor), at 6; *id.*, Verified Statement of Janet Drysdale at 11 ("V.S. Drysdale").

The Application explained that the Transaction meets the statutory approval standard, see 49 U.S.C. § 11342(d), and will have no anticompetitive effects. B&LE asked that the Board therefore approve the Transaction, subject only to the standard *New York Dock* employee protective conditions, as modified by *Wilmington Terminal*, required by 49 U.S.C. § 11326 for transactions of this type.

C. B&LE and CSX Have Begun Outreach to Customers and Shortlines To Facilitate Smooth Transition After Consummation

The CN System has conducted extensive outreach to stakeholders regarding its proposed acquisition of the U.S. Massena Lines. It has shared its information about the acquisition with more than 13,000 contacts at more than 8,000 customers. B&LE and CSXT have approached customers, short lines, elected officials, local communities, and other stakeholders as part of their outreach and transition planning efforts. B&LE has contacted local customers on the U.S. Massena Lines and has explained the Transaction and its potential benefits for customers and communities, listened to their concerns, and begun preparing for the anticipated substitution of B&LE service for that of CSXT. That outreach has included shippers and receivers of a wide range of commodities, including agricultural and food products, chemicals, metals and equipment, minerals, forest products and paper, and phosphates and fertilizer.

As part of its integration planning for each customer, B&LE will implement a number of key steps prior to Closing. These include establishing a customer ID, setting up the customer contact information in our Customer Relationship Management System, and assigning an

Account Manager representative; transitioning rate publications; and publishing rate authorities.

In the coming weeks, B&LE will continue to prepare for a smooth integration upon closing.⁵

D. The Board Classified the Transaction as “Minor” In Decision No. 1.

The Board made a preliminary determination that the Transaction clearly satisfied the statutory standard for approval.⁶ The Board concluded: “Nothing in the record thus far suggests that the Transaction would have anticompetitive effects.”⁷ And the Board further recognized that “if anticompetitive effects resulting from the Transaction should later be shown to be likely, they would appear, from the face of the application, to be outweighed by the Transaction’s contribution to the public interest in meeting significant transportation needs.”⁸ The Board advised that “after the record in the proceeding is fully developed, the Board will carefully review the proposed transaction to make certain that it does not substantially lessen competition, create a monopoly, or restrain trade and that any anticompetitive effects are outweighed by the public interest.”⁹ The Board found the Transaction was properly classified as minor.

E. Two Commenters Have Asked the Board to Impose Conditions That Are For Their Own Commercial Advantage, Rather Than Based on Anticompetitive Effects.

Two commenters—FGLK and the Port of Oswego—have sought conditions to further their own commercial interests by asking the Board for various conditions. None of these

⁵ See Reply Verified Statement of Janet Drysdale at 4-6 (“R.V.S. Drysdale”) (attached hereto).

⁶ Decision No. 1, slip op. at 5-6 (STB served Nov. 8, 2019).

⁷ Slip op. at 6.

⁸ *Id.*

⁹ *Id.* (citing 49 U.S.C. § 11324(d)).

conditions would address a reduction in competition. A third commenter, Attis, initially sought similar conditions. Attis now supports B&LE's Application to acquire and operate the U.S. Massena Lines, including the Fulton Subdivision, and has withdrawn its comments, withdrawn its request for conditions, and withdrawn its support for other requested conditions.¹⁰

Several unions (the Allied Rail Unions ("ARU") and the Transport Workers Union of America ("TWU")) asked the Board to impose the employee protection conditions from *New York Dock*, as modified by *Wilmington Terminal*, consistent with B&LE's and CSX's requests. Samuel J. Nasca, who serves as New York State Legislative Director for the International Association of Sheet Metal, Air, Rail and Transportation Workers/Transportation Division ("SMART/TD-NY"), argued in his December 9 comment that the Board should not classify the Transaction as minor. On December 19, SMART/TD-NY made an untimely second filing that focused on labor protection conditions.

No cities, counties, or municipalities have sought any conditions.

STANDARDS FOR APPROVING MINOR APPLICATION AND IMPOSITION OF CONDITIONS

Under the statute, the Board must approve a line sale transaction proposed under Section 11323, unless it finds that *both* (1) the transaction is likely to cause "substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any

¹⁰ See letter from J. Gregory Pilewicz (President, Attis Ethanol Fulton, LLC) to Cynthia T. Brown (Chief, Section of Administration, Office of Proceedings, Surface Transportation Board) (Jan. 7, 2020) ("Attis Letter") (attached as Exhibit 3).

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).

The Board must approve the Application unless anticompetitive effects arise “that are both ‘likely’ and ‘substantial.’” *Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of the Delaware & H. Ry.*, Docket No. FD 35873, slip op. at 14 (STB served May 15, 2015) (“NS/D&H”); *CSX Transp., Inc.—Joint Use—Louisville & I. R.R.*, Docket No. 35523, slip op. at 5 (STB served Apr. 10, 2015); *Mass. Coastal R.R.—Acquisition—CSX Transp., Inc.*, STB Finance Docket No. 35314, slip op. at 6 (STB served Mar. 29, 2010).

The Board exercises its conditioning authority only “where a condition bears on issues [the agency] may consider in deciding whether to approve a transaction.” *Norfolk & W. Ry.—Purchase—Ill. Terminal R.R.*, 363 I.C.C. 882, 891-92 (1981) (“N&W/Illinois Terminal”), *aff’d sub nom. Illinois v. ICC*, 687 F.2d 1047 (7th Cir. 1982).¹¹ Thus, in the context of a minor transaction, which the Board must approve if there is no significant reduction in competition, the Board exercises its conditioning authority “to ameliorate competitive harm that might result from the proposed transaction.” *NS/D&H*, slip op. at 22. The Board may not impose conditions absent a showing that the Transaction would result in significant anticompetitive effects.¹² *See id.* at 24-

¹¹ Labor protective conditions have an independent statutory basis, *N&W/Illinois Terminal*, 363 I.C.C. at 892 n.10 (citing 49 U.S.C. § 11347 (now § 11326)), as do environmental mitigation conditions under the National Environmental Policy Act, *Village of Barrington v. STB*, 636 F.3d 650, 665 (D.C. Cir. 2011).

¹² To the extent FGLK’s comment could be read as suggesting the Board may impose such conditions where the Transaction will not result in competitive harm, B&LE disagrees. *See* FGLK Comments at 13 (“Even if the Board determines that the transaction overall does not adversely affect competition, or that the public benefits outweigh any competitive harm, and that the transactions [*sic*] should be approved, the Board can still consider appropriate conditions.”).

25 (denying requested conditions on grounds that they “do not seek to remedy a loss of competition” and “in no way relate[] to a competitive harm alleged to be caused by this proposed transaction”); *Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC*, STB Finance Docket No. 35147, slip op. at 6 (STB served Mar. 10, 2009) (“*NS/PAS*”) (denying conditions not based on alleged competitive effects).

Proponents of a condition must demonstrate that it is necessary. *CSX Corp.—Control—Chessie Sys., Inc.*, 363 I.C.C. 521, 577 (1980) (“protestants have not demonstrated that any of the conditions sought are necessary”); *Rio Grande Indus., Inc.—Purchase & Trackage Rights—Chicago, M. & W. Ry. Line Between St. Louis, Mo & Chicago, IL*, 5 I.C.C.2d 952, 968-69 (1989) (“*RGI/CMW*”) (in transaction subject to the predecessor statute of § 11324(d) burden is on opponents of transaction to submit evidence sufficient to overcome agency’s tentative conclusion that it would have no anticompetitive effects).

The harm to be addressed by conditions “must be to competition, not to a particular competitor.”¹³ Additionally, the competitive harm “must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing” that are not caused by the transaction.¹⁴ Moreover, commercial conditions may not be imposed to remedy anticompetitive effects unless the conditions to be imposed “will ameliorate or eliminate the harmful effects,” “be operationally feasible,” and “produce public benefits (through reduction

¹³ *NS/D&H*, slip op. at 22 (citing *Canadian Nat’l Ry.—Control—Ill. Cent. Corp.*, 4 S.T.B. 122, 140 (1999) (“*CN/IC*”)).

¹⁴ *Id.* (quoting *Canadian Nat’l Ry.—Control—Duluth, M. & I.R. Ry.*, STB Docket No. 34424, slip op. at 14 (STB served Apr. 9, 2004) (“*CN/DMIR*”)).

or elimination of possible harm) outweighing any reduction to the public benefits” of the transaction.¹⁵

Finally, conditions calling for “affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights . . .)” must be sought through a responsive application. 49 C.F.R. § 1180.3(h). Responsive applications are not permitted in proceedings involving a minor transaction. *Id.* § 1180.4(d)(1).

ARGUMENT

The Board concluded in its preliminary finding in Decision No. 1 that the Transaction clearly meets the standard for approval under 49 U.S.C. § 11324(d). That standard is focused on whether the proposed transaction will reduce competition. In this case, where the record demonstrates that the transaction will have no anticompetitive effect, the Board should approve the Transaction without conditions, other than standard *New York Dock* labor protective conditions, as modified by *Wilmington Terminal*. FGLK and the Port of Oswego seek Board-imposed conditions, but their requests are not based on any anticompetitive effects of the proposed Transaction. Instead, they seek to further their own commercial interests by expanding or improving their current operations.

Part I below explains that the Board should approve the Transaction without imposing the commercial conditions requested by FGLK and the Port of Oswego. Part II discusses why their

¹⁵ *Canadian Nat’l Ry.—Control—Ill. Cent. Corp.*, STB Finance Docket No. 33556, Decision No. 7, slip op. at 4 (STB served Sept. 18, 1998) (citing *Union Pac. Corp.—Control—Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982)); see also *CN/DMIR*, slip op. at 14.

requests are inappropriate and should be denied. Instead, as discussed in Part III, the Board should only impose standard labor protection conditions requested by B&LE and CSXT.

I. THE BOARD SHOULD APPROVE THE END-TO-END TRANSACTION WITH ONLY STANDARD LABOR CONDITIONS.

A. The Transaction Will Substitute B&LE for CSXT and Will Not Reduce Competition.

The record has demonstrated that the Transaction would not reduce competition as the Transaction would not reduce the number of rail carriers serving any rail customer or connecting short line. The Transaction would preserve the competitive status quo by substituting B&LE for CSX as operator of the U.S. Massena Lines, without reducing transportation options for shippers or connecting rail carriers. Under similar circumstances in other line sale transactions between two carriers where one railroad will be substituted for another railroad as operator of the rail line, the Board has recognized there is no likelihood of substantial anticompetitive effects arising from the transaction and found there was no need to address the public interest. *See, e.g., CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk W. R.R.*, Finance Docket No. 35522, slip op. at 6 (STB served Feb. 8, 2013) (“Having found no likelihood of substantial anticompetitive effects from this transaction, we need not address whether the public interest outweighs any such effects.”); *Mass. Coastal R.R.—Acquisition—CSX Transp., Inc.*, STB Finance Docket No. 35314, slip op. at 7 (STB served Mar. 29, 2010) (same). Where the Board finds that a minor transaction will not reduce competition, it approves the transaction without imposing conditions, other than labor protection.¹⁶

¹⁶ *See, e.g., Paducah & Louisville Ry.—Acquisition—CSX Transp., Inc.*, STB Finance Docket No. 34738, Decision No. 5, slip op. at 4 (STB served Nov. 18, 2005) (“[T]he transactions

No commenter substantively argued that the Board should deny B&LE's Application to acquire and operate the U.S. Massena Lines. The State of New York Department of Transportation ("NYSDOT") filed comments that neither called for approval or disapproval of the Transaction; nor did NYSDOT ask the Board to impose any conditions on the Transaction.¹⁷ FGLK and the Port of Oswego did not take a position on whether the Board should approve the Transaction. Attis now supports the Transaction and has withdrawn its Comments, which had also taken no position on approval of Transaction.¹⁸ The ARU and TWU did not oppose the Transaction nor did they oppose the Board's classification of the Transaction as minor.

Only one commenter—SMART/TD-NY—contended that the Board should deny the Application in a late-filed supplemental comment. Its untimely comment should be rejected.¹⁹

contemplated by P&L will not have any anticompetitive effects, because they will simply allow EVWR to replace CSXT as the railroad providing service on the Evansville-Okawville Line"; transaction approved with labor protection conditions); *Buckingham Branch R.R.—Lease—CSX Transp., Inc.*, STB Finance Docket No. 34495, Decision No. 6, slip op. at 6 (STB served Nov. 5, 2004) ("Here, there is no claim that competition would be reduced or a monopoly created. BBRR would simply replace CSXT as the carrier for all traffic origination or terminating on these Lines other than [traffic to and from a single shipper, which would continue to be served solely by CSXT]; transaction approved with labor protection conditions).

¹⁷ NYSDOT Comments at 1-2.

