

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. FD 36347

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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 TO SUPPLEMENTAL INFORMATION OF FINGER LAKES RAILWAY CORP.

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Dated: February 21, 2020

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CSX Transportation, Inc. (“CSXT”)¹ hereby replies to the Supplemental Information submitted by FGLK on February 14, 2020.

The Board’s *Decision No. 3*, issued in the above-captioned matter on February 7, 2020, sought information from interested parties regarding any potential anticompetitive effects of the Transaction on FGLK or its shippers. Apart from CSXT and B&LE, the only party to submit a response was FGLK, and FGLK’s response was insubstantial and virtually devoid of any information.² It is clear that FGLK has no basis for the conditions it is asking the Board to impose on its approval of the sale of the Massena Lines. FGLK sees the Massena Lines sale as a chance to obtain from the Board new commercial opportunities that FGLK has not been willing to spend the resources to develop. As CSXT has explained, the Board’s conditioning authority is not and has never been used for that purpose. Moreover, to obtain its regulatory windfall, FGLK is asking the Board to rewrite the commercial agreement between CSXT and B&LE. That would undermine essential elements of the Massena Lines sale without which CSXT was not willing to

¹ Unless otherwise defined herein, the acronyms and defined terms used herein are the same as those used in Reply Comments of CSX Transportation, Inc. filed in this proceeding on January 8, 2020 (“CSXT January 8 Comments”), modified as necessary to reflect the Board’s usage in *Decision No. 3*.

² If FGLK’s strategy is to hold back any Supplemental Information until the reply round of filings and thereby prevent any response from CSXT or B&LE, such a strategy would be inappropriate and should not be countenanced.

proceed when the PSA was negotiated. The Board should not jeopardize the significant public benefits that will come from the sale of the Massena Lines to B&LE so that FGLK can have new opportunities to move traffic to and from Canada that it does not have today.³

While FGLK's February 14 filing was extremely slim, it nevertheless confirms, as discussed below, that FGLK has no valid basis for seeking conditions on the Massena Lines sale.

1. FGLK clarifies that it is not concerned about movements between points on FGLK and points on the Massena Lines.

In *Decision No. 3*, the Board indicated 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 would ostensibly require an additional intermediate carrier as a result of the Transaction." *Decision No. 3* at 4. FGLK's February 14 filing concedes that the Board's concern is misplaced: "FGLK customers do not originate or terminate traffic on the Massena Lines." FGLK Supp. Info. at 2. Not surprisingly, FGLK is not concerned about a transportation market (FGLK origins/destinations to Massena Lines origins/destinations) that does not now exist and that FGLK does not apparently view as a viable or attractive future market. As CSXT noted in its February 14 Supplemental Information, it would make no sense (even if it was otherwise authorized) for the Board to impose regulatory conditions to facilitate FGLK's access to a market in which FGLK has no existing traffic.

³ Numerous parties, including short lines similarly situated to FGLK, expressed their strong support for the Transaction in recognition of the benefits that will result. See B&LE January 8 Comments, at Drysdale VS, Exhibits 2, 3 and 4.

2. FGLK clarifies that its concern is about the addition of B&LE into a through movement that already includes B&LE's corporate affiliate.

While conceding that it has no customers that move traffic between points on FGLK and points on the Massena Lines, FGLK states that it does have customers that “move, or could move, commodities to and from eastern Canada over the Massena Lines.” FGLK Supp. Info. at 2. First, as CSXT and B&LE have pointed out already, FGLK has only *a single* customer today that uses the Massena Lines to move traffic to or from eastern Canada. FGLK's footnote reference to FGLK customers that currently move traffic to and from Canada through Buffalo is highly misleading. CSXT's data indicate that almost all of the Buffalo traffic moves to or from Ontario destinations in the vicinity of or west of Toronto, and the rest of FGLK's Canadian traffic that moves through Buffalo moves to western Canadian provinces – *none* of the Buffalo traffic moves to Quebec, where the Massena Lines enter Canada. FGLK's movements through Buffalo are totally irrelevant to the Massena Lines sale.

