

SERVICE DATE – LATE RELEASE FEBRUARY 7, 2020

SURFACE TRANSPORTATION BOARD

DECISION

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.

Digest:¹ In this decision, the Board seeks supplemental information regarding potential anticompetitive effects of a particular aspect of the proposed acquisition and operation transaction.

Decision No. 3

Decided: February 7, 2020

On October 11, 2019, Bessemer and Lake Erie Railroad Company (B&LE or Applicant), an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (CNR), filed an application seeking Surface Transportation Board (Board) approval under 49 U.S.C. §§ 11323-25 to acquire from CSX Transportation, Inc. (CSXT), a Class I railroad, and to operate approximately 236.3 miles of rail line in New York. This proposal is referred to as the Transaction. In this decision, the Board seeks comments regarding the potential competitive impact of the Transaction on Finger Lakes Railway Corp. (FGLK), and shippers served by FGLK.

BACKGROUND

Applicant seeks the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11321-25 to acquire and operate certain CSXT lines, collectively known as the Massena Lines, from Woodard, N.Y., to the U.S.-Canadian border near Fort Covington, N.Y. (Appl. 1-2.) The Transaction would move the current interchange between the CN System² and CSXT from

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Applicant defines "CN" as CNR's U.S. rail operating subsidiaries, including B&LE, and "CN System" as the rail system operated in Canada by CNR and in the United States by CN. (Appl. iv.)

Huntingdon, Que., to Woodard, where the ends of each railroad would meet. (*Id.*, Ex. 15 at 5.)³ However, Applicant states that there are not adequate facilities at Woodard for physically interchanging traffic, nor could such facilities easily be added. (*Id.* at 22.) B&LE would therefore physically interchange traffic with CSXT at CSXT's Belle Isle Yard (near Solway, N.Y.) or CSXT's Dewitt Yard (near Syracuse, N.Y.), depending on the type and direction of traffic. (*Id.* at 22, 25, Ex. 15 at 5.) According to Applicant, CSXT would grant operating rights that would allow B&LE to operate between the Massena Lines and these CSXT yards solely for the purpose of effectuating interchange with CSXT. (*Id.* at 25 n.25, Ex. 15 at 5-6.) The Purchase and Sale Agreement (PSA) governing the Transaction expressly prohibits B&LE from using these operating rights to access two rail carriers, New York Susquehanna and Western Railway (NYSW) and FGLK. Specifically, section 5.14(b) of the PSA states:

The Parties agree that [CSXT] will not grant to Buyer, and Buyer will not seek, directly or indirectly, before or after Closing, through the transactions contemplated by this Agreement or other means, access to the New York, Susquehanna and Western Railway ("NYSW") or the Finger Lakes Railway Corporation ("FGLK") or any successor or assign of NYSW or FGLK. In the event such access is acquired or required to be afforded prior to, or as a condition of Closing, either Party shall have the right to terminate the Transaction pursuant to Section 11.02 hereof. Buyer shall be entitled to the limited use of certain trackage as described in the Operative Documents for the purpose of effectuating interchange, with [CSXT] only, at each of Belle Isle and in Dewitt Yard provided that such interchange shall not be used for the purpose of achieving access to NYSW or FGLK. This Section 5.14(b) shall survive Closing.

(*Id.*, Ex. 2 at 32-33.)

On November 8, 2019, the Board issued Decision No. 1, which accepted B&LE's acquisition application, established a procedural schedule, and preliminarily determined that the proposed transaction is a minor transaction as defined by the Board's regulations. Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if a determination can be made that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. The Board preliminarily determined that, based on the application and the record at that time, the transaction would clearly not have anticompetitive effects and that, if any anticompetitive effects did exist, they would be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. Decision No. 1, FD 36347, slip op. at 6. The Board explained that its findings regarding anticompetitive effects were preliminary and that it would give careful consideration to any claims that the transaction would have anticompetitive effects that were not apparent from the application and the record at

³ Additional background can be found in the Board's decision in Bessemer & Lake Erie Railroad—Acquisition & Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y. (Decision No. 1), FD 36347, slip op. at 2-3 (STB served Nov. 8, 2019).

that time. Id. at 1. In making this determination, the Board reserved the right to require the filing of supplemental information as necessary to complete the record. Id. at 5.

On December 9, 2019, FGLK, a Class III railroad headquartered in Geneva, N.Y., filed comments, taking no position on whether the Transaction should be approved but requesting conditions to alleviate alleged competitive harms that would impact FGLK and the shippers it serves. FGLK asserts that the provision in the PSA preventing B&LE from seeking direct access to FGLK would prevent FGLK from competing for Canadian traffic moving over the Massena Lines to and from the Syracuse area, leaving “FGLK at the mercy of CSXT who controls the FGLK’s gateway to the CN System despite [CSXT’s] minimal participation in such moves.” (FGLK Comment 8.) FGLK states that, under the proposed operating plan, B&LE, and by proxy, CNR, would come within 2.8 miles of a direct connection to FGLK via the CSXT mainline near FGLK’s Solvay Yard. (Id. at 6.) Additionally, according to FGLK, with the operating rights CSXT would grant B&LE for interchange at CSXT’s Belle Isle Yard, B&LE/CNR trains would operate only 528 feet from FGLK’s interchange point with CSXT at Solvay Yard. (Id.) FGLK asserts that “[t]he option of a direct connection to the CN System through a FGLK-B&LE interchange might provide a more efficient and lower cost service to these markets; however, the forced inclusion of CSXT make it unlikely.” (Id. at 8.) FGLK notes that “the PSA contains no such restrictions on short line carriers that will have a direct interchange with B&LE/CNR,” nor any restrictions on other short line carriers “that may have an indirect connection with B&LE/CNR via CSXT (other than NYSW).” (Id. at 7-8.)⁴