¹⁸ See Attis Letter (attached as Exhibit 3).

¹⁹ SMART/TD-NY has already filed two sets of comments in this Transaction and has indicated that it intends to file a third set of comments on January 8, 2020. See NASCA-2 at 3 n.3. Mr. Nasca should not be permitted to come in on that date and make new arguments or propose new conditions on matters on which the applicant is entitled to close the record. See *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, Finance Docket No. 32760, Decision No. 37, 1996 WL 271993, at *4 (STB served May 22, 1996) ("applicants are entitled to respond to all the opposition to the case on [the date set in the procedural schedule for reply to opposition comments] and to close the record on their own case"). Decision No. 1 was explicit that "**All** comments, protests, requests for conditions, and **any other evidence and argument in opposition to the application**" were due on December 9, 2019 (emphasis added). The procedural schedule provided ample time for commenters to prepare and file their comments.

Even if the Board does not reject the comment as untimely, it should decline the suggestion as unsupported and contrary to the evidence in the record. SMART/TD-NY asserts in one sentence that “SMART/TD-NY opposes the proposed transaction, and urges that it be denied.”²⁰ It provides no grounds for that request. Its request is also inconsistent with the positions advanced by the unions, including the ARU and the TWU, described above.

As discussed below, the record now confirms the Board’s preliminary determinations in Decision No. 1: that the Transaction will not reduce competition; and that even if there were such effects, which there are not, they would be outweighed by the public interest.

B. The Transaction Is in the Public Interest.

The fact that no anticompetitive effects will arise from the Transaction is underscored by the broad support for B&LE’s acquisition of the U.S. Massena Lines. Supporters include customers, shortlines that directly connect to the U.S. Massena Lines, ports, elected officials, and other stakeholders. They have explained how B&LE’s purchase and operation of the U.S.

The January 8, 2020 deadline applies to “[r]esponses to comments, protests, requests for conditions, and other opposition.” Decision No. 1 at 9. The Board plainly contemplated that the filings permitted on that date were those in support of the Minor Transaction, and that they were to close the evidentiary record, consistent with Applicant’s right to close the record. Importantly, by providing for the close of evidentiary proceedings on January 8, 2020, the Board also provided sufficient time for it to issue its final decision by February 21. *Id.* at 7 (citing 49 U.S.C § 11325(d)(2)). B&LE has been diligently preparing for a decision to be issued on or by February 21, 2020, and to take effect on or by March 22, 2010, as provided in Decision No. 1. SMART/TD-NY should not be allowed to make untimely filing that could result in delay in the issuance of the Board’s final decision. Thus, any further filing by SMART/TD-NY, or any other commenter, opposing the Transaction or seeking conditions on the Board’s approval, should be disregarded by the Board.

²⁰ NASCA-2 at 1.

Massena Lines will be beneficial for rail transportation on the lines and do not pose any anticompetitive effects.²¹

In this case, the proposed Transaction not only would preserve the competitive status quo, but also would further the public interest in meeting significant transportation needs. As the Application explained, the Transaction secures a future for the Massena Lines. The principal effect of the Transaction, from the point of view of shippers of overhead customers moving traffic between the CN System and CSXT, would be to move the interchange location from Huntingdon, QC to Woodard, NY.²² As a result, the Transaction ensures that a third carrier would not be inserted in the overhead moves between the CN System and CSXT upon CSX's divestiture of the Massena Lines, which insertion would otherwise require a second interchange, making the route less fluid and potentially diverting traffic to more circuitous, less efficient routes. The Transaction will preserve existing competition over the U.S. Massena Lines for rail transportation to and from the Northeastern United States, which in turn will enable the CN System and CSXT to continue to provide efficient interline rail service to customers shipping between U.S. East Coast points and locations in the Canadian provinces of Quebec, New Brunswick, and Nova Scotia.

²¹ See R.V.S. Drysdale at 6; *see also* Summary of Support Statements (attached as Exhibit 2).

²² Although the revenue interchange would be at Woodard, NY, for efficient interchange and operations, B&LE's physical interchange of traffic with CSXT would occur at CSXT's Belle Isle Yard or CSXT's Dewitt Yard depending upon the type of traffic (BLE-1 at 22 & n.24, 25-26 & n.25; *id.*, Exhibit 15 at 5 & n.6; V.S. Drysdale at 5 n.4).

B&LE plans to operate the U.S. Massena Lines with the goal of working with overhead and local customers to maintain and, over time, grow overhead and local rail traffic. B&LE plans to invest in the U.S. Massena Lines and its operations, including immediate investments in equipment, inspection vehicles, and tools, and longer-term investments in track work, bridges, and structural work.²³ B&LE is committed to working with local customers on the U.S. Massena Lines to understand and identify their rail service needs, develop efficient plans to serve their facilities, and help them grow their future businesses.

B&LE has incentives to operate the U.S. Massena Lines efficiently to benefit its rail customers. A key planned efficiency is the elimination of the existing transfer assignments between Massena, NY and Huntingdon, QC, which is expected to improve reliability, reduce costs, and reduce total transit time by approximately 24 hours. The reduction in transit time will benefit all local customers on the U.S. Massena lines moving traffic between the lines and Canada, including {{ [REDACTED] }} It will also benefit overhead customers such as {{ [REDACTED] [REDACTED] }} whose traffic will move roughly a day faster over the Massena Lines after consummation. B&LE will also bring CNR's experience and practices to operate safely during challenging winter operating conditions.

B&LE's plans thus address the question raised by the NYSDOT in its Comments, regarding carloads that CSXT currently moves for local customers from or to the U.S. Massena Lines via its tracks south of Woodard, NY, as well as traffic "generated on one of the three stub-

²³ See BLE-1, Exhibit 15 at 11.

ending Class III railroads that connect exclusively with the U.S. Massena Lines.” NYSDOT urges that B&LE “ensure that services, rates, an[d] routings through Syracuse remain competitive.”²⁴ Doing so is consistent with B&LE’s plans and incentives. B&LE has engaged the three shortlines that directly connect to the U.S. Massena Lines, and none has opposed the transaction. Indeed, MSTR (one of the three stub-ending Class III railroads that directly connects to the U.S. Massena Lines, a group whose traffic was referenced by NYSDOT) actively supports the Transaction.²⁵ Another shortline that directly connects to the U.S. Massena Lines, the NYOG, also supports the Transaction.²⁶

II. THE BOARD SHOULD DENY THE REQUEST FOR CONDITIONS SOUGHT BY FGLK AND THE PORT OF OSWEGO THAT SEEK TO ADVANCE THEIR OWN COMMERCIAL INTERESTS RATHER THAN ADDRESS ANY REDUCTION IN COMPETITION.

Two commenters—FGLK and the Port of Oswego—have requested that the Board impose various conditions on the Transaction that are designed to advantage their own commercial interests.²⁷ They seek trackage rights for the FGLK to operate on the Fulton Subdivision as well as the St. Lawrence Subdivision,²⁸ which FGLK wants to use to exclude

²⁴ NYSDOT Comments at 1-2.

²⁵ See letter of Leonard M. Wagner (President, Massena Terminal Railroad) to Cynthia T. Brown (Chief, Section of Administration, Office of Proceedings, Surface Transportation Board) (Sept. 27, 2019) (attached to BLE-1).

²⁶ See letter of Frank K. Rogers (Vice President Business and Interline Development, Vermont Rail Systems, on behalf of New York and Ogdensburg Railway Company, Inc.) to Cynthia T. Brown (Jan. 6, 2020) (attached as Exhibit 4).

²⁷ Attis requested conditions, but it has withdrawn its request and now supports B&LE’s acquisition and operation of the U.S. Massena Lines, including the Fulton Subdivision.

²⁸ See Exhibit 1 (map showing FGLK’s proposed trackage rights).

B&LE from movements on the Fulton Subdivision that B&LE is acquiring as part of the Transaction, including moves between the Fulton Subdivision and CSXT. FGLK also seeks trackage rights to move carloads between customers located on FGLK's tracks and B&LE at Woodard, NY, for moves into Canada via CNR, excluding CSXT as a bridge carrier. The port seeks three additional conditions: to limit the importation of grain from Canada based on exchange rate fluctuations; to freeze rates for carloads moving under existing price authorities and cap per-car rates for new traffic for the port; and to address expansion of the industry track within the port's facility.

The Board should deny commenters' attempts to utilize this regulatory process to seek Board-ordered trackage rights and other conditions to further their own future commercial interests. None of these conditions is addressed to a reduction in competition. The Transaction is a pro-competitive end-to-end line sale substituting B&LE for CSXT as the owner and operator of the U.S. Massena Lines and thus preserving the competitive status quo. The Transaction will enhance competition rather than cause any reduction in competition. The commenters are attempting to utilize the regulatory approval process to address pre-existing circumstances that do not arise from any reduction in competition from the Transaction. Their unwarranted requests would undermine the fundamental economics underlying the Transaction.

The deficiency of the commenters' unsupported requests for trackage rights for FGLK is particularly evident given that such requests for trackage rights are generally precluded in minor transactions. Trackage rights are a form of affirmative relief requiring a responsive

application.²⁹ However, responsive applications are not permitted in minor transactions.³⁰ This is consistent with the statute, 49 U.S.C. § 11325(b)-(d), which provides for the filing of inconsistent applications for “major” and “significan[t]” transactions, but not for minor transactions.³¹

This rule has been applied in a context similar to the present proceeding, where one carrier was substituted for another as part of a minor transaction, maintaining the status quo.³² The rule should likewise be applied here as an additional independent basis for denying commenters’ requests for trackage rights in this proceeding. FGLK and the Port of Oswego have not sought to submit a responsive application, they have not challenged the designation of the Transaction as “minor,” and they have not demonstrated that the proposed Transaction would cause any reduction in competition that could justify waiving or bypassing the responsive application requirement or otherwise granting their requested trackage rights.³³

²⁹ 49 C.F.R. § 1180.3(h) (“Responsive applications. Applications filed in response to a primary application are those seeking affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as **trackage rights**, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). . . .) (emphasis added).

³⁰ 49 C.F.R. § 1180.4(d)(1) (“No responsive applications shall be permitted to minor transactions.”).

³² In *NS/D&H*, the Board refused to consider a request by a group of local customers for assignment to Norfolk Southern of other trackage rights on lines not included in the transaction previously granted to D&H because it “essentially constitute[s] a responsive application that is prohibited in this minor transaction.” *NS/D&H*, slip op. at 25.

³³ In transactions involving merger cases, where trackage rights are commonly requested, the Board has indicated that it may nonetheless retain the authority to impose trackage rights conditions if necessary to address harms that would be caused by an unconditioned transaction

A. The Board Should Deny Requests for Conditions That Seek to Advantage FGLK and Port of Oswego as Transportation Competitors.

FGLK requests conditions to protect or improve its own competitive position, as does the Port of Oswego in its request for a condition regarding the importation of grain from Canada. Any requested conditions to improve a competitor's positions—without showing that the conditions are necessary to prevent anticompetitive effects that would arise from the Transaction—are inappropriate.

Long-standing precedent makes clear that the Board's conditioning authority is to be used to "protect competition, not competitors." *Union Pac. Corp.—Control—Chicago & N.W. Transp. Co.*, Finance Docket No. 32133, Decision No. 25, slip op. at 98 (ICC served Mar. 7, 1995) (denying trackage rights and pricing conditions requested by railroad to protect it from loss of traffic to more efficient competitive routing made possible by applicants' proposed transaction); see also *Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239-40 (1992) (denying conditions that would have granted requester access to traffic of acquired railroads through pricing and service commitment authority or through haulage, "[b]ecause [requester's] evidence focuses on harm to itself as an individual competitor rather than on harm to the shipping public and to competition for surface freight

initially accepted as "minor." See *Canadian Nat'l Ry.—Control—Wisc. Cent. Transp. Co.*, STB Finance Docket No. 34000, Decision No. 4, slip op. at 2 (STB served June 15, 2001). But the Board's discussion of that possibility was in a procedural decision that preceded the filing of comments on the application, and appears to have been intended to provide for the possibility that a party might show that trackage rights conditions were warranted. Here, by contrast, commenters have had their opportunity to comment, and the record shows that the proposed Transaction will not cause any reduction in competition and that there is no other justification for commenters' requested trackage rights conditions.

transportation in the area”); *Rio Grande Indus., Inc.—Control—S. Pac. Transp. Co.*, 4 I.C.C.2d 834, 918 & n.66 (1988) (denying haulage and rate-setting condition requested to protect requesting railroad from loss of traffic as a result of applicants’ proposed transaction; noting that “[w]e have said on numerous occasions that we protect competition, not competitors”); *Union Pac. Corp.—Control—Mo.-K.-T. R.R.*, 4 I.C.C.2d 409, 458-60 (1988) (denying trackage rights and independent ratemaking authority conditions sought by railroads claiming that merger would create unacceptably high market concentration; holding that new single-line routes would increase competition and noting that “[w]e have said on several occasions that we protect competition, not competitors”).³⁴ As the Board has explained, “In assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers.” *CN/IC*, 4 S.T.B. at 140.

