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BY E-FILEING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

Re: *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 Supplemental Information of Bessemer and Lake Erie Railroad Company in Response to Decision No. 3 (designated as “B&LE-6”). 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.

Sincerely,

/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**

**SUPPLEMENTAL INFORMATION OF
BESSEMER AND LAKE ERIE RAILROAD COMPANY IN RESPONSE
TO DECISION NO. 3**

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February 14, 2020

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TO DECISION NO. 3**

Bessemer and Lake Erie Railroad Company (“B&LE”) hereby submits supplemental information as requested in Decision No. 3 (issued February 7, 2020) regarding the proposed acquisition and operation by B&LE of the U.S. Massena Lines (as defined in B&LE’s Application (BLE-1 at 7, 21-22)) of CSX Transportation, Inc. (“CSXT”) (“the Transaction”).

The Board has asked B&LE, CSXT, and other parties to address potential competitive impacts of the Transaction on Finger Lakes Railway Corp. (“FGLK”) and shippers on FGLK’s lines. As explained in B&LE’s prior filings and below, FGLK’s request for a trackage rights condition between Woodard and Solvay, NY is unwarranted and inappropriate in this end-to-end line sale of the U.S. Massena Lines that do not physically connect to FGLK. The proposed Transaction will have no anticompetitive effects on FGLK or customers located on its lines and thus will not reduce competitive service options for its shippers. FGLK’s request for a trackage rights condition between Woodard and Solvay is instead an effort to use the Board’s processes to

FGLK's own commercial advantage, rather than to address a reduction in competitive transportation options resulting from the Transaction. Although FGLK's request for trackage rights between Woodard and Solvay might serve FGLK's own commercial interests, such trackage rights would be contrary to the interests of overhead and local rail customers whose movements transit the U.S. Massena Lines, because any trackage rights condition would have the potential cause delays in train movements and thus reduce the efficiency and reliability of B&LE's post-Transaction operations.

INTRODUCTION

In Decision No. 3, the Board ordered B&LE and CSXT to file supplemental information addressing "the potential anticompetitive effect of section 5.14(b) of the PSA."¹ The Board also requested "interested parties to address potential anticompetitive effects on shippers served by FGLK, including information about the degree to which these shippers would be impacted." Finally, it invited parties to address whether, if it concluded "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"²

B&LE appreciates the Board's effort to develop a complete record through its request for supplemental information. B&LE previously explained that it and CSXT had begun outreach to customers and shortlines to facilitate smooth transition after consummation, and those efforts remain ongoing and will continue in the coming weeks. B&LE is starting to schedule meetings with customers whose facilities are located on the U.S. Massena Lines to understand and identify

¹ Section 5.14(b) is reprinted in Application (BLE-1), Exhibit 2 at 32-33.

² Slip op. at 4.

their rail service needs, develop efficient plans to serve their facilities, and help them grow their future businesses. Safety is a core value, and B&LE looks forward to providing safe and reliable rail operations to customers over the U.S. Massena Lines after Closing.

The development of the record in this case has confirmed the Board’s “preliminary determination” in Decision No. 1 (served November 8, 2019). In that decision the Board accepted B&LE’s Application and found that the Transaction appeared, on the record as it existed at that time, to clearly have no anticompetitive effects.³ It further found that, even if there were any such effects, they would clearly be outweighed by the Transaction’s contribution to the public interest in meeting significant transportation needs. *Id.* As the Board indicated it would do, it has since “give[n] careful consideration to any claims that the transaction would have anticompetitive effects that were not apparent from the application and the record at that time.”⁴

It remains the case, just as it was when B&LE filed its Reply In Support of Its Minor Application in January, that the record reflects that the Transaction will not result in a reduction in transportation options for FGLK or customers on its lines. In particular, nothing will change regarding CSXT’s role as an intermediate carrier for traffic that moves overhead via the Massena Lines between points on FGLK’s lines and points in Canada served by Canadian National Railway Company (“CNR”). Both before and after the Transaction, three carriers participate in such overhead moves: FGLK, CSXT, and the CN System. Similarly, the Transaction will not reduce transportation options for local movements between points on FGLK’s line and points on

³ Decision No. 1 at 1.

⁴ Decision No. 3 at 2-3 (citing Decision No. 1 at 1).

the U.S. Massena Lines. Although the Transaction would increase the number of carriers participating in the movement, this is typical of a Class I carrier line sale. The Transaction will not cause any competitive harm to customers on FGLK's lines. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} The

Transaction does nothing to change the fact that CSXT is a bridge carrier between the CN System and customers located on FGLK's lines, and this is true regardless of Section 5.14(b).