Accordingly, FGLK requests two conditions to address these alleged harms of the transaction: (1) the Board should condition its approval on the removal of the PSA restriction on B&LE/CNR accessing or seeking to access FGLK directly or indirectly; and (2) the Board should grant FGLK trackage rights, on reasonable terms and conditions, over CSXT to interchange with B&LE and the CN System at the Woodard Yard; alternatively, the Board should grant B&LE and the CN System trackage rights, on reasonable terms and conditions, to FGLK’s interchange point at Solvay Yard. (Id. at 16.)

In their respective comments, B&LE and CSXT argue that the Board should reject the conditions sought by FGLK as they seek to create new competitive options rather than to ameliorate competitive harms created by the Transaction. (B&LE Reply 24-25; CSXT Reply 13.) B&LE and CSXT note that CSXT is currently the intermediate carrier for movements between points on the FGLK system and points on the CN System in Canada, and that, after the Transaction, nothing would change for such movements except for the interchange point between the CN System and CSXT, as FGLK’s existing tracks do not physically connect with the CN System today on the Massena Lines or anywhere else. (B&LE Reply 24, 35-37; CSXT Reply 13, 18-19, 20.) B&LE further notes that 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. (B&LE Reply 36.) B&LE and CSXT assert that FGLK’s attempt to obtain trackage rights conditions and to remove section 5.14(b) from the PSA serves only to improve its own

⁴ FGLK also asserts that the restriction would negate the rights of FGLK to connect with B&LE/CNR under the Railroad Industry Agreement that allows short lines to avoid paper and steel barriers under specified circumstances. (FGLK Comment 8.)

competitive position and is unrelated to any anticompetitive effects arising from the Transaction. (B&LE Reply 24; CSXT Reply 17, 19-22.) B&LE and CSXT further argue that the trackage rights sought by FGLK would amount to affirmative relief and that such requests are not permitted in minor transaction proceedings under 49 U.S.C. § 11325 and 49 C.F.R. § 1108.3(h). (B&LE Reply 16-17; CSXT Reply 10, 21.) CSXT also contends that section 5.14(b) of the PSA does not prohibit an interchange with FGLK; it only restricts B&LE, not FGLK, from seeking to create a direct connection between the two carriers. (CSXT Reply 14-15.) CSXT further states that, should FGLK create a direct connection with B&LE, 49 U.S.C. § 10742 would require B&LE to allow the interchange and the PSA provision would not prevent it. (CSXT Reply 15.)

The Board will require supplemental information to complete the record regarding FGLK's claims concerning potential anticompetitive effects of the Transaction. The PSA provision that restricts B&LE/CNR from seeking access to FGLK—despite B&LE operating less than 600 feet from FGLK's Solvay Yard—raises questions as to the competitive impact of the Transaction. This restriction on interchange, while not technically an interchange commitment that completely prohibits interchange, warrants further review as to the potential for any anticompetitive effect. The Board is particularly concerned about the anticompetitive effects on any shippers whose traffic, post-Transaction, would originate or terminate on FGLK and move to or from points on the Massena Lines, as this traffic ostensibly would require an additional intermediate carrier as a result of the Transaction. The Board therefore will require B&LE and CSXT to submit supplemental information addressing the potential anticompetitive effect of section 5.14(b) of the PSA. The Board also invites other interested parties to address potential anticompetitive effects on shippers served by FGLK, including information about the degree to which these shippers would be impacted. The Board seeks input on whether, should the Board conclude that the Transaction would have such anticompetitive effects, FGLK's requested conditions would adequately address them, or whether modifications to the requested conditions would be appropriate, e.g., conditioning only to give B&LE trackage rights over CSXT to Solvay Yard, for the sole purpose of interchanging with FGLK only with respect to traffic that originates or terminates on FGLK.

B&LE and CSXT will be directed, and other interested parties permitted, to submit supplemental information by February 14, 2020. Replies to comments will be due by February 21, 2020. Accordingly, the procedural schedule set forth in Decision No. 1 will be modified to allow for this supplemental information and to amend the date by which the Board's final decision will be served to April 6, 2020.⁵

⁵ The final decision will become effective 30 days after it is served.

It is ordered:

1. B&LE and CSXT shall, and other interested parties may, submit the supplemental information described above by February 14, 2020. Replies shall be filed by February 21, 2020.
2. The procedural schedule set forth in Decision No. 1 is amended as described above.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.