These requests from FGLK and the Port of Oswego attempt to further their commercial interests as transportation providers, rather than address any anticompetitive effects of the Transaction.

1. FGLK Seeks Two Sets of Trackage Rights Conditions that Would Drastically Expand Its Operations and Enable It to Exclude Respectively B&LE and CSX From Those Moves.

There is no basis for the Board to impose the trackage rights conditions requested in this proceeding, given the fact that the Transaction will not result in any reduction of competition. The proposed Transaction is an end-to-end line sale where B&LE as the acquiring railroad will substitute itself for CSXT as the sole rail carrier on the U.S. Massena Lines.

³⁴ See also *NS/D&H*, slip op at 18 (conditioning authority should be used to “protect competition overall, not specific competitors”); *Wisc. Cent.* 9 I.C.C.2d at 239-40.

FGLK cites no authority for the trackage rights conditions it seeks. Those rights would greatly expand FGLK's own operations, but they are not rooted in any need to address a reduction in competition and are thus beyond the scope of the Board's conditioning authority. See *N&W/Illinois Terminal*, 363 I.C.C. at 891-92. This is an end-to-end line sale where one railroad is merely substituting for another.³⁵ FGLK's lines are in Solvay, NY. They do not even physically connect with the tracks B&LE is acquiring. Moreover, FGLK does not operate on the Fulton Subdivision or the St. Lawrence Subdivision, nor does it have rights to do so. FGLK's requests for such rights is unsupported, contrary to the Board's precedent, and beyond the Board's authority. The request for conditions should be denied.

a) Trackage Rights In Connection With the Fulton Subdivision To Give FGLK the Ability to Exclude B&LE As a Carrier From Those Moves

FGLK seeks broad trackage rights in connection with the Fulton Subdivision to vastly expand its current operations.³⁶

- FGLK seeks trackage rights to move carloads between the Port of Oswego and CSXT over the Fulton Subdivision and St. Lawrence Subdivision. FGLK seeks to

³⁵ Indeed, in *NS/D&H*, the Board rejected three requests for conditions requiring assignment of trackage rights, in one instance explicitly on the ground that “[t]hese requests do not seek to remedy a loss of competition, but instead seek to put [a requester] in a position to conduct new operations where no current operations exist.” Slip op. at 23-24.

³⁶ The Port of Oswego also has requested Board-imposed trackage rights for FGLK on the Fulton Subdivision to provide rail service between the Port and CSXT, as well as trackage rights for FGLK to operate on the Fulton Subdivision between the Port of Oswego and Novelis. Port of Oswego Comments at 5. However, Novelis did not join the Port's request. The Port of Oswego also requested “similar rights for Attis,” *Id.* at 6, and FGLK has supported that request. FGLK Comments at 16-17. However, Attis has withdrawn its separate request for conditions and now supports the Transaction. See Attis Letter (attached as Exhibit 3).

physically interchange carloads between the Fulton Subdivision and CSXT, either at FGLK's Solvay Yard or CSXT's Dewitt Yard.³⁷ In addition to seeking to siphon off carloads from the Fulton Subdivision, FGLK also seeks the ability to exclude B&LE from the interline moves so that the carloads would move FGLK-CSXT and be interchanged at Solvay.

- FGLK additionally seeks trackage rights to operate new common carrier service between the Port of Oswego and either Novelis or Attis on the Fulton Subdivision.

FGLK's request for trackage rights conditions is contrary to the Board's established precedent. This Transaction substitutes one railroad for another as the owner and operator of the Fulton Subdivision, and thus there is no loss of rail competition resulting from the Transaction. Rather than address any reduction in competition, FGLK is seeking trackage rights to **increase** the number of railroads that currently operate on the Fulton Subdivision, on the St. Lawrence Subdivision to Woodard, and over CSXT's tracks between Woodard and Solvay. Before the Transaction, CSXT is the sole railroad providing rail transportation on those lines. Under FGLK's requested trackage rights condition, after the Transaction, two railroads would operate on the Fulton Subdivision and St. Lawrence Subdivision to Woodard: B&LE as owner and operator of the rail line, and FGLK, as the recipient of Board-imposed trackage rights as a condition of the Transaction. FGLK wants to exclude B&LE from any such moves where FGLK exercises the trackage rights it seeks. This is evident from the map accompanying FGLK's comments, which shows that the trackage rights FGLK seeks between the Fulton Subdivision and CSXT's tracks in Solvay, NY.³⁸

³⁷ FGLK Comments at 4.

³⁸ See FGLK Comments, Exhibit B.

FGLK's and the Port of Oswego's use of the phrases like "expanded switching service" and "shuttle service" should not mislead or hide what FGLK is seeking. FGLK is asking the Board to impose trackage rights as a condition of the Transaction that would add a second railroad as a common carrier providing rail transportation on Board-regulated lines where only one railroad currently operates and where the only operating railroad is selling the line to B&LE.

FGLK's request for conditions is particularly inappropriate given that FGLK has not made the initial investment required to purchase any of the lines on which it seeks trackage rights and that it would not make the continuing long-term investments necessary to operate or maintain those lines. As Janet Drysdale explains, FGLK is seeking a free ride without assuming the risk of the investment. FGLK seeks Board-imposed trackage rights conditions in connection with the Fulton Subdivision that would allow it to potentially divert local carloads from the three largest customers on the Fulton Subdivision—a principle line that B&LE is acquiring. FGLK also intends to exclude B&LE from any participation in these movements by obtaining Board-imposed trackage rights between Oswego and CSXT in Solvay, NY. FGLK's request for such trackage rights, which would add a second railroad to the Fulton Subdivision and allow FGLK to operate over a portion of the St. Lawrence Subdivision, is contrary to the very purpose of the end-to-end line sale: for B&LE to replace CSX as the sole railroad owner and operator on the U.S. Massena Lines.

As Janet Drysdale explains, the proposed trackage rights conditions would thus effectively restructure the Transaction in a way that is contrary to the essential economic premises for the Transaction. FGLK seems to contemplate that it would act as a handling line for CSXT on the Fulton Subdivision and thereby provide direct commercial access for CSXT to customers

on that line—the very railroad line that CSXT is selling to B&LE.³⁹ As Janet Drysdale explains, FGLK’s proposal would not address a reduction in competition, it would instead effectively unwind a key component of the proposed Transaction—the sale of the Fulton Subdivision to B&LE—by retaining commercial access by CSX to all of the customers on that line.⁴⁰

FGLK’s comments focus on the Fulton Subdivision. Perhaps FGLK wanted to expand its operations to the Fulton Subdivision without undertaking any responsibility for the full package of Massena Lines. But the fact is that CSXT decided to sell the Fulton Subdivision as part of the package of the Massena Lines with ownership of the buyer’s track extending north from Woodard, NY. CSXT understandably included the Fulton Subdivision in its overall package because that subdivision connects with the St. Lawrence Subdivision north of Woodard, NY. If it had not done so, the owner/operator of the Fulton Subdivision would have needed to interchange

³⁹ FGLK requests trackage rights for “expanded switching” or “extended switching.” While it is unclear what FGLK means, perhaps FGLK refers to its status as a handling carrier for CSXT on FGLK’s existing lines. See AAR’s Railway Accounting Rules (Including ISS Rules) (effective Dec. 1, 2016) (defining a “Handling Carrier” as “A rail carrier that performs rail service for another rail carrier under an operating agreement for a portion of a rail move but does not participate in interline or switching settlement.”). But under established precedent, FGLK cannot require CSXT to absorb a switch or enter into a handling line arrangement for the Fulton Subdivision. See *Kansas City Power & Light Co. v. Kansas City S. Ry.*, 361 I.C.C. 308, 327-28 (1978) (“[W]e cannot require a railroad to absorb the switching charges of a connecting carrier absent a violation of section 2 or 3(1) of the act [now 49 U.S.C. § 10741].”) (citing *Absorption of Switching Charges at Macon, Ga.*, 280 I.C.C. 311, 314 (1951); *Switching Charges and Absorption*, 339 I.C.C. 65 (1971); *International Paper v. Akron, C. & Y. R. Co.*, 343 I.C.C. 478, 486 (1972)). Nor are such arrangements contemplated by the PSA—which expressly provides that CSXT would sell the Fulton Subdivision to B&LE. FGLK’s status as a handling carrier with CSXT is different from the in-plant switching that it performs at Attis’s facility as a contractor.

⁴⁰ See R.V.S. Drysdale at 3-4 (noting that CNR and B&LE executed the PSA in order to give B&LE an exclusive franchise on the U.S. Massena Lines, substituting for CSX as owner and operator of those lines).

with an additional carrier—the purchaser of the remaining Massena Lines (e.g., B&LE)—to get to CSXT. It was thus a far more efficient operating structure for the Fulton Subdivision to be included in the sale with the Massena Lines. Additionally, by including the Fulton Subdivision in the Massena Lines package, CSXT included the volumes from the Fulton Subdivision to create the volume density required for the Massena Line to be an attractive investment.

b) Trackage Rights So FGLK Can Exclude CSXT As a Bridge Carrier And Move Directly to B&LE at Woodard, NY Carloads Destined For Canada.

FGLK also seeks trackage rights to operate movements from points on FGLK’s tracks to B&LE at Woodard, NY for traffic moving in connection with CNR in Canada.⁴¹ Through these new rights, FGLK would exclude CSXT as a bridge carrier from such movements.⁴² But FGLK’s existing tracks do not physically connect with the CN System today on the Massena Lines or anywhere else.

This request is again unrelated to any anticompetitive effects arising from the Transaction. The Board should not accept FGLK’s attempts to obtain trackage rights conditions to improve its own competitive position by enabling it to operate on the Fulton Subdivision and the St. Lawrence Subdivision to Woodard, NY, with the effect of excluding CSXT as a bridge carrier between FGLK and the CN System. FGLK expresses concern that, in the absence of the

⁴¹ FGLK seeks trackage rights either for it to operate to Woodard, NY or for B&LE to obtain trackage rights to operate to Solvay, NY.

⁴² FGLK Comments at 16-17. To the extent that FGLK presumes that charges for its “switch traffic,” FGLK Comments at 4, over such trackage rights would be absorbed by B&LE, B&LE would not agree and could not be obligated to do so as explained above. See *Kansas City Power & Light Co.*, 361 I.C.C. at 327-28; R.V.S. Drysdale at 15-16.

ability of FGLK to reach B&LE through trackage rights, an opportunity may be lost for the CN System to work with “FGLK’s existing facilities,” rather than “CN setting up new competing facilities off of the lines it is purchasing.”⁴³ But FGLK’s intention to create a new opportunity, as opposed to addressing any reduction in competition from the Transaction, provides no basis for the Board to impose a condition on this distinctly pro-competitive transaction.⁴⁴

2. The Port of Oswego Seeks Board-Imposed Conditions to Protect its Barge Operations from Potential Rail Competition from the CN System After Consummation.

The Port of Oswego requests a ban on Canadian grain imports as a means of limiting potential competition from the CN system with the port’s barge transportation. The port explains that it has made investments in fertilizer and grain storage and handling capacity, and that it wishes to protect that investment against the threat that the CN System may be able to offer increased competition by moving “grain products . . . from Canada” over the new single-line route it will acquire through the Transaction.⁴⁵ The Port of Oswego’s requested condition, however, strays far beyond any alleged anticompetitive effect arising from the Transaction. Instead, the port invites the Board to intrude into matters of U.S.-Canada trade to impose what would constitute an import ban based on exchange rate fluctuations—all matters that are outside

⁴³ FGLK Comments at 5.

⁴⁴ Despite FGLK’s speculations regarding CN System’s future plans, {{ [REDACTED]
[REDACTED]
[REDACTED] }}

See R.V.S. Drysdale at 16.

⁴⁵ See Port Comments at 4.

the Board's jurisdiction. The Port of Oswego does so in complete disregard of the myriad practical issues that such a ban would necessarily entail.

The Port of Oswego is correct that the Transaction would enable new single-line rail service on the CN System between points in Canada and points on the U.S. Massena Lines and that direct rail service likely would be more efficient and thus could potentially enable the CN System to create a rail service product offering that is more competitive than the existing CNR-CSXT interline service offered to local customers on the U.S. Massena Lines. But more competitive rail rates and service results from and are a benefit of the free operation of the market, not something from which the Board should protect competitors.