In the absence of any loss of competitive transportation options as a result of the Transaction, the Board should not impose a trackage rights condition for FGLK's benefit. The fact that FGLK attempts to exclude CSXT from existing or future movements is not an adequate basis for imposing a trackage rights condition. FGLK wrongly suggests that its proposed trackage rights condition between Woodard and Solvay would be easy to implement and does not address potential disruption to other rail customers that depend upon the reliability of rail service on the U.S. Massena Lines. In reality, any movements pursuant to such a trackage rights condition would add congestion and inefficiency to the post-Transaction operations of both B&LE and CSXT. In addition to potentially harming the active rail customers that depend on the U.S. Massena Lines, such a trackage rights condition between Woodard and Solvay would be disruptive for other freight customers and Amtrak passengers utilizing CSXT's double-track mainline running through Syracuse, which would have to be used for any such trackage rights movements.

LEGAL STANDARD FOR IMPOSING A CONDITION IN A LINE SALE

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). The Board must approve a minor transaction unless it would cause anticompetitive effects “that are both ‘likely’ and ‘substantial.’” *Norfolk S. Ry.—Acquisition & Operation—Certain Rail Lines of Delaware & H. Ry.*, Docket No. FD 35873, slip op. at 14 (STB served May 15, 2015) (“*NS/D&H*”). There is no basis for the Board to impose a competition-preserving condition on a minor transaction unless such “substantial” anticompetitive effects exist.

The Board and its predecessor agency have long recognized that end-to-end line sale transactions, such as this one, are not likely to raise competitive issues.⁵ Like other end-to-end line sales, this Transaction would clearly have no anticompetitive effects, let alone ones that are “likely” or “substantial.” Within this context, there is no basis for imposing the trackage rights condition sought by FGLK. A trackage rights condition in this proceeding is not only unwarranted given the absence of a competitive issue, but also because such a trackage rights

⁵ *E.g., Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC*, STB Finance Docket No. 35147, slip op. at 5 (STB served Mar. 10, 2009) (“This agency has long held that end-to-end transactions are unlikely to generate the types of competitive problems that often arise in parallel transactions.”); *see also id.* (finding that the end-to-end transaction would not adversely affect competition); *Norfolk S. Corp.—Control & Consolidation Exemption—Algers, W. & W. Ry.*, STB Finance Docket No. 34839, slip op. at 8 (STB served Feb. 15, 2007) (finding no “likelihood that a substantial lessening [*sic*] of competition” would result from the end-to-end transaction); *Huron & E. Ry.—Acquisition—CSX Transp., Inc. Line Between Bad Axe & Saginaw, MI*, Finance Docket No. 31316, 1988 WL 225140, at *5 (ICC Dec. 16, 1988) (finding that the end-to-end transaction “w[ould] not result in the loss of, or any reduction in, competitive rail services”).

condition is not appropriate in this minor transaction. Trackage rights are a form of affirmative relief requiring a responsive application, and responsive applications are not permitted in minor transactions.⁶

FACTUAL BACKGROUND FOR SUPPLEMENTAL INFORMATION

B&LE has already submitted evidence regarding the Transaction’s “potential anticompetitive effects on shippers served by FGLK, including information about the degree to which these shippers would be impacted.”⁷ To summarize, there are none. In 2019, a single customer on FGLK’s lines shipped carloads overhead via the Massena Lines to points on CNR in Canada. That customer is {{{ [REDACTED]

after the Transaction, three carriers participate in this movement – FGLK, CSXT and the CN System. There will be no change in the number of carriers participating in these overhead movements between points on FGLK’s lines and points in Canada via the Massena Lines as a

⁶ See B&LE Reply Comments at 9, 16-17. The Board’s statute provides for the filing of inconsistent applications for “major” and “significan[t]” transactions, but not for minor transactions. 49 U.S.C. § 11325(b)-(d). The Board’s regulation provides, “No responsive applications shall be permitted to minor transactions.” 49 C.F.R. § 1180.4(d)(1). The regulations further explain that a “responsive application” includes inconsistent 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*, . . . and other types of proceedings not otherwise covered).” 49 C.F.R. § 1180.3(h) (emphasis added).

⁷ Decision 3 at 4.

result of the proposed end-to-end line sale with CSXT. The CSXT-CN interchange for the traffic will simply be relocated from Huntingdon, QC to Woodard, NY.