While the traffic volume therefore is extremely small, FGLK explains that its concern about the Transaction is that movements to and from Canada that are currently handled by CSXT from Solway to the Canadian border will post-Transaction be handled by CSXT and a new carrier – B&LE – to the border of Canada. In other words, a new intermediate carrier has been added to the route, but that new carrier is an indirect wholly owned subsidiary of one of the carriers that is already in the route – CNR. Contrary to FGLK's vague complaint, the addition of B&LE to the route is not a source of competitive concern but instead is the source of the public benefits that will result from the Transaction. As B&LE explained in support of its Application, the essence of this Transaction is that it moves the interchange between the CN System and CSXT from a point near Montreal to Woodard. Application at 4. By adding B&LE to the movement, CN is extending the CN System length of haul, which will allow the CN System to improve efficiency

through better transit times and reduced yard activities and potentially to expand traffic. *See* CSXT January 8 Comments at 5.

Moreover, as CSXT explained in its January 8 Comments (at 23-24) and again in its February 14 Supplemental Information (at 8-10), the addition of a new intermediate carrier as the result of a line sale -- even if it were an unaffiliated carrier -- is not and has never been seen as a competitive issue that has any bearing on the Board's approval of line sales. Indeed, it is virtually inevitable that a line sale will result in the addition of a new carrier to prior routes, and the Board has never expressed concern about the addition of a new carrier.⁴ It would make even less sense for the Board to be concerned about the addition of a new carrier that is an indirect wholly owned subsidiary of one of the existing carriers in the route, where the addition of the affiliate merely extends the length of haul of the CN System. Even though B&LE has a separate corporate identity, it is part of the CN System.

3. CSXT's continued participation in the route does not change any circumstances that exist today.

While FGLK acknowledges that CSXT is already a participant in the movement of any traffic between FGLK lines and Canada, it complains that CSXT would continue to be in the route after the Transaction and would therefore "control access of FGLK's shippers to the Massena Lines by its pricing and service despite only handling traffic between Solvay and

⁴ The examples are abundant. *See, e.g., Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.*, FD 35873, Dec. No. 6, slip op. at 27 (STB served May 15, 2015) (denying conditions related to the addition of another carrier on some movements, finding that the party requesting the conditions did not "present[] evidence that this change is actually anticompetitive"); *Decatur & E. Ill. R.R., L.L.C.—Acquisition Exemption Containing Interchange Commitment—CSX Transp., Inc.*, FD 36206 (STB served Aug. 24, 2018) (transaction added rail carrier to certain movements); *Fla. Gulf & Atlantic R.R., LLC—Acquisition & Operation Exemption with Interchange Commitment—CSX Transp., Inc.*, FD 36247 (STB served Dec. 21, 2018) (same); *Blue Ridge S. R.R., L.L.C.—Acquisition Exemption—Norfolk S. R.R. Co.*, FD 35820 (STB served July 11, 2014) (same); *Rapid City, Pierre & E. R.R., Inc.—Acquisition & Operation Exemption Including Interchange Commitment—Dakota, Minn. & E. R.R. Corp.*, FD 35799 (STB served March 27, 2014) (same). There are numerous other decisions where a line sale results in the addition of a new carrier to a prior route. Indeed, when FGLK was formed, the result was an increase in the number of carriers in some routes. *See Finger Lakes Railway Corp. – Acquisition and Operation Exemption – Consolidated Rail Corporation*, ICC Finance Docket No. 32574 (served Oct. 14, 1994).

DeWitt Yards.” FGLK Supp. Info. at 3. Notwithstanding FGLK’s pejorative suggestion that CSXT would “control access” to Canadian movements through pricing and service, nothing would change as a result of the Transaction. Today, CSXT participates in the movement and it has every incentive to set prices on traffic moving to and from Canada to ensure that movements will occur; and after the Transaction, CSXT will have exactly the same incentive to ensure that the traffic will move. CSXT has no reason to take actions that would discourage movements between FGLK and Canada. To the contrary, the central reason that CSXT continues to own a segment of the route and that the PSA includes Section 5.14(b) is to allow CSXT’s continued participation in interline movements routed over the Massena Lines. CSXT is not going to turn around and discourage the very movements in which it wants to continue participating.