In any event, the Port of Oswego's concerns are overstated. CNR's and B&LE's acquisition of the Massena lines from CSXT will not alter the many other fundamental market dynamics that affect the flow of grain shipments. As Janet Drysdale explains, transportation is just one of many factors that affect when, where, and how grain is sourced by customers and which mode of transportation is selected.⁴⁶ Proximity to the Port, transportation cost, service needs, in-transit storage/handling, final destination, selling price, and multiple other factors influence a shipper's choice among transportation modes, destinations, and timing of movements. As a general example, locally produced grain typically moves by truck when the consuming market is nearby, or by the lowest-cost transport service, whether by water, rail, or some combination of modes, for locations farther from origin.

⁴⁶ R.V.S. Drysdale at 17.

B. The Board Should Deny Conditions Sought By FGLK and the Port of Oswego Relating to the Fulton Subdivision Because They Address Pre-Existing Circumstances, Rather Than Competitive Issues That Arise From the Transaction.

The Board does not impose conditions intended to address pre-existing circumstances, that is, circumstances that do not arise from a transaction. Yet many of the conditions sought by FGLK and the Port of Oswego seek to do exactly that.

1. Before the Transaction, CSXT Is the Only Carrier Providing Rail Transportation on the Fulton Subdivision and the St. Lawrence Subdivision.

FGLK and the Port of Oswego request that the Board impose trackage rights conditions that would add a second rail common carrier on the Fulton and St. Lawrence Subdivisions.⁴⁷ But today there is only one such carrier—CSXT. And the Transaction is structured for there to be one such carrier after consummation of the Transaction—B&LE.

The Board's precedents make clear that trackage rights conditions such as those requested by FGLK and the Port of Oswego, which seek to alter pre-existing circumstances unrelated to the proposed Transaction, are unwarranted. A pre-existing circumstance where a customer or corridor is served by a single railroad does not justify imposition of a condition on a Transaction. The key issue remains whether the Transaction itself caused a reduction in competition. Indeed, the Board has regularly denied requests for trackage rights conditions in transactions that did not result in a reduction in rail competition for a customer or corridor. In doing so, the Board has strongly reiterated the principle that its conditioning power is not intended to address pre-existing circumstances.

⁴⁷ Port of Oswego Comments at 3.

For example, in *NS/D&H*, slip op. at 4, the Board denied trackage rights condition on grounds that they “do not relate to any competitive harm that would be caused by the proposed Transaction.” The Board noted that “the concerns cited by [proponents of trackage rights conditions] pre-date the Transaction and would not be exacerbated by the Transaction.” *Id.* In another example, the Board denied one party’s request for a trackage rights condition because the request did not “relate to any harm to competition and, in any event, . . . seek[s] to remedy matters that pre-date the Transaction and would not be made worse by the Transaction.”⁴⁸ The Board similarly denied another party’s request for a trackage rights condition because the Board found it unlikely that a railroad would refuse to route traffic efficiently in cooperation with an unaffiliated carrier, so that it could route it over a less efficient route with an affiliate. The Board denied a third party’s request for imposition of a trackage rights condition because the requester’s “service complaints do not relate to competition and . . . predate the Transaction.”⁴⁹

FGLK seeks to support its trackage rights request by arguing that some customers on the Fulton Subdivision will have interline service after the Transaction whereas they presently have CSXT single-line service. But it is not the Board’s practice to restructure transactions that are otherwise beneficial to the public in order to preserve single-line service for a few customers. *See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.[Gen’l Oversight]*, STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 5, slip op. at 16 (STB served Feb. 2, 2001) (“We found that the impact of loss of single-line service was essentially an unavoidable

⁴⁸ *Norfolk S. Ry. – Joint Control & Operating/Pooling Arrangements – Pan Am S. LLC*, Docket No. FD 35147, slip op. at 9-10, 13 (STB served Mar. 10, 2009) (“NS/PAS”)

⁴⁹ *Id.*

impact of this transaction, which created close to 6 times as many new single-line movements as it ended, and that it would not be in the public interest to attempt to force CSX and NS to restructure their transaction so as to prevent any loss of single-line service.”).

A Class I carrier line sale transaction will typically result in the introduction of an additional carrier (i.e., the buyer) into movements that were formerly handled solely by the Class I carrier seller. CSXT’s sale of the Massena Lines (including the Fulton Subdivision) is no different. The sale will necessarily result in the loss of single-line service for the traffic moving between the Fulton Subdivision and CSXT-served points south of Woodard, NY. But that reduction in single-line service is inevitable, regardless of the buyer. Because the line sale here is to B&LE, which is part of the CN System, the Transaction has benefits that would not be present if the Massena Lines were sold to a different carrier. The Transaction ensures that overhead interline service between the CN System and CSXT will continue after the Transaction, and new CN System single-line services will be created.

Yet FGLK and the Port of Oswego wholly ignore the benefits of CNR and B&LE acquiring and operating the Massena Lines. Only a sale to a carrier in the CN System could maintain the Massena gateway for overhead traffic between the CN System and the CSXT. As Janet Drysdale explains, more than 45% of the current carload traffic on the Massena Lines is overhead traffic. Every rail customer with overhead traffic between the CN System and CSXT will receive this ongoing benefit because the Transaction maintains the direct connection and gateway over the Massena Lines. That includes the only customer on FGLK’s tracks who moves products to markets in Eastern Canada overhead using the Massena Lines: {{[REDACTED]}}

Additionally, only a sale to an entity within the CN System could create the benefit to local customers on the U.S. Massena Lines whose traffic moves between the CN System in Canada and points on the Massena Lines. This accounts for more than 16% of volumes in 2018. Those customers currently receive interline CNR-CSXT rail transportation, and after the Transaction, they will receive direct rail service from the CN System. Thus, customers such as {{[REDACTED]}} on the Fulton Subdivision will realize a benefit in improved efficiency and transit time that would not result from a sale of the Massena Lines to any other carrier. These two groups of customers—overhead customers plus local customers whose traffic originates or terminates in Canada—accounts for more than 61% of volumes moving in 2018 on the Massena Lines.

As a reflection of the fact that the Transaction maintains the competitive status quo and results in substantial public benefit, the Port of Oswego is the only commenter that receives rail service on the U.S. Massena Lines that continues to seek conditions. And the port's rail movements are less than {{[REDACTED]}} of the total carloads on the Massena Lines in 2018 and less than {{[REDACTED]}} of the local carloads moving between the Massena Lines and CSXT.

In any event, FGLK proposes a condition that would not remedy the identified problem. FGLK does not propose that trackage rights be retained for CSXT. The requested trackage rights conditions for FGLK would still add it as second carrier on approximately 34 miles of the Fulton Subdivision and the St. Lawrence Subdivision. This would introduce the operating inefficiencies described in Janet Drysdale's verified statement.⁵⁰

⁵⁰ R.V.S. Drysdale at 10-11.

The Port of Oswego and FGLK suggest that requested trackage rights are necessary for Attis.⁵¹ Attis now supports the Transaction and has withdrawn its requested conditions as well as its support for other conditions.⁵² Attis’s movements were more than {{[REDACTED]}} of the total carloads on the U.S. Massena Lines in 2018 and approximately {{[REDACTED]}} of the total local carloads moving between the U.S. Massena Lines and CSXT.

FGLK and the Port of Oswego also claim that trackage rights for FGLK are necessary to meet Novelis’s need for a shuttle service.⁵³ But Novelis—the “leading producer of flat-rolled aluminum products and the world’s largest recycler of aluminum,”⁵⁴ with operations in 23 facilities in 9 countries and annual revenue of \$12.3 billion— has filed no comments seeking conditions. This suggests the Port’s and FGLK’s requested condition for Novelis’s benefit is unnecessary. As noted above, shipment data for the U.S. Massena Lines illustrates that {{[REDACTED]}} will benefit from the Transaction. {{[REDACTED]}}

[[REDACTED]]

[[REDACTED]]

[[REDACTED]]

[[REDACTED]]

⁵¹ See Port Comments at 6 (noting expanded switching by FGLK would “include[e] similar rights for Attis”); *id.* at 4 (describing proposed rail service by FGLK on the Fulton Subdivision between the Port and Attis and indicating that “CSXT showed little willingness to allow such a shuttle....”).

⁵² See Attis Letter (attached as Exhibit 3).

⁵³ Port of Oswego Comments at 5 (claiming that the Port “requires rail ‘shuttle’ service to Novelis” and that FGLK’s experience makes it the “ideal partner”).

⁵⁴ About Us, <https://novelis.com/about-us/>.

2. Before the Transaction, No Rate Freezes or Caps Applied For Commodities Shipped By Rail From the Port of Oswego

The Port of Oswego requests that the Board impose a condition freezing for a period of five years its existing rail rates, “for all commodities listed in the Application,” including, apparently, rates moving under existing contracts. The port further requests that the Board order a condition imposing for the next 5 years, a \$600 per car rate cap, including track spot placement, for new commodities shipped by the port.⁵⁵ The port has not alleged that any such rate freeze or cap applies today. It cites generalized concerns about future costs and potential rate hikes, but makes no argument based on the Transaction reducing competition.

The Port of Oswego’s request should be denied. As the Board has held in similar cases, when one railroad would replace another as the carrier exclusively serving a customer, it would be inappropriate to impose conditions to guarantee particular levels of rates or service in the absence of some showing that the new carrier would have greater market power than the incumbent. *See Ia. Interstate R.R.—Acquisition Exemption—Line of BNSF Ry.*, Docket No. FD 35755, slip op. at 5-6 (STB served Jan. 14, 2014) (declining, in absence of showing of increased market power in a line sale swapping one railroad for another, to require commitments by line purchaser regarding rate structure and level); *RGI/CMW*, 5 I.C.C.2d at 971-972 & n. 19 (declining to impose requested conditions where transaction would merely substitute one railroad for another, without creating new market power). In such cases, any power the new carrier may have to raise rail rates is the same ability that the incumbent railroad already holds.⁵⁶ The port

⁵⁵ Port of Oswego Comments at 6.

⁵⁶ *RGI/CMW*, 5 I.C.C. at 972 n.19.

has made no showing, nor is there any reason to believe, that when B&LE steps into CSX's shoes as operator of the U.S. Massena Lines, it will possess enhanced market power as compared to CSXT. Absent such a showing, the port's request for a rate freeze or a fixed rate should be denied.

As discussed above in the context of trackage rights requests intended to address incidental losses of single-line service, the introduction of another interline carrier on the Fulton Subdivision for commodities moving between the Fulton Subdivision and CSXT is the unavoidable consequence of CSX's sale of the U.S. Massena Lines to any buyer. The substitution of B&LE for CSXT as the railroad providing rail transportation on the Fulton Subdivision, however, does not reduce competition or justify the imposition of conditions that would freeze rates or cap rates. Moreover, the Port of Oswego's request is particularly concerning insofar as it is seeking a rate freeze of CSX's existing contract rates that are outside of the Board's jurisdiction under 49 U.S.C. § 10709. The Board has emphasized that its "general practice is not to use its conditioning authority to freeze in place the contractual terms . . . which have been voluntarily bargained for independent of a transaction." *CSX Transp., Inc.—Joint Use Agreement*, Docket No. FD 35348, slip op. at 8 (STB served Oct. 22, 2010)).

Nonetheless, it is important to B&LE and CSXT that existing carloads continue to move to and from the Massena Lines after consummation. This is why B&LE and CSXT {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}}⁵⁷

3. Before the Transaction, CSX Did Not Agree to the Port of Oswego's Request Regarding Expansion of the Industry Track At the Port's Facility

The Port of Oswego asks the Board to impose a condition that B&LE understands is in reference to a potential track expansion project that the port is considering on its facility. B&LE understands that the port is looking to expand a switching track in the port's facility to give the port additional storage for railcars awaiting loading or unloading. The port did not reach agreement with CSXT regarding this potential project on the port's property.

The Port of Oswego's requested condition thus seeks to address pre-existing conditions in its facility, and its request is certainly not intended to address an anticompetitive effect arising from the Transaction. Post-Transaction, after B&LE has gained experience operating on the Fulton Subdivision, B&LE will review and respond to the Port of Oswego's proposed track expansion project for the port's facility. At this stage, B&LE does not have a full understanding of the Port of Oswego's proposal or of its rail operations, including traffic flows and commodity mix. B&LE understands that the Port's proposal may be contingent on other factors, such as securing public funding. While any such project depends upon numerous circumstances, including real estate and operating considerations, generally, when a customer is considering

⁵⁷ See R.V.S. Drysdale at 18. B&LE does not agree with the Port of Oswego's speculation regarding what rates may apply for a particular local customer on the U.S. Massena Lines for a particular commodity in the coming years after consummation. See Port of Oswego Comments at 3 (speculating that a "fixed price commitment" exists for certain commodities for a specified time period).

expanding its tracks on its land to provide additional storage to receive railcars, CN tries to work with the customer to assess feasibility and potential impact on operating plan, if any.

C. There is No Basis for FGLK's Request for Conditions That Would Enable It to Exclude CSXT As a Bridge Carrier Between the CN System and FGLK.