Apart from this small number of overhead carloads moving between FGLK's lines and points in Canada via the Massena Lines, there are no active FGLK shippers utilizing the Massena Lines. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

The map attached as Exhibit 1 shows these two flows: (1) the small amount of overhead carloads moving from points on FGLK's lines for one customer to points in Canada via the Massena Lines; and (2) the handful of movements of {{ [REDACTED] [REDACTED] }}. To put the overhead movements in context, in 2019, the CN System and CSXT handled roughly {{ [REDACTED] }} carloads of overhead traffic to/from CSXT via the Huntingdon, QC interchange on the Massena Lines. {{ [REDACTED] }} carloads from its facilities on the FGLK represented less than {{ [REDACTED] }} of that traffic {{ [REDACTED] }}

The Board also inquired whether FGLK's requested trackage rights condition between Woodard and Solvay would be appropriate if the Board concludes that the Transaction would have anticompetitive effects. To understand the potentially serious operational impacts of FGLK's proposed trackage rights condition, here is a description of the track and yard facilities that are implicated.

PUBLIC VERSION

B&LE's future ownership after consummation would end at Milepost 3.0 near Woodard, NY. The facilities of nearly a dozen customers, including those of a number of warehousing and packaging companies as well as a grain elevator of Cargill Inc., are located near Liverpool and Woodard. *See* map attached as Exhibit 2. Industrial leads from these facilities connect to the single-track St. Lawrence Subdivision, as does the Fulton Subdivision, which also is being acquired by B&LE as part of the U.S. Massena Lines. Aside from the facilities near Milepost 3.0 near the railroad station of Woodard in Liverpool, NY being used to serve active local rail customers, the single-track St. Lawrence Subdivision is also used by all other local and overhead traffic moving over that line to interchange with CSXT.

After consummation, CSXT will continue to own trackage on the St. Lawrence Subdivision south of Milepost 3.0 to a connection at Control Point ("CP") 291 with CSXT's double-track main line that runs east-west through Syracuse. CSXT's double-track main is used by a large volume of freight traffic and by 8 Amtrak passenger trains per day. CSXT's Dewitt Yard and Belle Isle Yard are on opposite sides of Syracuse, and each connect to CSXT's double-track main line running between Chicago and New York.

CSXT's Dewitt Yard is located on CSXT's mainline east of Syracuse and east of CP 291. B&LE understands it is CSXT's principal rail yard in the Syracuse area where CSXT processes intermodal and merchandise traffic, including the Massena Line overhead and local traffic. After the Transaction, Dewitt Yard will be used for the physical interchange of most of the traffic exchanged between B&LE and CSXT (manifest carloads, intermodal, and military trains moving between Fort Drum and points east of Syracuse).

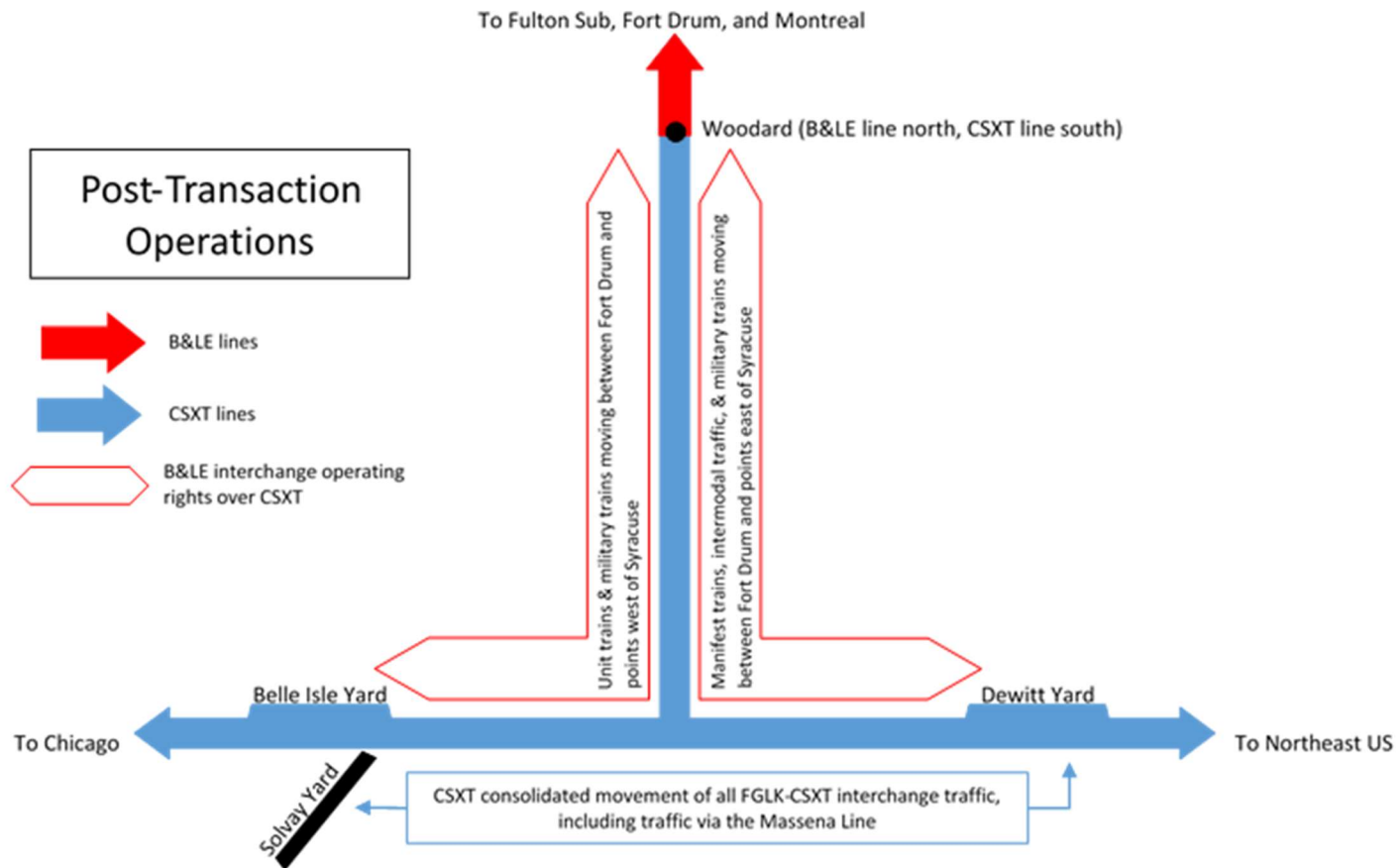
CSXT's Belle Isle Yard is located on CSXT's mainline west of Syracuse and west of CP 291. Belle Isle Yard has a long siding north of CSXT's main line 1. After the Transaction,