Moreover, FGLK seeks to minimize the importance of CSXT’s post-Transaction participation in the movement of FGLK traffic to B&LE, but CSXT’s participation is critical for the movements to occur. As CSXT explained in its February 14 Supplemental Information, CSXT’s DeWitt Yard is CSXT’s principal yard in the Syracuse area, and it is at DeWitt that CSXT today builds trains that will move on the Massena Lines and will continue to be where trains are built post-Transaction. CSXT Supp. Info. at 5-6, 11. FGLK’s traffic must therefore move between Solvay Yard and DeWitt Yard for efficient handling over the Massena Lines regardless of whether CSXT or B&LE/CN handle the traffic to Canada. The traffic between Solvay and DeWitt must move over several miles of CSXT’s dense Water Level Route that supports 42 freight trains and eight Amtrak intercity passenger rail trains per day. CSXT is clearly entitled to participate in the revenues of the through movement as compensation for its transportation service.

4. Not only are FGLK's concerns about possible cost increases irrelevant, they are misguided.

FGLK further claims that its concern about the addition of a new carrier (i.e., the extension of the CN System's length of haul), is that it "would potentially increase total transportation costs over the Massena Lines. . . and diminish the efficiency of rail service. . . ." FGLK Supp. Info. at 3. But a concern over the possibility of higher costs and inefficient service resulting from the addition of a new carrier, even if it were valid, would not support the imposition of conditions on the Transaction. As FGLK itself acknowledged in its December 9, 2019 Comments, the Board's authority to impose conditions in transactions under 49 U.S.C. § 11324(d) is to "ameliorate competitive harm that would result from the transactions." FGLK Dec. 9 Comments at 13. The addition of costs to a movement as the result of the addition of a new intermediate carrier is not anticompetitive and does not justify regulatory intervention.

In any event, FGLK is simply wrong that the Transaction will increase costs or adversely affect efficiency. As discussed above, CSXT will perform the same operation post-Transaction to bring cars from Solvay to DeWitt Yard, where trains are built for further movement on the Massena Lines. No costs will be added as a result of the Transaction. In DeWitt Yard, the only change is that the trains, once formed, will be handled by B&LE rather than CSXT. But this will not add costs or affect efficiency. Then, movement of the trains over the Massena Lines will be carried out by B&LE rather than CSXT, but the movement by B&LE is actually expected to *improve* efficiency and reduce transit times by approximately 24 hours. Application at 10. Thus, FGLK's access to Canadian markets can be expected to *improve* due to the increased efficiency of the movement post-Transaction.

5. Section 5.14(b) is irrelevant to any of the concerns FGLK has expressed or any of the benefits it seeks from the Board through conditions.

FGLK's February 14 Supplemental Information claims that Section 5.14(b) of the PSA "expressly prohibit[s] B&LE from using the operating rights it is acquiring from CSXT to directly access FGLK." Once again, FGLK mischaracterizes Section 5.14(b). In fact, Section 5.14(b) has no impact at all on the operating rights that B&LE will have post-Transaction or what B&LE can do with those operating rights. The operating rights themselves, not Section 5.14(b), preclude any direct connection between B&LE and FGLK. Operating rights to effectuate an interchange with CSXT would not permit an interchange between B&LE and FGLK.

As CSXT explained in its February 14 Supplemental Information, because CSXT and B&LE are connecting carriers, CSXT will provide B&LE with operating rights to Belle Isle Yard to move certain unit trains and certain military trains (none of which are handled by FGLK or moved to points on FGLK), and with operating rights to DeWitt Yard for other traffic. In both cases, the sole purpose of the operating rights is to effectuate an efficient interchange with CSXT for traffic moving on the Massena Lines. Facilities do not exist at Woodard for an efficient interchange at the physical point where CSXT's and B&LE's lines will meet. Therefore, CSXT will allow B&LE to operate to Belle Isle and DeWitt Yards for the limited purpose of effectuating the interchange with CSXT.

Section 5.14(b) is unrelated to the operating rights that are the focus of FGLK's concern. If FGLK's concern with Section 5.14(b) is that it precludes B&LE from pursuing a short build-out to Solvay from Belle Isle, where B&LE has operating rights, that concern makes no sense. Such a build-out would accomplish nothing. As CSXT explained in its February 14 Supplemental Information, the traffic that B&LE will carry to and from Belle Isle is irrelevant

commercially to FGLK. CSXT Supp. Info. at 5. Moreover, even if FGLK were seeking a build-out from Solvay to Belle Isle, B&LE could not interchange directly with FGLK at Belle Isle or Solvay. B&LE's operating rights are limited. B&LE has operating rights to Belle Isle only to effectuate an interchange at Belle Isle *with CSXT*. B&LE could not use those operating rights to effectuate an interchange with FGLK even if a build-out connected the two yards. FGLK would have to build out *to Woodard* to make such a connection, but it is clear that FGLK has no desire or intent to pursue such a build out, and in any event, Section 5.14(b) would not preclude it.

