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NASCA-4

Before the
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347



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

RESPONSE TO COMMENTS

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Preliminary Statement

Samuel J. Nasca, for and on behalf of SMART/Transportation Division-New York State Legislative Board (SMART/TD-NY), submits this Response to Comments, Etc., in accordance with the Decision No. 1 procedural schedule.

The announced commencement of negotiations over implementing agreements between CSXT and employees who will be affected by the transaction, as recited by Samuel J. Nasca in his current verified statement, gives rise to further SMART/TD-NY argument that the Wilmington Terminal modification to New York Dock would be inappropriate to this transaction, should the STB nevertheless approve CN's bid to acquire the CSXT Massena lines through a non-connecting railroad subsidiary

Our earlier submission, NASCA-2, filed December 19, 2019, traced the history of the

small line spin off from major Class 1 carriers, culminating in Wilmington Terminal, a badly fragmented five-member STB1990 decision, with continuation of the controversies resulting in the 1995 decision by the Congress to shut down the ICC, and in the process to enact further short-line legislation, including a revised formula for employee protections.

Despite Congressional settlement of the short-line spinoff controversy, the STB now has seemingly opted to expand the scope of Wilmington Terminal, so as to govern all lease and line acquisitions between rail carriers, regardless of carrier size, cognizable under 49 USC 11323(a)(2). Indeed, the instant transaction involves two Class 1 rail carriers, the buyer having set up a dummy carrier subsidiary with no employees in the area, and anticipates hiring all new employees in New York to operate the lines being acquired,. (Appl. 17).

SUBSEQUENT IMPOSITION OF WILMINGTON TERMINAL TO
ALL LINE SALES AND LEASES IS CONTRACT TO STATUTE.

A. History. The STB recently has extended the Wilmington Terminal employee conditions beyond small line spinoffs from major railroads, far from ITS original focus. This chronology WAS forth by the Board in Finance Docket 35873, Norfolk Southern Railway Company-Acquisition and Operation-Certain Rail Lines of the Delaware and Hudson Railway Company, Inc. (Decision No. 6), at 28-29. (May 15, 2015)(NS/D&H), reconsid.. den. (Decision No. 10, at 9-10). (Oct. 18, 2016), where the STB emphasized that a line sale is not considered to be a consolidation.

The STB in NS/D&H , Decision 6 at 28-29, reasoned that New York Dock (1979) applies to 49 USC 11323 transactions involving “consolidations:” (e.g. merger or common

control) in which at least one entity will cease to exist as a separate entity; whereas, Wilmington Terminal (1990) involves a line sale with the continued existence of both carriers.(ibid.). The Board did not consider a line sale or lease to be a "consolidation." Decision 10, at 9-10, highlighted the Board's assertion that New York Dock requires an "umbrella" agreement, outlining how the two workforces will be combined, whereas under the Wilmington Terminal modification, the Board asserts that no "umbrella" agreement is required--only that each side negotiates with its own employees. The Board listed its five subsequent decisions following its Wilmington Terminal determination. (NS/D&H, Decision 6, at 29, 35-36..

1. Mass Coastal. NS/D&H indicated the STB, following Wilmington Terminal, first changed from its long-standing straight application of New York Dock for line sales, in Finance Docket No. 35314, Massachusetts Coastal Railroad, LLC-Acquisition-CSX Transportation, Inc. (May 19, 2010)(Mass Coastal). The Board in its earlier March 29, 2010 action, had imposed straight New York Dock in authorizing Mass Coastal, a Class III carrier operating apx. 58.5-miles of freight lines, to acquire apx. 33 miles of CSXT, with Mass Coastal replacing CSXT -- the sole operator of the CSXT line. However, upon request for clarification, the Board on May 19, 2010, clarified its decision, and thereupon imposed the Wilmington Terminal modification, stating:

Under 49 USC §11326, with the exception of transactions involving only Class III rail carriers, the Board must impose employee protective conditions when it approves an application for authorization of a transaction under §§11323-25. In approving line sales under §§11323-25 that involve a Class I rail carrier, the appropriate employee protection conditions under §11326(a) are New York Dock, as modified by Wilmington Terminal.

2. . UP/San Pedro. The STB staff decision in FD35666, Union Pacific Railroad Company-Acquisition and Operation Exemption-San Pedro Railroad Operating Company (Sept. 7, 2012), is cited for UP acquisition of abandonment lines, and acquisition of San Pedro whose underlying right-of-way already is owned by UP. This staff action is merely noticed in the Federal Register. There is no indication of any San Pedro employees, and seemingly appears agency efforts to puff up Wilmington Terminal. NS/D&H, Decision No. 6, at 29.