B&LE will use Belle Isle Yard solely for physical interchange of unit trains originating or terminating on the Fulton Subdivision and military trains moving between Fort Drum and points west of Syracuse.⁸

B&LE understands that FGLK and CSXT interchange manifest cars at Solvay Yard, and that CSXT moves those cars between Solvay Yard and CSXT's Dewitt Yard over CSXT's double-track main line. Solvay Yard is south of main 2, which is on the opposite side of CSXT's double-track line from the siding at CSXT's Belle Isle Yard. Given the layout of the facilities, any train moving from Belle Isle Yard to reach Solvay Yard to switch cars would have to perform a reverse shove move across CSXT's double-track main line, tying up that line for the duration of the operation.

The following schematic diagram illustrates how interchange traffic between B&LE and CSXT, as well as between FGLK and CSXT, will move after the Transaction.

⁸ BLE-1 at 22 n.24.



SUPPLEMENTAL INFORMATION AND ARGUMENT

I. THE BOARD SHOULD DENY FGLK’S PROPOSED TRACKAGE RIGHTS CONDITION BETWEEN WOODARD AND SOLVAY BECAUSE THE TRANSACTION WILL NOT REDUCE COMPETITIVE ALTERNATIVES FOR FGLK OR ITS SHIPPERS.

FGLK has asked the Board to impose a trackage rights condition over CSXT’s tracks between Solvay, NY and Woodard, NY. FGLK suggests that the Board could grant trackage rights to FGLK, allowing it to operate from Solvay over CSXT’s line to Woodard for interchange with B&LE, or to B&LE, allowing it to operate over CSXT’s line to Solvay Yard for interchange with FGLK. Such a trackage rights condition is unnecessary and inappropriate because the Transaction would not reduce “the existing transportation options for shippers and

carriers ... or that any shipper would lose a competitive rail option.” *See CSX Transp., Inc.—Joint Use—Louisville & Ind. R.R.*, Docket No. FD 35523, slip op. at 5 (STB served Apr. 10, 2015) (“*CSXT/L&P*”).

A. Overhead Traffic Between Points on the FGLK and Points in Canada Will Continue to Move Via Three Carriers After the Transaction.

A single FGLK customer currently ships carloads over the Massena Lines to points in Canada served by CNR. Today, such overhead traffic moves over three rail carriers (FGLK-CSXT-CN System), and it would move over the same three carriers after the Transaction. Upon B&LE’s acquisition of the U.S. Massena Lines, its track will not physically connect with FGLK’s track. Any future overhead traffic moving between FGLK and the CN System will therefore continue to operate over CSXT’s tracks as a bridge carrier, as it does today. From the perspective of customers moving carloads over the Massena Lines, the only changes after the Transaction are that (1) B&LE will own the track north of Woodard and thus the CN System will operate a longer length of haul over the route; and (2) under B&LE’s operating plan, such traffic 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.⁹

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 [i.e., for Canadian traffic to and from the Syracuse area],” but that “the forced inclusion of CSXT makes it unlikely.”¹⁰ As CSXT is already in the route for this traffic today, FGLK’s reference to

⁹ *See* BLE-1 at 10; *id.*, Exhibit 15, at 6.