FGLK's objective, therefore, is forced trackage rights over the several miles of CSXT track between Solvay and Woodard. But CSXT explained in its January 8 Comments and its February 14 Supplemental Information why forced trackage rights would be unauthorized, unsupported by any evidence demonstrating competitive harm, and unprecedented. CSXT January 8 Comments at 21-22; CSXT Supp. Info. at 13-14. CSXT also explained in its February 14 Supplemental Information why forced trackage rights would be highly disruptive to its operations because of the important and high volume flow of traffic over CSXT's Water Level Route in the Syracuse area. CSXT Supp. Info. at 11-13. The forced trackage rights would not reduce or eliminate any existing movements that must take place between Solvay and DeWitt (to build trains going to multiple destinations) and between Woodard and DeWitt (to move some of those trains to and from Canada) but rather would add two new trains (Woodard-Solvay and Solvay-Woodard) to this already high density corridor. And the trains would have to be introduced to the high density line for safety and operational reasons at low speeds that would substantially interfere with the existing high speed traffic, including Amtrak passenger trains. The forced trackage rights that FGLK seeks would be totally inappropriate even if there were a valid competitive issue to be addressed, which there is not.

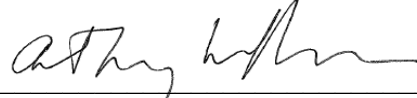
Since FGLK would not obtain the benefits it seeks by removing Section 5.14(b), there would be no justification for conditioning the Board's approval of the Transaction on the removal of Section 5.14(b), as FGLK has requested. A condition requiring removal of Section 5.14(b) would not even advance the *private* interest of FGLK, let alone any *public* interest in the efficient movement of traffic between the United States and Canada. With or without Section 5.14(b) in the PSA, B&LE's tracks only reach to Woodard and do not connect to FGLK. However, the forced removal of Section 5.14(b) from the PSA would jeopardize the strong public benefits that CSXT and B&LE expect from the Massena Lines sale. CSXT and B&LE have previously described the substantial benefits that will result from the sale of the Massena Lines, including improved transit times, and the potential expansion of traffic and development of new markets. CSXT January 8 Comments at 5; Application at 8-11. But these benefits would be at risk if the Board were to rewrite the terms of the commercial agreement between CSXT and B&LE. As CSXT has explained, Section 5.14(b) was an essential element of the PSA. CSXT was not willing to sell the Massena Lines to a buyer that might then turn around and take measures to exclude CSXT from interline traffic routed over the Massena Lines.

FGLK's request for conditions on the approval of the Massena Lines sale should therefore be denied. As to the requested removal of Section 5.14(b) from the PSA, that provision brings about no change in competitive options that exist today, and its removal would not even satisfy FGLK's ultimate objective of obtaining a direct connection with B&LE without spending any funds. As to the request for forced trackage rights, trackage rights are unauthorized and unprecedented in transactions such as this, and in the circumstances here they would be highly disruptive.

CSXT therefore requests that the Board allow the Transaction to go forward as the parties agreed and without imposing any unjustified regulatory constraints or conditions on the approval of the sale.

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Dated: February 21, 2020

VERIFICATION

I, Adam Smith, Head of Operations Planning & Performance, of CSX Transportation, Inc., declare under penalty of perjury that the factual information regarding CSXT facilities and operations contained in the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this factual information on behalf of CSX Transportation, Inc. Executed on February 21, 2020.



Adam Smith

CERTIFICATE OF SERVICE

I certify that I have, on February 21, 2020, served copies of this Supplemental Information of CSX Transportation, Inc. on all parties of record in this proceeding.

A handwritten signature in black ink that reads "Sally Mordi". The signature is written in a cursive, slightly slanted style.

Sally Mordi

Attorney for CSX Transportation, Inc.