3. B&M Bridge Line. The STB decision in FD35791, Union Pacific Railroad Company-Acquisition and Operation Exemption-Brownsville and Matamoros Bridge Company (Mar. 13, 2014), involved a US-Mexico railroad bridge owned 50 percent each by UP and Govt. of Mexico., but all operations historically performed by UP. However, BNSF has non-used overhead trackage rights. UP's petition to acquire and operate the rail line gives no indication from the Board's unopposed action to warrant WilmingtonTerminal. NS/D&H, Decision 6, at 29.

4. Nebraska Norrtheastern Railway. The STB's decision in Finance Docket 35644, BNSF Railway Company-Acquisition and Operation Exemption-Nebraska Northeastern Railway Company, (NS/D&H, Decision 6, at 29, involved a Nebraska line owned by a BNSF predecessor, which BNSF sought to reacquire. The entire NENE was acquired.. Wilmington Terminal was imposed without discussion concerning lack of continued existence. .

5. Canadian Pac. Ltd.-Control-Davenport, Rock Island & NW Ry. This STB decision, FD 32579 (NS/D&H) (Decision 6, at 29. (Feb. 10, 1995), is not available for examination of the application or decision, and appears removed from STB website or public file.

B. Statute. The provisions of 49 USC 11326(a) apply New York Dock to class I carrier

transactions under 49 USC 11323-25. Other carrier classifications are directed to §11326(b)(c). There is no distinction between the so-called “consolidation” or “line sale or lease.” within 49 USC 11323(a)(2), to warrant different employee coverage so as to modify the New York Dock protection. Moreover, the five decisions cited by STB in its NS/D&H Decisions 6 & 10, are inconsistent with one another.

The STB is attempting to modify traditional employee protection standards imposed by the Congress. This is wrong.

Respectfully submitted



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Attorney for Samuel J. Nasca

January 8, 2020

SECOND SUPPLEMENTAL
VERIFIED STATEMENT OF
SAMUEL J. NASCA

1. My name is Samuel J. Nasca. I previously submitted two verified statements in this proceeding NASCA-1, dated December 9, 2019, and NASCA-2, dated December 19, 2019.

2. This current verified statement NASCA-4, dated January 8, 2020, is addressed to certain opposition material filed on and after December 9, 2019 and, as such, this statement is responsive to the Procedural Schedule set forth in STB Decision No. 1, p. 9, para. 6, for "Responses to comments, protests, requests for conditions, and other opposition," are due January 8, 2020.

3. CSXT. Seller CSXT in its comments (12/9/19), states it has begun labor negotiations for implementing agreements:

Pursuant to the requirements of the Protective Conditions, CSXT has begun the process of negotiating implementing agreements with the representatives of the employees who will be affected.

SMART/TD has not been approached by either CSXT or B&LE/CN for discussions about anticipatory implementing agreements in the event the transaction is approved.. I am opposed to the transaction itself, and consider the Wilmington Terminal employee conditions would be insufficient and inapplicable. I recognize that discussions with management frequently occur over implementing agreements in the event a transaction is approved, prior to the agency report and decision, and at a time the ultimate agency decision is in doubt

This is a transaction between two independent Class I rail carriers, as the application confirms, already emphasized in my earlier verified statements. For example (Appl., 5):

Finally,...the transaction is a line sale involving two independent Class 1 railroads.....

The fact that Canadian National Railway Company (CNR) has elected to acquire the Massena lines through a non-connecting bogus B&LE subsidiary should not permit CNR to evade the Class I character of B&LE and evoke Wilmington Terminal. I consider the creation of a bogus B&LE railroad carrying US-Canadian traffic through New York State as an attempt to evade the standard New York Dock provisions enforced by Congress through 49 USC 11326(a).

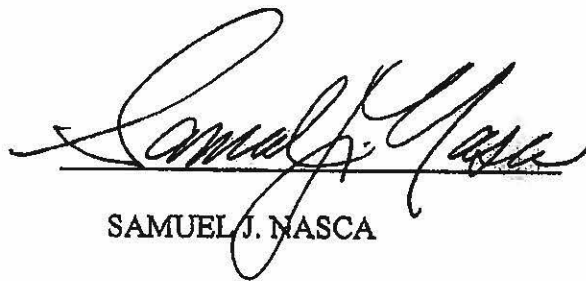
4. Fulton Subdivision. Some three concerns seek to condition the transaction as to upgrade use of the Fulton subdivision. These are Finger Lakes Railway Corp., Attis Ethanol Fulton, and Port of Oswego. It appears to me a major effect would be to increase movement by Finger Lakes Railway over the Fulton subdivision by trackage rights. Apparently, B&LE(CN) would maintain the line, with perhaps reduced work for B&LE(CN) train and engine personnel.

I do not believe the STB need reach the issues presented, for the application should be denied.

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

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

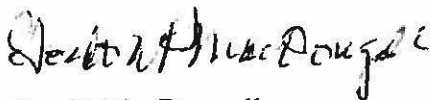


SAMUEL J. NASCA

Dated at
Albany, NY
January 8, 2020

CERTIFICATE OF SERVICE

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


Gordon P. MacDougall

Washington DC