1. Both Before and After the Transaction, CSXT Is a Bridge Carrier for Carloads Moving Between Points on FGLK's Lines And to the Interchange with the CN System Destined to Points In Canada.

FGLK seeks a Board-imposed condition to use trackage rights to exclude CSXT as a bridge carrier from moves between the CN System in Canada and FGLK's line over the Massena gateway.⁵⁸ However, both before and after the Transaction, CSXT is a bridge carrier for movements between points on the FGLK, whose tracks run from Solvay, NY to W. Victor (outside of Rochester), and points on the CN System in Canada. The Transaction will simply move the interchange point between the CN System and CSXT on the Massena gateway from Huntingdon, QC to Woodard, NY. No reduction in competition will arise from the Transaction. The Board should deny FGLK's requested condition.

Customers located on FGLK who want to ship to or from Canada already have the ability to move carloads to and from FGLK's tracks, over CSXT as a bridge carrier, to or from the CN System, which reaches markets in Canada. The Transaction changes nothing for such movements except the interchange point between the CN System and CSXT. There is only customer located on FGLK's lines whose carloads move overhead on the Massena Lines. That is {{[REDACTED]}} on FGLK's lines. In 2019, {{[REDACTED]}} shipped {{[REDACTED]}} carloads overhead from {{[REDACTED]}} on FGLK's lines, over CSXT as an intermediate carrier, to

⁵⁸ FGLK Comments at 16.

CNR for delivery in Canada.⁵⁹ Carloads for this same customer move over two other gateways between CSXT and the CN System (Buffalo and Chicago). All of these movements require three carriers at present—FGLK, CSXT, and the CN System—and all of these movements will still require three carriers after consummation of the Transaction.

Aside from this overhead traffic moving on all three railroads (FGLK, CSXT, and the CN System) over the Massena Lines and the occasional movement of FGLK's rail equipment to Attis's facility on the Fulton Subdivision,⁶⁰ no traffic has moved between customers located on the FGLK and points on the U.S. Massena Lines. In other words, there are no customers located on FGLK who currently ship or receive carloads in movements by CSXT to or from the U.S. Massena Lines themselves. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

As a practical matter, both before and after the Transaction, CSXT's participation would be required for any customers on FGLK's lines to ship traffic to or from Canada on the CN System. As the CN System would do for any customer, it is willing to explore whether there might be new opportunities to move carloads to or from its system, including via through movements with other carriers. This includes opportunities for customers located on FGLK's lines who may be interested in shipping to or from Canada.

⁵⁹ R.V.S. Drysdale at 14.

⁶⁰ *Id.*

2. Section 5.14(b) of the Purchase & Sale Agreement Does Nothing to Change the Fact that CSXT is a Carrier Between the CN System and Customers Located on FGLK's Lines.

FGLK also requests a condition that would require the removal from the PSA of the provision in Section 5.14(b), which restricts CNR and B&LE from seeking direct access to FGLK. FGLK's tracks do not directly connect to the CN System before or after the Transaction. Nonetheless, FGLK claims that Section 5.14(b), along with the restriction in the PSA prohibiting B&LE from using its interchange operating rights with CSXT to instead interchange with FGLK, "place an unfair, anticompetitive restriction on FGLK's ability to develop Canadian traffic via B&LE and its parent CN."⁶¹ FGLK acknowledges that "the transaction does not introduce an additional carrier to the route," but claims that the Transaction "allows CSXT to move from line haul participant to gatekeeper, and to control FGLK's Canadian traffic opportunities."⁶²

But FGLK has no physical connection with B&LE or any other railroad in the CN System. That is an existing condition, unchanged by Section 5.14(b) of the PSA. Thus, Section 5.14(b) does not represent a reduction in actual competition that presently exists; it merely preserves the status quo where CSXT operates between the CN System and FGLK as described above. The movement of the interchange between the CN System and CSXT from Huntingdon, QC to Woodard, NY will have no impact on the ability of customers located on FGLK's tracks that may want to ship traffic to or from locations served in Canada by CNR.

⁶¹ FGLK Comments at 8, 14.

⁶² *Id.* at 5; *see also id.* at 8.

Nor will Section 5.14(b) impact customers located on FGLK's tracks that want to move traffic between FGLK's lines and the Fulton Subdivision in the future. Post-Transaction such traffic will move from FGLK to CSXT to B&LE. Currently, as noted above, the other traffic that moves between points on FGLK's tracks and customers on the Fulton Subdivision is FGLK's equipment that it uses to provide in-plant contract switching at the Attis facility. Nothing in Section 5.14(b) prevents FGLK from acting as a contract agent to switch cars within customer facilities, as FGLK has done for Attis (and Sunoco, previously, when it was the owner of the present Attis facility). Just as there has been no suggestion that Section 5.14(b) would bar FGLK's current in-plant switching operations for Attis at the Attis facility, it would not prevent FGLK from contracting to operate within the fence line of another customer's rail facility. Thus, if at some point in the future, FGLK began switching cars on tracks within another customer facility on the Fulton Subdivision, FGLK could become a contractor operating as that customer's agent.

The Board should similarly disregard the arguments FGLK raises on the basis of the Railroad Industry Agreement ("RIA") negotiated by the Association of American Railroads ("AAR") and the American Short Line Railroad Association ("ASLRRA").⁶³ The RIA was an industry-wide effort by AAR and ASLRRA to balance the interests of Class I railroads and shortline railroads after line sales, including how to typically handle new traffic in the future after a line sale occurs. The RIA provides that "No new Access to industries, shippers or

⁶³ FGLK Comments at 8-9.

receivers not now served is granted or created; all Access is Railroad to Railroad.”⁶⁴ The RIA has seven examples, five of which relate to paper barriers and two of which relate to new routes for new traffic. Nothing in the PSA would or could override any potentially applicable provision of the RIA. If FGLK believes that in the future, circumstances arise after consummation that are governed by the RIA, then FGLK may pursue the remedies available pursuant to the terms of the RIA, including potential arbitration before the Board.

III. THE BOARD SHOULD IMPOSE NEW YORK DOCK LABOR PROTECTIVE CONDITIONS, AS MODIFIED BY WILMINGTON TERMINAL, FOR ADVERSELY AFFECTED EMPLOYEES.

Two rail labor entities—the ARU and TWU—acknowledged that under settled Board precedent, the *Wilmington Terminal* modification to *New York Dock* is applicable to transactions such as the one proposed by B&LE.⁶⁵ The ARU and TWU thus called on the Board to impose such labor protection, if it approves the Application. The Unions’ statement of precedent is accurate, and the Board should therefore impose the labor protective conditions contained in *New York Dock*, as modified by *Wilmington Terminal*.

By contrast, the December 19, 2019 filing of SMART/TD-NY repeats its unsupported contention that that *Wilmington Terminal* applies only in smaller line sales to shortline railroads under 49 U.S.C. § 11323, and not to larger transactions or those with a Class I buyer. The Board

⁶⁴ RIA at 1.

⁶⁵ ARU Comments at 1-2; TWU Comments at 1-2. See *New York Dock Ry. – Control – Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), as clarified by *Wilmington Terminal R.R. – Pur. & Lease – CSX Transp., Inc.*, 6 I.C.C.2d 799 (1990), modified, 7 I.C.C.2d 60 (1990), *aff’d sub nom. Railway Labor Executives’ Ass’n v. ICC*, 930 F.2d 511 (6th Cir. 1991) (“*Wilmington Terminal*”).

recently rejected this identical argument in *Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of The Delaware and Hudson Railway Company, Inc.*, Docket No. FD 35873, slip op. at 28-29 (STB served May 15, 2015). The Board’s reasoning in *NS/D&H* was directly on point and dispositive of SMART/TD-NY’s repeated argument: “Contrary to SMART/TD-NY’s suggestion, this [*Wilmington Terminal*] is the applicable standard regardless of the size of the railroads involved or the bargaining status of their employees.” *Id.* at 29.⁶⁶

SMART/TD-NY offers no basis to depart from these settled principles in this proceeding. SMART/TD represents operating craft employees – mostly conductors and other ground service employees. But the B&LE existing lines and Massena lines are over 200 miles apart, so there will be no need to allocate work opportunities or seniority rights between competing groups of employees. And, none of B&LE’s current employees—or other CN current employees in the United States—will be adversely affected by the transaction.⁶⁷

⁶⁶ SMART/TD-NY attempts to distinguish *NS/D&H* by claiming that the seller in that transaction, *Delaware and Hudson Railway Company, Inc.*, was a Class II carrier, while B&LE as buyer is a Class I carrier. NASCA-2, Supplemental Verified Statement of Samuel J. Nasca at 1. However, SMART/TD-NY is incorrect regarding the classification of carriers. D&H and B&LE both have standalone revenues that would qualify them as Class II railroads. B&LE, along with CNR’s other U.S. indirect rail carrier subsidiaries, are operated as an integrated rail system, and are treated for STB regulatory reporting purposes by the Board as a single Class I rail carrier under the name Grand Trunk Corporation. The same is true for D&H, which reports to the Board on a consolidated Class I basis under the name of Soo Line Corporation. In any event, the *buyer* in the *NS/D&H* line sale transaction was a Class I carrier, and the Board was clear that *Wilmington Terminal* governed.

⁶⁷ Minor Application at 17; see *Wilmington Terminal*, 6 I.C.C.2d at 817. See also *NS/PAS*, slip op. at 17 (“Because we see no basis for negotiation of an implementing agreement until Applicants decide to implement labor changes that are related to the Transaction, we will not require that Applicants commence negotiations now.”); *Genesee & Wyoming Inc. – Acquisition of Control Exemption – Providence and Worcester R.R.*, Docket No. FD 36064

Equally important, B&LE and its corporate affiliates have long-standing collective bargaining agreements and bargaining relationships with the unions that represent the CSXT employees. It is in B&LE's interest to ensure a smooth transition of operations. B&LE has no employees in New York, and so it must hire qualified employees to operate the U.S. Massena Lines. Accordingly, B&LE agreed to extend hiring preference to the current CSXT current employees on the U.S. Massena Lines and, as a practical matter, B&LE must establish terms and conditions of employment that the CSXT employees will accept. B&LE already has reached out to the unions representing most of the CSXT employees to discuss initial terms and conditions of employment—and has had productive discussions with a representative of ARU and TWU. Under these circumstances, SMART/TD-NY provides no reasoned basis for the Board to jettison established precedent in this Transaction and to do so would be counterproductive.⁶⁸

(STB served Dec. 16, 2016), at 6-7 (citing *NS/PAS* and finding no need to negotiate implementing agreements until carrier determines “whether or which employees may be adversely affected...”).

⁶⁸ To the extent that SMART/TD-NY appears to suggest that B&LE has voluntarily agreed to enter into umbrella implementing agreements for CSXT employees, that is inaccurate. B&LE's willingness to discuss initial terms and conditions of employment with the ARU and TWU does not waive the application of *Wilmington Terminal* to this line sale transaction.

CONCLUSION

For the reasons set forth above, the Board should grant the Application and approve the Minor Transaction without conditions, other than labor protection as prescribed by *New York Dock* and modified by *Wilmington Terminal*.

Respectfully submitted,

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Attorneys for Bessemer and Lake Erie Railroad Company

January 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of January, 2020, caused copies of the foregoing
Reply of Bessemer and Lake Erie Railroad Company in Support of its Minor Application
(designated as (BLE-5) on all parties of record listed on the service list in this proceeding, by
email or first-class mail.

/s/ James M. Guinivan _____

**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 VERIFIED STATEMENT
OF
JANET DRYSDALE**

My name is Janet Drysdale. I am Vice-President, Financial Planning for Canadian National Railway Company (“CNR”).¹ I submitted a verified statement in support of Bessemer and Lake Erie Railroad Company’s (“B&LE”) Application for a Minor Transaction (designated as BLE-1). In that verified statement, I described B&LE’s proposal to acquire from CSXT and operate the U.S. Massena Lines (the Transaction proposed for the Board’s approval in this proceeding). I explained that the Transaction would have no anticompetitive effects and will not reduce the number of current competitive rail alternatives for customers.

In this Reply Verified Statement, I provide further support for B&LE’s Application and respond to conditions requested by the Finger Lakes Railway Corp. (“FGLK”) and the Port of

¹ Abbreviations in this Verified Statement have the meanings given in the Table of Abbreviations found at pages v-viii of the Reply of Bessemer and Lake Erie Railroad Company in Support of Its Minor Application.

Oswego that seek to further their own commercial interests and do not address any reduction in competition that would result from the Transaction.

I. THE TRANSACTION IS AN END-TO-END TRANSACTION THAT WILL MERELY SUBSTITUTE B&LE FOR CSXT ON THE U.S. MASSENA LINES, INCLUDING THE FULTON SUBDIVISION, AND THUS WILL HAVE NO ADVERSE EFFECTS ON COMPETITION.