¹⁰ FGLK Comments at 8.

“more efficient and lower cost service” reflects the purpose of FGLK’s trackage rights condition: to exclude CSXT from the route in an effort to create a new FGLK-B&LE service after the Transaction, even though their tracks will not physically connect. But the Board’s conditioning authority in a minor transaction is only to be used to address reductions in competition, not to improve the efficiency or reduce the cost of rail service as compared to pre-transaction levels. *See Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp.*, 10 I.C.C.2d 661, 745 (1995) (“*BN/Santa Fe*”) (“[T]he conditioning power is used to *preserve* competitive options (not to *expand* them)”), *petition for rev. denied sub nom. W. Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *NS/D&H*, slip. op. at 24, 35 (same); *Genesee & Wyo. Inc.--Control--RailAmerica, Inc.*, Docket No. FD 35654, slip op. at 4 (STB served Dec. 20, 2012) (trackage rights conditions denied where “the competitive landscape would remain unchanged” following the transaction); *see also CSX Corp.--Control--Ind. R.R.*, STB Finance Docket No. 32892, 1996 WL 648610, at *3 (STB served Nov. 7, 1996) (potential changes in service levels “do not relate to the issue of competitive impact”).

Tellingly, FGLK asserts that it “believes that there would be *additional traffic opportunities* if there were a direct connection between FGLK and B&LE and the CN System,”¹¹ acknowledging that FGLK seeks new speculative traffic movements, not a remedy for any anticompetitive effects of the Transaction on existing shippers between points on FGLK’s lines and Canada via the Massena Lines. FGLK thus seeks the imposition of a trackage rights condition on the Transaction not to preserve FGLK’s competitive options, but to create its own commercial advantage. FGLK’s desire to enhance its competitive posture—by excluding CSXT

¹¹ FGLK Comments at 5 (emphasis added).

from participating in moves between points on FGLK's tracks and B&LE's tracks over CSXT's own double-track main line—is not an appropriate basis for the Board to exercise its conditioning authority.

B. There Have Been No Movements Between Customers on FGLK's Lines and Points on the U.S. Massena Lines Other than FGLK's Own Rail Equipment in 2018 through 2020 to Date.

In Decision No. 3, the Board stated that it was “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.”¹² But there are no such movements between customers on FGLK's lines and points on the U.S. Massena Lines.

The only exception {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

Further, if local traffic between points on FGLK and points on the Massena Lines might develop after the Transaction, it will move efficiently without FGLK's requested trackage rights condition between Woodard and Solvay. The insertion of an additional carrier into the movement of a shipper's carloads as a result of a line sale does not constitute grounds for imposing a condition on the proposed transaction, as such additional carrier participating in the movement does not deprive that shipper of any competitive rail options. *NS/D&H*, slip op. at 27 (denying GWI's requested condition, because “GWI has not presented evidence that [insertion of

¹² Decision No. 3 at 4.

additional carrier into GWI's routing options] is actually anticompetitive"). Many Class I line sales result in adding a carrier to existing movements. It would set a dangerous precedent and act as a disincentive for future line sales that serve the public interest, if the Board were to treat such an addition as a basis for imposing a trackage rights condition.

II. THE TRACKAGE RIGHTS CONDITION SOUGHT BY FGLK WOULD INTERFERE WITH EFFICIENT AND RELIABLE OPERATIONS AFTER CONSUMMATION AND COULD POTENTIALLY DETERIORATE RAIL SERVICE FOR ACTIVE RAIL CUSTOMERS.

B&LE appreciates the opportunity to provide supplemental information that explains why FGLK's proposed trackage rights condition between Woodard and Solvay would cause operating problems for B&LE and CSXT and their customers after consummation. It would adversely impact efficiency and service for other active rail customers on the U.S. Massena Lines, including the military as well as overhead customers whose carloads move via the Massena Lines. Service for rail customers and Amtrak passengers who depend upon CSXT's double-track main line through Syracuse could also be adversely impacted.

FGLK's proposal ignores the real, practical impacts its proposal would have on active customers at Woodard, rail customers elsewhere on the Massena Lines, and customers who depend upon the Massena Lines as the gateway for their goods to move between U.S. East Coast points and locations in the Canadian provinces of Quebec, New Brunswick, and Nova Scotia. FGLK also fails to account for the impact on freight rail customers and Amtrak passengers that depend upon the fluidity of CSXT's double-track mainline through Syracuse. FGLK focuses only on its own narrow commercial interests, asserting:

The 6-mile lines of CSXT and B&LE/CN between Solvay and Woodward [*sic*] are only scheduled to have two trains a day in each direction, leaving plenty of windows to schedule a FGLK trackage train to Woodward [*sic*] and back.