As discussed in my previous Statement, CSXT announced in June 2018 that, in connection with its rationalization of its system, it was selling six rail lines. According to CSXT, its decision to sell the Massena Lines followed a review of its entire network to identify lines that are not core to its business and could be more valuable to other operators well positioned to maintain and improve the Lines and better serve local customers. The Massena Lines extend generally between Milepost QM 3.0, south of Woodard, NY (near Syracuse), and Beauharnois, Quebec.

CSXT invited interested parties to bid on the Massena Lines as a package, including CSXT's St. Lawrence and Fulton Subdivisions. It made operational and business sense for CSXT to include the Fulton Subdivision in the Transaction. The Fulton Subdivision connects to the St. Lawrence Subdivision approximately four miles north of Milepost QM 3.0 where the ownership for the buyer of the Massena Lines will end after consummation. If CSXT had sold the Fulton Subdivision separately from the St. Lawrence Subdivision, then for movements between CSXT's lines south of Woodard, NY and the Fulton Subdivision, the traffic would need to be interchanged with two other railroads--the purchaser of the Fulton Subdivision and the purchaser of the St. Lawrence Subdivision. In addition, by including the Fulton Subdivision in the Massena package offered for sale, CSXT ensured that the package would include the volumes from three large customers {{ [REDACTED] }} on that Subdivision and thus would have sufficient volume density necessary to be an attractive

investment for potential buyers. CSXT's decision to sell the overall package, including the Fulton Subdivision, enabled a single railroad buyer to secure the long-term future of the Massena Lines.

CNR submitted a bid for the Massena Lines. CSXT selected CNR's bid, and CNR/B&LE negotiated with CSXT to execute a Purchase and Sale Agreement ("PSA"). I understand that CSXT's choice of CNR and its affiliates to purchase the Massena Lines was motivated in part by CSXT's confidence in the CN System's demonstrated ability to maintain and operate lines in difficult winter conditions, and the expectation that that experience would improve operations and service over winter-challenged lines.

The PSA provides for an end-to-end acquisition between the CN System and CSXT. The Transaction will move the revenue interchange between the CN System and CSXT from Huntingdon, Quebec to Woodard, New York, and thus increase the CN System length of haul in the interline movements between the two systems. Physical interchange will occur in the same yards CSXT uses today for its operations (Dewitt Yard and Belle Isle Yard). The Transaction will also preserve the existing gateway between the CN System and CSXT over the Massena Lines for overhead traffic, which accounted for more than 45% of the carload traffic on the Massena Lines in 2018. This will enable the Massena Lines gateway to remain a viable transportation option for customers moving traffic between U.S. East Coast points and the Canadian provinces of Quebec, New Brunswick and Nova Scotia, by avoiding the need to route overhead traffic over an alternate and more distant gateway with increased transit times and higher costs for traffic.

The PSA provides for B&LE to acquire an exclusive rail franchise and substitute for CSXT as the owner and operator on the U.S. Massena Lines. CSXT did not retain any trackage

rights or haulage rights to serve local customers on the U.S. Massena Lines. The PSA, however, is structured so that CSXT would continue to participate in movements between the Massena Lines and points south of Woodard. Further, CNR/B&LE understood from the negotiation of the PSA that CSXT would not agree to sell the Massena Lines unless the PSA included Section 5.14(b), which restricts CNR and B&LE from seeking direct access to FGLK.

II. B&LE HAS BEGUN OUTREACH TO CUSTOMERS, SHORTLINES, AND OTHER STAKEHOLDERS TO FACILITATE A SMOOTH TRANSITION AFTER CLOSING THE TRANSACTION.

Following execution of the PSA and public announcement of the Transaction, the CN System broadly shared with more than 13,000 contacts at more than 8,000 customers its announcement that it was acquiring the U.S. Massena Lines. Aside from broad outreach to customers and shortlines, B&LE and CSXT have reached out to a wide range of other stakeholders about the Transaction, including federal and state elected officials in New York, local communities, and other stakeholders. See Attachment for partial list of customers and short lines contacted.

In this outreach, B&LE has explained the Transaction and its anticipated benefits, responded to questions, listened to potential concerns, and begun planning for the anticipated transition from CSXT to B&LE service. We shared information about various aspects of our planned purchase of the Massena Lines, including B&LE's plan to hire new employees, which is described more fully in the Application. We also shared the information regarding the Surface Transportation Board's regulatory approval process, including anticipated timelines for the Board's decision and, ultimately, for consummation of the Transaction.

B&LE has begun contacting local customers on the U.S. Massena Lines in preparation for the transition after consummation. Its outreach has extended to shippers and receivers of a

wide range of commodities, including agricultural and food producers, chemicals, metals and equipment, minerals, forest products and paper, and phosphates and fertilizer. B&LE has explained that it plans to operate the U.S. Massena Lines with the goal of maintaining existing overhead and local traffic and working with overhead and local customers to grow rail volumes. These plans include the new interline intermodal service that the CN System and CSXT announced in August 2019 between the U.S. East Coast and CN-served areas in greater Montréal and Southern Ontario.

B&LE additionally has committed that it will work with customers on the U.S. Massena Lines to understand and identify their rail service needs, develop efficient plans to serve their facilities, and seek to grow their businesses. B&LE has begun its outreach to customers to support transition planning and answer questions that they may have about B&LE's plans for operations after consummation. This included a productive conversation with the {{[REDACTED]}} in late December. B&LE looks forward to additional conversations and meetings with customers on the U.S. Massena Lines, and will diligently continue these efforts in the coming weeks in preparation for that anticipated transition after consummation.

These efforts are just a few of many steps that B&LE is undertaking to facilitate a smooth transition for customers after consummation of the Transaction. Early outreach is important to facilitate smooth transition from CSXT to B&LE after consummation of the Transaction. For example, for each customer, B&LE has a number of steps to complete in preparation, including establishing a customer ID; setting up the customer contact information in our CRM system; assigning an Account Manager representative; transitioning rate publications; and publishing rate authorities.

B&LE has also voluntarily reached out to the labor unions representing most of the affected CSXT employees. B&LE does not have employees in New York and will be hiring new employees in New York to operate the U.S. Massena Lines after Closing. To that end, as explained in the Application, B&LE plans to offer priority hiring consideration to employees currently employed by CSXT on the U.S. Massena Lines. In addition, B&LE and/or CN have established collective bargaining relationships with the unions that represent CSXT's employees, and intends to discuss with them the terms under which B&LE will offer employment to former CSXT employees currently working on the U.S. Massena Lines. We also explained that no current CN employees in the United States will be adversely affected by the Transaction.

III. THERE IS BROAD SUPPORT FOR THE TRANSACTION FROM CUSTOMERS, SHORTLINES, AND OTHER STAKEHOLDERS

Customers, connecting railroads, and other stakeholders broadly support B&LE's acquisition of the U.S. Massena Lines. They have explained how B&LE's purchase and operation of the U.S. Massena Lines will be beneficial for rail transportation on the lines and will not reduce competition on those lines. Supporters include customers and shortlines transporting a variety of commodities, Members of Congress, local chambers of commerce, and other stakeholders. For example, Alcoa described that the Transaction "will help ensure that our Massena site remains competitive in a global commodity market." The Port Authority of NY & NJ explained that Transaction "will benefit the Port of New York and New Jersey by preserving local and efficient rail service on the Massena Lines, which is important to our future." Congressman Katko and Congresswoman Stefanik support the Transaction as the "addition of CN to New York will bring a third Class I freight railroad to the state, offering enhanced competition and new service opportunities." The support letters are summarized in Exhibit 2 of the Reply of B&LE in Support of its Minor Application.

IV. THE TRANSACTION IS IN THE PUBLIC INTEREST

As explained in the Application, the Transaction will benefit rail customers using the Massena Lines. Acquisition of the Massena Lines by B&LE and CNR will ensure that, after consummation, the Massena Lines route between the CN System and CSXT will continue to include only two rail systems, thereby avoiding the loss in efficiency that would likely result if a third carrier were inserted into that route. Also, as explained in my prior Statement, the CN System plans to operate a pair of through trains each day between Woodard, New York and Taschereau Yard (in Montréal), which will replace two CSXT through trains currently operating between Woodard and Massena and two CSXT transfer assignments now operating between Massena and Huntingdon, Quebec. B&LE anticipates that the replacement of the transfer assignments will reduce total transit time over the Massena Lines by approximately 24 hours. This will benefit overhead customers, whose traffic accounts for more than 45% carloads in 2018 on the Massena Lines. It also will benefit customers located on the Massena Lines whose traffic originates or terminates in Canada (accounting for more than 16% of 2018 volumes on the Massena Lines), who currently receive CNR-CSXT interline service and who after the Transaction will receive single-line rail service from the CN System. These two groups of customers—overhead customers plus local customers whose traffic originates or terminates in Canada—account for more than 61% of volumes moving in 2018 on the Massena Lines. Of the more than 38% of carloads that originate or terminate on the Massena Lines and move to or from CSXT, only one customer continues to seek conditions. Although Attis initially sought conditions, it has withdrawn its request for conditions and support for other requested conditions. Attis now supports the Transaction. Attis's movements account for more than {{REDACTED}} of the total carloads on the Massena Lines in 2018 and approximately {{REDACTED}} of the total local carloads moving between the Massena Lines and CSXT. The Port of Oswego is the only

customer that continues to seek conditions. The Port of Oswego's rail movements are less than {{[REDACTED]}} of the total carloads on the Massena Lines in 2018 and less than {{[REDACTED]}} of the local carloads moving between the Massena Lines and CSXT.

B&LE and CSXT have also considered what they need to do immediately after the Transaction to transition customers whose facilities are located on the U.S. Massena Lines. In addition, in the coming years after the Transaction, B&LE has every incentive to operate the U.S. Massena Lines with the goal of maintaining existing overhead and local rail traffic, and if possible, to grow that traffic by helping customers get products to and from their markets by rail and developing new transportation offerings, such as the new joint intermodal service with CSXT between CNR terminals serving Montréal and Southern Ontario areas and the CSXT-served ports of Philadelphia and New York/New Jersey, as well as the New York metropolitan area.

V. THE BOARD SHOULD DENY THE CONDITIONS REQUESTED BY FGLK AND THE PORT OF OSWEGO THAT SEEK TO FURTHER THEIR COMMERCIAL INTERESTS RATHER THAN ADDRESS ANY REDUCTION IN COMPETITION.

FGLK and the Port of Oswego have each sought conditions from the Board to further their own respective commercial interests. They seek trackage rights for the FGLK to operate on the Fulton Subdivision as well as the St. Lawrence Subdivision, the very tracks B&LE is purchasing in this Transaction. See Reply, Exhibit 1 (map showing FGLK's proposed trackage rights). Those requested trackage rights make clear that FGLK seeks the opportunity to exclude B&LE from movements between the Fulton/St. Lawrence Subdivisions that B&LE is acquiring and CSXT. FGLK also seeks trackage rights over CSXT that would eliminate CSXT as a bridge carrier for movements to and from the CN System in Canada. The Port seeks three additional conditions: to limit the importation of grain from Canada based on exchange rate fluctuations; to

freeze rates for carloads moving under existing price authorities and cap per-car rates for new traffic for the Port of Oswego; and to require B&LE to cooperate on expansion of the industry track within the Port's facility. These conditions are not designed to address any reduction in competition that would result from the Transaction. Nor could they, because the Transaction will merely substitute B&LE for CSXT as the owner and operator of the U.S. Massena Lines and will have no adverse effects on competition.

A. Trackage Rights In Connection with the Fulton Subdivision that Would Give FGLK the Ability to Exclude B&LE as a Carrier From Those Moves.

FGLK and the Port of Oswego request that FGLK be granted trackage rights over the Fulton Subdivision and the St. Lawrence Subdivision to enable FGLK to operate as a common carrier between the Attis and the Port and CSXT.² FGLK and the Port also request that the Board impose a condition granting trackage rights to FGLK so it can operate between the Port and Novelis and between the Port and Attis if in the future they want to receive carloads by rail that arrive at the Port via barge. FGLK is seeking to use the Board's conditioning authority to bring about a vast expansion of FGLK's own operations onto new tracks, even though there is no reduction in rail competition that would justify invocation of that authority.