Alternatively, if the Board were to require that B&LE be given trackage rights to FGLK, it is clear that those rights would be feasible, as B&LE already has been granted trackage rights by CSXT to Belle Island [*sic*] Yard and Dewitt Yard, each of which essentially passes by the lead to FGLK's Solvay Yard.

FGLK Comments at 17. FGLK's assertions are mistaken, and FGLK minimizes both the workload that would be required to use Board-imposed trackage rights between Woodard and Solvay as well as the added inefficiency, increased cost for crews and locomotives, and delays that the exercise of such trackage rights would entail.

A. After the Transaction, B&LE Will Operate to CSXT's Dewitt Yard and to CSXT's Belle Isle Yard Solely for Interchange with CSXT, In Train Movements Identical to Those Currently Performed by CSXT.

CSXT is not granting B&LE trackage rights over the CSXT main lines. Instead, it is granting limited operating rights solely for the purpose of allowing B&LE to interchange traffic with CSXT at locations that are more feasible than Woodard.¹³ The locations for interchange preserve the same flows of traffic after the Transaction as CSXT performs before the Transaction. The trains that B&LE would use operating rights for the purpose of interchange would replace existing trains now operated by CSXT, and thus would not add to congestion on CSXT's double-tracked main lines. The fact that this would not add new trains is important, because these interchange movements operate over CSXT's principal east-west double-tracked main line between New York and Chicago, which is a high-density line that hosts Amtrak passenger trains as well as numerous other CSXT freight trains.

B&LE understands that at present, CSXT picks up and delivers cars in interchange with FGLK daily at Solvay Yard. This includes all of the interchange traffic between FGLK and

¹³ CSXT Reply Comments at 8 n.9.

CSXT, that is, cars moving overhead via the Massena Lines as well as cars moving to or from other parts of CSXT's network. CSXT moves the cars received from FGLK from Solvay Yard to CSXT's Dewitt Yard. At Dewitt Yard, CSXT switches the {{[REDACTED]}} cars and adds them with other CSXT carloads that are moving via the Massena Lines to CSXT's Q620 train, which operates north from Dewitt Yard over the Massena Lines.

After the Transaction, this operating pattern would remain the same, except that it will be a B&LE crew and locomotive (rather than CSXT) that will operate the Massena Line trains to and from Dewitt Yard. Those trains will include the small number of {{[REDACTED]}} overhead carloads that originated on FGLK's lines, along with other interchange cars from CSXT. Cars moving from the Massena Lines to FGLK follow the same path but in reverse, including the empty carloads flowing back to {{[REDACTED]}} from Canada. Those cars are moved from the Massena Lines to CSXT's Dewitt Yard (by CSXT before the Transaction and by B&LE after the Transaction). Both before and after the Transaction, CSXT would switch cars in Dewitt Yard, separating the interchange cars for FGLK to be delivered by CSXT to Solvay Yard for interchange with FGLK.

FGLK suggests that it would be easy for B&LE to operate Board-ordered trackage rights from Woodard to Solvay to interchange cars with FGLK because B&LE's trains will "essentially pass[] by the lead to FGLK's Solvay Yard."¹⁴ However, as discussed above, after the Transaction, B&LE will move unit trains between the Fulton Branch and CSXT's Belle Isle Yard to interchange with CSXT. It would be operationally infeasible for a unit train to stop on CSXT's double-track main line to pick up or drop off a handful cars at the Solvay Yard tracks

¹⁴ FGLK Comments at 17.

(on the opposite side of CSXT's double-track main lines from the unit train siding at Belle Isle Yard). This is why FGLK's request for a trackage rights condition for B&LE to move between Woodard and Solvay would require B&LE to run an additional assignment solely for the purpose of moving between Woodard to Solvay.

This new assignment would increase expense and add a new train moving between Woodard and Solvay, including on the busy CSXT's double-track main line. B&LE would also be required to do added switching of FGLK cars at Woodard, in order to add and remove them from B&LE's northbound and southbound trains. This would be an uneconomic and inefficient operation that would tend to add delays that could increase the transit time for cars going to other customers on and over the Massena Lines. Such a small volume of traffic surely would not justify the added costs of a new assignment and delays from added switching.