FGLK's proposed trackage rights would, in effect, restructure the Transaction. While the PSA provides for B&LE to be the exclusive railroad operating on the Fulton Subdivision, FGLK requests trackage rights for "expanded switching" or "extended switching," which would allow it to operate on the Fulton Subdivision and potentially divert carloads away from B&LE. While it is unclear what FGLK means by those terms, perhaps it is referring to FGLK's status as a

² FGLK Comments at 16-17; Port of Oswego Comments at 5-6.

handling carrier.³ FGLK does not participate in the Interline Settlement System or in rate negotiations with customers, and it is essentially a handling carrier that charges a per-car rate to the connecting carrier for the service FGLK performs. FGLK's trackage rights proposal would be commercially equivalent to direct CSXT service, with FGLK acting as a handling carrier that does not negotiate rates or appear in the waybill route. Yet CSXT is selling the right to directly serve customers on the Fulton Subdivision when it sold the Massena Lines to B&LE. It does not retain any right to provide service, whether by trackage rights, haulage rights, through an agent, or otherwise, to customers on or over the Fulton Subdivision and St. Lawrence Subdivision.⁴

FGLK's request for trackage rights would further restructure the Transaction in that its proposed non-exclusive trackage rights would add a second railroad to the Fulton Subdivision and St. Lawrence Subdivision, instead of simply substituting B&LE for CSXT as under the PSA. Although FGLK would not appear in the waybill route if it acted as a handling carrier for CSXT (an arrangement with which CSXT would need to concur), the physical operations of FGLK's proposed trackage rights would require introduction of a second carrier handling the movement, just as would substituting B&LE for CSXT on the Massena Lines.

In addition, the trackage rights sought for FGLK would introduce operating inefficiencies by allowing a second railroad to operate on the Fulton Subdivision and St. Lawrence Subdivision. Under the PSA, B&LE would efficiently move all carloads for the Fulton Subdivision and efficiently interchange with CSXT at the same yards CSXT uses today to

³ To the extent FGLK is referring to its in-plant switching services that it performs for Attis as a contractor, that is different from the common carrier transportation that FGLK proposes in its trackage rights requests.

⁴ Instead, CNR/B&LE understood that CSXT sought to ensure that it would participate in movements to or from the Massena Lines south of milepost 3.0 on the St. Lawrence Subdivision where B&LE's ownership will end after the Transaction.

provide rail service. In seeking to divert traffic moving between the Fulton Subdivision customers and CSXT, FGLK would introduce operating inefficiencies of adding a second carrier operating on the Fulton Subdivision and St. Lawrence Subdivision. B&LE would continue to operate between the Fulton Subdivision and points in Canada. B&LE would also operate on the St. Lawrence Subdivision to move overhead carloads plus other local traffic between the Massena Lines and CSXT.

FGLK would also add further inefficiency and delay with its proposed interchange with CSXT at Solvay Yard. B&LE plans to interchange with CSXT at Belle Isle Yard and Dewitt Yard, which is how the traffic currently moves today. FGLK's proposed interchange with CSXT in Solvay Yard would introduce a new interchange and require FGLK to cross CSXT's double-track main. FGLK's proposed trackage rights would also require FGLK to operate on PTC-equipped tracks on the St. Lawrence Subdivision. B&LE has already negotiated with CSXT so that CSXT will provide certain PTC transition services on the St. Lawrence Subdivision after B&LE's acquisition of the U.S. Massena Lines while CN engages with the Federal Railroad Administration ("FRA") regarding PTC on the St. Lawrence Subdivision given the unique circumstances of the line. FGLK does not indicate that it has made any preparations for using PTC to operate on the St. Lawrence Subdivision.

The involuntary trackage rights sought by FGLK would give it the opportunity to divert local carloads from the three largest customers on the Fulton Subdivision. Indeed, these three customers account for approximately 37% of carloads on Massena Lines in 2018 that go to or come from CSXT. Worse, FGLK wants to enable itself to exclude B&LE entirely from these movements by seeking trackage rights on approximately 34 miles of the Fulton St. Lawrence Subdivisions, plus the miles on CSXT's tracks to Solvay, NY.

FGLK's request for Board-imposed trackage rights is contrary to the very purpose of this end-to-end line sale: for B&LE to replace CSX as the sole railroad owner and operator on the U.S. Massena Lines. The economies of the Transaction, from the standpoint of both seller and buyer, were premised on the expectation that B&LE would acquire and exclusively operate the U.S. Massena Lines, including the Fulton Subdivision, and that it would provide exclusive service to all local customers on those lines, including the three largest customers on the Fulton Subdivision. Indeed, CSXT's inclusion of the Fulton Subdivision and its volumes made the Massena Lines a more attractive investment for CNR and B&LE. Needless to say, if the Board were to grant the trackage rights condition requested by FGLK, it potentially would reduce the traffic volumes that B&LE could expect to move on the U.S. Massena Lines following consummation of the Transaction. The acquisition would be less valuable to B&LE if another railroad could use the Board's regulatory process to its own commercial advantage to obtain trackage rights to attempt to divert volumes from local customers away from the acquiring railroad.

The CN System decided to invest in the Massena Lines to increase the CN System's length of haul and accepted the risks that there may be fluctuations in traffic and changes due to traffic mix. FGLK had equal opportunity to pursue this investment by bidding on the Massena Lines. FGLK instead is seeking a free ride. It is now trying to obtain Board-imposed trackage rights to expand its operations and attempt to divert volumes from the three largest customers on the Fulton subdivision without making the investment necessary to acquire, operate, and maintain that subdivision, let alone the other lines in the Massena Line package, and without the assumed risk of a future decline in volumes.

FGLK and the Port of Oswego also claim that the requested trackage rights would enable FGLK to operate a “rail shuttle” between the Port and the Novelis facility.⁵ Novelis has not filed comments and thus has not joined this request. { { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

FGLK and the Port of Oswego cite no reduction in competition that would justify the trackage rights conditions they seek. Instead, they claim that insertion of a second carrier in addition to CSXT would increase costs and add an interchange. But the request for FGLK to operate on the Fulton Subdivision and St. Lawrence Subdivision would have the same impact, if not more impact, as described above. Under their requested trackage rights for FGLK, traffic moving between the Port of Oswego and CSXT would still require an additional carrier to move the carloads to CSXT—FGLK and the Port just want that additional carrier to be FGLK instead of B&LE. FGLK operationally is seeking to increase the number of common carrier railroads that could operate on the Fulton and St. Lawrence Subdivisions, allowing FGLK to attempt to

⁵ Port of Oswego Comments at 5.

divert movements for FGLK's own commercial advantage and give FGLK the ability to exclude B&LE from those movements.

B. Trackage Rights to Reach the CN System in Canada and Exclude CSXT As a Bridge Carrier From Those Moves

FGLK separately requests that it be given trackage rights over CSXT that would allow it to interchange with B&LE at Woodard Yard, or alternatively that B&LE be given trackage rights over CSXT that would allow it to interchange with FGLK at the latter's Solvay Yard. FGLK also asks the Board to require removal from the PSA of Section 5.14(b), which restricts CNR and B&LE from seeking direct access to FGLK.

FGLK's tracks have no physical connection to B&LE or any other railroad in the CN System. The Transaction does not change this fact. The Transaction will not cause any competitive harm to customers on FGLK's lines. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

These moves require operations of three carriers before the Transaction: FGLK, CSXT, and the CN System. After the Transaction, those same three carriers will move these carloads as well as any other carloads that other customers may want to move, with CSXT as the intermediate

carrier between FGLK and the CN System.⁶ The only difference is that the carloads will move faster over the Massena Lines by approximately 24 hours as a result of B&LE’s reduced transit time and improved operating efficiencies.

FGLK suggests that CSXT should be compelled to grant trackage rights to FGLK because it believes “there would be additional traffic opportunities if there were a direct connection between FGLK and B&LE and the CN System.”⁷ But CSXT’s role as an intermediate carrier between FGLK and the CN System is not created by the Transaction. And the Transaction would not impede customers on the FGLK and the CN System from exploring business opportunities for shipments to or from Canada. The CN System is willing to explore whether there might be new opportunities for rail customers to move carloads to or from Canada; such carloads would have a revenue interchange between B&LE and CSXT at Woodard, NY after the Transaction, including customers located on FGLK’s lines.

What the CN System is not willing to do is to undermine the purpose of the Transaction through FGLK’s proposed trackage rights conditions. As noted above, unless FGLK changed its

⁶ In this respect, the three-carrier move over the Massena gateway is the same as the moves over the two other gateways used by FGLK, CSXT, and the CN System. The CN System and CSXT interchange such traffic at three gateways: Buffalo, Chicago, and Huntingdon (on the Massena Lines). The following chart shows for {{[REDACTED]}} carloads to or from FGLK locations the volumes interchanged between the CN System and CSXT at those three gateways during 2019:

Gateway	Carloads
Buffalo	{{[REDACTED]}}
Chicago	{{[REDACTED]}}
Huntingdon	{{[REDACTED]}}

⁷ FGLK Comments at 5.

status as a handling carrier and its way of doing business, FGLK would need the CN System to absorb the charge for FGLK's movements in any exercise of FGLK's requested trackage rights conditions.⁸ The CN System is not obligated to absorb any charge from FGLK to move carloads between customers on FGLK's tracks and Woodard so that they may reach points in Canada served by CNR.

Finally, FGLK also suggests that if it is unable to reach the CN System through trackage rights that exclude CSXT, FGLK would lose "opportunities to convince CN that FGLK's existing facilities could offer more efficient destinations/transloads rather than CN setting up new competing facilities off of the lines it is purchasing."⁹ Yet the conditions sought by FGLK that would fundamentally undermine broader aspects of the Transaction. In any event, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

C. Port of Oswego's Request for a Condition That Would Ban Import of Grain From Canada Based On The Exchange Rate

The Port of Oswego seeks a condition to protect its barge operations from potential increased rail competition from the CN System after it acquires the Massena Lines. The Port proposes a condition on the Transaction that would prohibit imports of Canadian grain into the Port "whenever the exchange rate of \$1.00 CA is greater than \$0.80/US."¹⁰ This request apparently seeks to stifle potential competition that would result from the Transaction, rather

⁸ This is also true for FGLK's request for trackage rights relating to the Fulton Subdivision described above—CSXT would need to agree to absorb any charge from FGLK.

⁹ FGLK Comments at 5.

¹⁰ Port of Oswego Comments at 4, 6.

than to remedy any reduction in competition, potentially intrudes on the subject of international trade accords, and is thus inappropriate. The Transaction will allow the CN System to establish new, more efficient single-line service between points in Canada and points on the U.S. Massena Lines. That new single-line service is a benefit for local customers on the U.S. Massena Lines and should not be undercut by protectionist conditions.

The Port's concerns and its request for an import ban overlook the added fact that a wide range of factors affect customers' decisions on choice of transportation mode for grain traffic. Transportation is just one of many factors that impact when, where, and how grain is sourced by customers and which mode of transportation is selected. Those factors include proximity to the Port, transportation cost, service needs, in-transit storage/handling, final destination, and selling price. Other factors include availability of elevator infrastructure along rail lines near waterways, the proximity of barge loading facilities to grain producers, unavailability of waterways during winter months, and comparative availability of barge and railcar capacity, and transportation rates.¹¹ These and other factors influence the market for transportation—how grain is sourced by customers and which transportation mode is selected among available origins, destinations, and timing of movements. In general, when the consuming market is nearby, locally produced grain typically moves by truck. For locations further from the origin, locally produced grain moves by the lowest cost transport service, whether by water, rail, or some combination of transportation modes.

¹¹ CN Grain Insight Podcasts, Episode 50: Rail Versus Barge, *available at* <https://soundcloud.com/user-46300629/episode-50-rail-versus-barge>.

D. The Port of Oswego's Request For a Rate Freeze For Carloads Moving Under Existing Price Authorities And Per-Car Rate For New Traffic

The Port of Oswego requests the Board impose a condition that would freeze existing rail rates in CSXT's price authorities for the Port for a period of five years, which would apparently include rates moving under contracts. The Port further requests that the Board impose a condition for new commodities shipped by the Port. Specifically, it proposes that a per-car rate of \$600, including track spot placement, apply to such shipments for a period of five years.

The Port of Oswego claims that its proposed rate freeze and rate cap are necessary because it will no longer receive CSXT single-line service after the Transaction. But it is important to B&LE that customers can continue to move traffic to and from the Massena Lines after consummation, as well as explore whether there are opportunities to grow rail volumes.

This is why B&LE and CSXT {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

E. The Port of Oswego's Request Regarding Expansion of the Industry Track At the Port's Facility

The Port of Oswego asks the Board to impose a condition in reference to a potential track expansion project that the Port is considering in its facility.¹² B&LE understands that the Port is

¹² Port of Oswego Comments at 6.

looking for an opportunity to expand a switching track in its facility in order to give the Port additional storage for railcars awaiting loading or unloading. B&LE further understands that the Port's proposal may be contingent on other factors, such as securing public funding. Before the Transaction, CSXT did not agree to the Port's request regarding the expansion of the industry track.

At present, B&LE does not have a full understanding of the Port of Oswego's proposal as well as rail operations at the Port, including traffic flows and commodity mix. While any particular project depends upon numerous circumstances, including real estate and operating considerations, generally, when a customer is considering expanding its tracks on its land to provide additional storage to receive railcars, CN tries to work with the customer to assess feasibility and potential impact on operating plan, if any.