The added switching required at Woodard would be costly and inefficient, and potentially deteriorate service for existing active shippers that use the Massena Lines. There are at least 10 active rail customers in the vicinity of Woodard (*see* map at Exhibit 2) that B&LE will serve after Closing. Based on B&LE's preliminary understanding of the facilities at Woodard and the number of nearby active customers plus the proximity of the Fulton Branch, B&LE is concerned that there would be inadequate facilities at Woodard for B&LE to accommodate a new train assignment plus the switching of cars. These circumstances are why post-consummation interchange of manifest carloads and intermodal traffic between CSXT and B&LE will occur at Dewitt Yard. In short, the movements that would be required with FGLK's proposed trackage rights would be entirely inconsistent with B&LE's operating plan.

This arrangement would also add a new train movement over CSXT's double-track mainline, as any cars from FGLK bound for B&LE would no longer be combined with other

FGLK cars in a single train interchanged with CSXT. It would be operationally and economically infeasible for B&LE to run these new trains across the busy CSXT east-west double track main line in order to pick up and drop off a small number of cars at Solvay.

It would be similarly inefficient and contrary to B&LE's operating plan for FGLK to operate on Board-imposed trackage rights between Solvay Yard and Woodard to handle whatever future FGLK cars may move on the Massena Lines. This arrangement would again add a new FGLK train over CSXT's busy double-track mainline, and it would again require a new interchange with B&LE at Woodard, with all the attendant costs and operational inefficiencies that would bring.

For the reasons discussed above, FGLK's proposed Woodard-to-Solvay trackage rights condition would cause operating inefficiencies and delays that would tend to deteriorate service for rail customers that depend upon rail service on the Massena Lines as well as add new trains over CSXT's east-west double-track mainline, reducing its capacity and increasing congestion on its line used by other rail customers and Amtrak passenger trains.

B. The Interchange Locations Chosen by CSXT and B&LE Should Not Be a Basis for the Board to Award Trackage Rights to FGLK.

The fact that B&LE will operate on CSXT's tracks after the Transaction to interchange unit trains and certain military trains at the siding in Belle Isle Yard and to interchange all other traffic with CSXT at Dewitt Yard is not a reason for the Board to impose a trackage rights condition for FGLK's private benefit. The proximity of B&LE's future interchange operations with CSXT to FGLK's own interchange operations with CSXT does not diminish competition. To the contrary, B&LE's interchange locations with CSXT at Dewitt Yard and Belle Isle Yard reflect feasible locations to interchange the traffic that will be handled at each: (1) manifest and

intermodal traffic at Dewitt; and (2) unit trains at Belle Isle Yard. Military trains will be handled at both in movements similar to unit trains.

As explained in the Application, CSXT and B&LE agreed that they should not interchange at Woodard (the post-Transaction point of ownership demarcation between B&LE's and CSXT's lines) given the available facilities, nearby local customers, desire to maintain the present traffic flows through Belle Isle Yard and Dewitt Yard, and large amount of overhead traffic.¹⁵ So while the location of the revenue interchange of traffic between B&LE and CSXT will be at Woodard, the railroads have agreed that physical interchange will take place at CSXT's Belle Isle Yard for unit trains and certain military trains and CSXT's Dewitt Yard for all other traffic.¹⁶ After the Transaction, CSXT will grant operating rights for the purpose of interchange to B&LE allowing it to operate on CSXT's tracks to and from those yards, solely for purposes of delivering and picking up cars in interchange with CSXT.¹⁷

CSXT has voluntarily agreed to grant those operating rights for the purpose of interchange, consistent with long-standing industry practice. Under an interchange agreement, the carriers designate facilities to interchange cars on both sides of the move and may permit operations over lines owned by one of the carriers for the sole purpose of interchanging cars with that carrier. These agreements do not permit the user to serve local shippers or interchange with other carriers. Participants in future line sales may be hesitant to agree to designate their own yard facilities for interchange if a foreign carrier could use the operations pursuant to the interchange agreement as a basis to seek Board-ordered trackage rights.

¹⁵ BLE-1 at 25 n.25.

¹⁶ BLE-1 at 22.

¹⁷ *Id.* at 25-26 n.25.

III. SECTION 5.14(B) OF THE PSA PRESERVES THE STATUS QUO WHERE CSXT OPERATES BETWEEN THE CN SYSTEM AND FGLK AND DOES NOT REDUCE ACTUAL COMPETITION THAT PRESENTLY EXISTS.