ATTACHMENT

B&LE's Outreach to Massena Line Customers and Shortlines Have Included the Following:

Customers:

- {{ [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]}}

Shortlines:

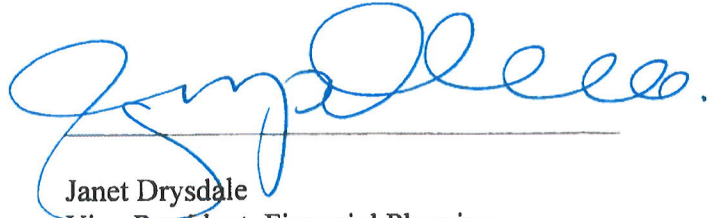
- Massena Terminal Railroad Company ("MSTR") — the short line on which Alcoa's plant is located, and for which the U.S. Massena Lines provide MSTR's only direct connection to any other railroad.
- New York and Ogdensburg Railroad ("NYOG")—a short line railroad that runs from Ogdensburg, New York to a point of connection with the U.S. Massena Lines, NYOG's only rail connection to the national rail network at Norwood, New York.

- Mohawk, Adirondack and Northern Railroad Corporation (“MHWA”)—a short line railroad whose Newton Falls-Carthage and Lowville-Carthage lines connect to the U.S. Massena Lines at Carthage, New York, and connect to the national rail system only through the St. Lawrence Subdivision on those Massena Lines.

VERIFICATION

I, Janet Drysdale, 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 Reply Verified Statement.

Executed on January 8, 2020.

A handwritten signature in blue ink, appearing to read "Janet Drysdale", is written over a horizontal line.

Janet Drysdale
Vice-President, Financial Planning
Canadian National Railway Company

EXHIBIT 1

Map

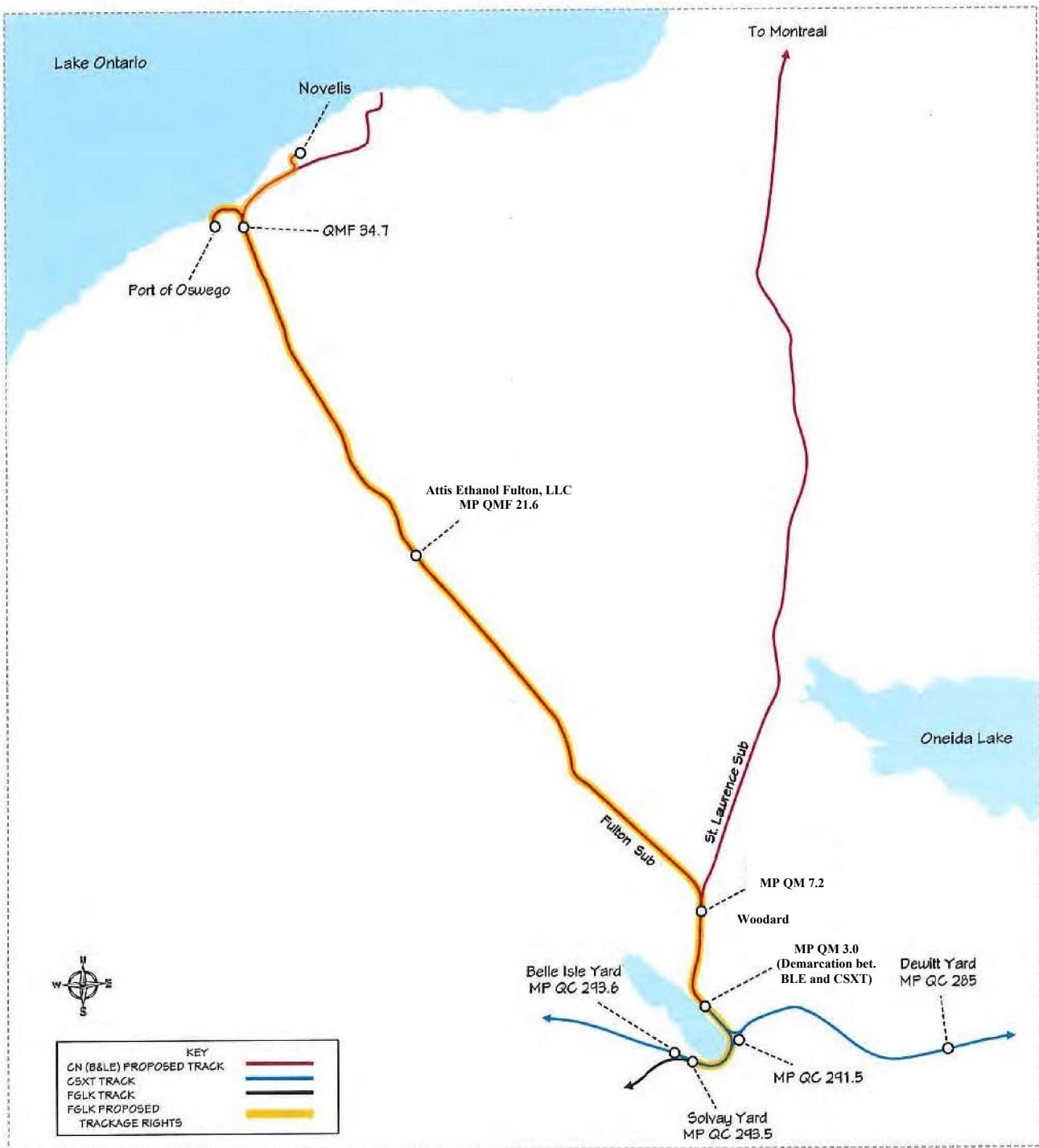


EXHIBIT 2

Summary of Support Statements

EXHIBIT 2

SUMMARY OF STATEMENTS IN SUPPORT OF THE TRANSACTION

- Alcoa U.S.A. Corp. (“Alcoa”) which operates an aluminum smelter in Massena, believes that the Transaction “will help ensure that our Massena site remains competitive in a global commodity market.” It notes that “[c]urrent rail transportation costs of raw materials to our site are cost-prohibitive” and hopes that, given Alcoa’s long-standing relationship with CNR, the acquisition by B&LE will help ensure that Alcoa receives competitive rates at its Massena site.
- Attis Ethanol Fulton, LLC (“Attis”), {{ [REDACTED] }}, which initially sought conditions from the Board, has reached a confidential settlement agreement with B&LE and CSXT that resolves its concerns with the Transaction, withdrawn its request for conditions, and stated that it supports the Transaction.
- Massena Terminal Railroad Company (“MSTR”), a short line that directly connects to the U.S. Massena Lines at Massena and that serves two active rail customers, including Alcoa, points out that the railroad “depends upon the Massena Lines and is glad that the future of those lines is secure” as a result of the Transaction. Citing the productive relationship that MSTR’s corporate parent, Genesee & Wyoming, Inc., has with subsidiaries that interchange elsewhere with the CN System MSTR says that it “expects the acquisition and integration of the Massena Lines into the CN system to proceed smoothly and rapidly due to its end-to-end nature.”
- New York and Ogdensburg Railway (“NYOG”), a short line that connects to the U.S. Massena Lines at Norwood, New York and extends to the Port of Ogdensburg on the St. Lawrence River. NYOG reports that it has been satisfied with the discussions it has had with B&LE over B&LE’s vision for the integration and operation of the acquired lines and “looks forward to working together on building the business to the benefit of our respective Companies as well as the Customers and Communities we serve.
- The Port Authority of New York and New Jersey, operator of the largest and busiest port on the U.S. East Coast and third largest in the nation, relies “on local rail service on the Massena Lines as well as CN/CSX interline service over those lines to facilitate the movement of goods to and from the Port.” The Port Authority explains that “CN’s extensive rail network and the direct connection to CSX will preserve access to critical markets for both import and export products moving through our Port.”
- Congressman John Katko of the U.S. House of Representatives. Congressman Katko represents the district that includes Syracuse, Oswego, and Fulton Counties. Congressman Katko’s district includes the Fulton Subdivision and the portions of the St. Lawrence Subdivision in Oswego and Onondaga Counties. In a joint letter to the Board, Congressman Katko and Congresswoman Stefanik (described below) stress

the “vital role” that freight railroads play “in connecting U.S. businesses, large and small, to markets around the world.” They believe the Transaction will benefit the State of New York by preserving the competitiveness of the Massena Lines and that the addition of a third Class I railroad to the State will “offer enhanced competition and new service opportunities.”

- Congresswoman Elise Stefanik of the U.S. House of Representatives. Congresswoman Stefanik represents the district that includes Ogdensburg and Watertown, and the northern portions of the U.S. Massena Lines, located in Jefferson, Saint Lawrence, and Franklin Counties.
- The North Country Chamber of Commerce, one of the largest business and economic development organizations in northern New York, represents more than 4,200 employees across multiple counties. The Chamber points out the Transaction raises no competitive issues, but involves an end-to-end acquisition that will relocate the CN/CSX interchange from Quebec to New York State. The Chamber says that the Transaction will allow the CN and CSX Systems “to maintain an efficient direct interchange for traffic moving over the Massena Lines route” and that it will preserve existing competitiveness and support growth opportunities related to rail.
- The Canadian/America Border Trade Alliance, an organization based in Lewiston, New York with a membership of over 60,000 companies and organizations in the U.S. and Canada, supports the Transaction because it will “preserve the competitiveness of the Massena Lines route” and trusts that ownership and management of the U.S. Massena Lines by the CN System “will provide opportunities and growth that enhances job creation in those [areas] it serves.
- CSXT, the seller of the Lines, supports the Transaction and assures the Board that it will abide by representations in the Application regarding CSXT employees who may be adversely affected by the Transaction

EXHIBIT 3

Letter from Attis Ethanol Fulton, LLC



J. Gregory Pilewicz
President
Attis Ethanol Fulton, LLC
12540 Broadwell Road, Suite 2104
Milton, GA 30004

January 7, 2020

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

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, N.Y.**

Dear Ms. Brown:

On December 9, 2019 Attis Ethanol Fulton, LLC ("Attis") filed in the above-referenced proceeding Amended and Restated Comments supported by a Verified Statement of Greg Pilewicz, President of Attis (the "Filing"). The Filing requested that certain limited conditions be imposed on the transaction proposed in that proceeding (the "Transaction"). Those conditions related solely to the Fulton Subdivision of the U.S. Massena Lines that Bessemer and Lake Erie Railroad Company ("B&LE") seeks to acquire from CSX Transportation, Inc. ("CSXT").

Attis has now reached a privileged and confidential settlement agreement with B&LE and CSXT that resolves its concerns (the "Agreement"). The Agreement is binding on the parties and does not require approval from the Surface Transportation Board.

Accordingly, Attis withdraws the Filing, no longer seeks for itself or supports other parties' requests for conditions on the Transaction, and supports the Transaction.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "J. Pilewicz", is written over a light blue circular stamp.

J. Gregory Pilewicz
President
Attis Ethanol Fulton, LLC

EXHIBIT 4

**Letter from New York and
Ogdensburg Railway Company, Inc.**



One Railway Lane, Burlington, VT 05401
Tel. 802-658-2550 Fax. 802-658-2553

January 6, 2020

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

Re: Bessemer & Lake Erie R.R. – Acquisition and Operation – Certain Rail Lines of CSX
Transportation, in Onondaga, Oswego, Jefferson, St Lawrence and Franklin Counties, New York.
STB Docket No. FD 36347

Dear Ms. Brown:

The New York and Ogdensburg Railway (NYOG) is a Class III carrier operating over approximately 23 miles of track from interchange with CSX at Norwood, New York, westward to the Port of Ogdensburg and northward to Norfolk, NY. NYOG is an affiliate of the Vermont Rail System (VRS), having assumed operation of the line in April of 2002. Since assuming operations NYOG has invested significant capital in infrastructure, worked closely with existing rail customers to stabilize and grow rail business as well as attract new companies to the line.

During the course of the proceedings NYOG has had numerous conversations with the B&LE RR (CN) relative to their vision for the integration and operation of the acquired lines and how it would interface with those of the NYOG commercially and operationally. To that end we have been satisfied with our discussions and the shared goal of growing our respective business.

For this reason NYOG supports B&LE's (CN) proposed acquisition and looks forward to working together on building the business to the benefit of our respective Companies as well as the Customers and Communities we serve.

Sincerely,

Frank K. Rogers

Vice President Business and Interline Development

Vermont Rail Systems

"Serving America's Industry With Pride"

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*Vermont Railway, Inc. - The Clarendon and Pittsford Railroad Company - Green Mountain Railroad Corporation
Washington County Railroad Company - New York & Ogdensburg Railway Company, Inc.*

www.vrs.us.com