FGLK’s argument for a trackage rights condition relies heavily on what it characterizes as the “broad prohibition” of Section 5.14(b) of the PSA, which FGLK claims “place[s] an unfair, anticompetitive restriction of FGLK’s ability to develop Canadian traffic via B&LE and its parent [CNR].” FGLK Comments at 14. But as CSXT has pointed out, the actual terms of Section 5.14(b) do not constrain FGLK, but instead only apply to B&LE and CNR.¹⁸ FGLK remains free to seek a direct connection with B&LE, and if it were able, for example, to construct a build-out line to B&LE’s line or persuade the Board to grant it access to B&LE under the Board’s competitive access regulations, then nothing in Section 5.14(b) would prevent B&LE from meeting its interchange obligations under 49 U.S.C. § 10742 or require B&LE to disobey a Board access order.¹⁹

In any event, Section 5.14(b) does not reduce actual competition that presently exists; instead it preserves the status quo where CSXT operates between the CN System and FGLK as described above. Both before and after the Transaction, FGLK has no physical connection with the CN System. It is thus impossible for the Transaction to deprive FGLK of such an opportunity. FGLK has not established that it has any reasonable prospects for being able to establish a direct connection with B&LE, even apart from the effects of Section 5.14(b). FGLK provides no evidence, for example, that it is constructing or is likely to be able to construct a build-out line to the tracks that B&LE will own after Closing. The record provides no basis for

¹⁸ CSXT Reply Comments at 14-15.

¹⁹ *Id.* at 15.

conditioning the Transaction on Solvay-to-Woodard or Woodard-to-Solvay trackage rights over CSXT's double-track mainline. Operation of such trackage rights would cause congestion and inefficiency in B&LE's and CSXT's operations and deteriorate rail service and transit times for other active rail customers.

Ultimately, FGLK appears to suggest that the Transaction has an anticompetitive effect simply because CSXT has not voluntarily agreed to grant trackage rights over CSXT's main line to create a direct connection between FGLK and B&LE after Closing. However, this is CSXT's decision. Indeed, the proximity of the CN System to FGLK's lines is only the result of the proposed Transaction. The Board should not impose a condition that would create—rather than preserve—competitive options by excluding CSXT as a carrier from operating on its own tracks.

Further, FGLK asserted that Section 5.14(b) “would go so far as to negate the rights of FGLK to connect with B&LE/[CNR] under the Railroad Industry Agreement (‘RIA’)” negotiated by the Association of American Railroads and the American Short Line and Regional Railroad Association.²⁰ As both B&LE and CSXT explained, Section 5.14(b) does not and cannot override any potentially applicable provision of the RIA.²¹ And if FGLK believes that in the future, circumstances arise after consummation that are governed by the RIA, then FGLK may pursue any available remedies pursuant to the terms of the RIA, including potential arbitration before the Board. *See generally Association of American Railroads & American Short Line & Regional Association—Agreement—Application Under 49 U.S.C. § 10706*, 3 S.T.B. 910 (1998). B&LE explained that the RIA includes seven examples, including two

²⁰ FGLK Comments at 8-9.

²¹ B&LE Reply Comments at 38-39; CSXT Reply Comments at 15-16.

examples that relate to new routes for new traffic. If new traffic between FGLK's lines and the Massena Lines were to actually develop in the future, the RIA anticipates this circumstance and appears to have an available forum and a pre-determined remedy if a voluntary agreement could not be reached (arbitration before the STB and haulage as remedy). There is therefore no need for the Board to impose a trackage rights condition between Woodard and Solvay in this case based on hypothetical future traffic that might not arise.

CONCLUSION

B&LE respectfully submits this Supplemental Information in response to Decision No. 3. For the reasons set forth above and in the record, the proposed Transaction will not result in any competitive harm to any customer, and the Board should deny the Woodard-to-Solvay trackage rights condition requested by FGLK.

Respectfully submitted,

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February 14, 2020

EXHIBIT 1
FGLK's Traffic Flows

REDACTED

EXHIBIT 2

Customers at Woodard, NY

REDACTED

VERIFICATION

I, Derek Taylor, verify under penalty of perjury under the laws of the United States that I am Vice-President Eastern Region of Canadian National Railway Company, that I have read the foregoing Supplemental Information of Bessemer and Lake Erie Railroad Company in Response to Decision No. 3, and that the facts stated therein are true and correct. Further, I certify that I am qualified and authorized to file this Verification on behalf of Bessemer and Lake Erie Railroad Company.

Executed on February 14, 2020.

A handwritten signature in dark ink, appearing to read "Derek Taylor", written in a cursive style.

Derek Taylor

CERTIFICATE OF SERVICE

I hereby certify that I have, this 14th day of February, 2020, caused copies of the foregoing Supplemental Information of Bessemer and Lake Erie Railroad Company in Response to Decision No. 3 (designated as (BLE-6) on all parties of record listed on the service list in this proceeding, by email, messenger, or first-class mail.

/s/ James M. Guinivan