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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

Re: **STB 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**

Dear Ms. Brown:

Enclosed for e-filing is CSX Transportation, Inc.'s Petition for Reconsideration of the Surface Transportation Board's April 6, 2020 Decision in this matter. The filing fee of \$350 was paid using pay.gov.

Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony LaRocca", written over a horizontal line.

Anthony J. LaRocca
Attorney for CSX Transportation, Inc.

cc: Parties of Record

FILED
June 5, 2020
SURFACE
TRANSPORTATION BOARD

FEE RECEIVED
June 5, 2020
SURFACE
TRANSPORTATION BOARD

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

PETITION FOR RECONSIDERATION

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Dated: June 5, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY
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PETITION FOR RECONSIDERATION

CSXT¹ submits this Petition for Reconsideration of the Board’s April 6, 2020 Decision in this matter (“April 6 Decision”), in particular to request that the Board remove the condition placed by the Board on its approval of B&LE’s acquisition of the U.S. Massena Lines from CSXT relating to Section 5.14(b) of the PSA (“Condition”). CSXT understands that B&LE has also submitted a Petition for Reconsideration requesting the removal of the Condition.

CSXT appreciates the efforts of the Board to evaluate the competitive effects of the proposed transaction in the April 6 Decision. In fact, most of the Board’s Decision addressed and correctly rejected claims about potential anti-competitive effects raised by the few parties that opposed the transaction or that sought conditions. The Board properly saw the proposed transaction as limited in scope and impact, given that the Massena Lines sale would simply move the existing interchange between CSXT and CN from a location near Montreal to a location in New York near Syracuse. April 6 Decision, slip op. at 5. The Board did not find any evidence of current competitive harm from such an end-to-end line sale, or any adverse change in the

¹ This Petition for Reconsideration uses the same abbreviations that were used in the comments previously filed in this matter.

competitive status quo from the proposed sale. The Board also recognized the public benefits that would result from the sale of the Massena Lines. *Id.*

Based on this analysis, the Board should have approved the line sale without the Section 5.14(b) Condition. The Board's role in evaluating line sales is limited by statute and by precedent. The governing statutory provision, 49 U.S.C. 11324(d), instructs the Board to approve line sales of this type unless they would cause adverse competitive effects that are both "likely" and "substantial" and that would not be outweighed by the anticipated benefits. Congress expressly limited the scope of Board authority in this area. Moreover, as a matter of policy, the Board has properly been reluctant to use its authority over line sale transactions to advance other regulatory initiatives or to bring about other changes in the rail network based on regulatory objectives. The Board has been careful not to create regulatory uncertainty that could discourage market-based transactions that are likely to improve the rail network and the service that rail carriers provide.

As explained below, the Condition imposed by the Board in the April 6 Decision is inconsistent with both the law and policy and CSXT respectfully requests that it be removed.

First, the mere possibility of unknown and unidentifiable future competitive impacts does not justify withholding approval of a transaction that will bring concrete and immediate benefits. The Board found that there was an absence of *current* competitive harm, which is not surprising given the limited scope of the end-to-end sale. Indeed, the Board concluded that "the Transaction itself would maintain the competitive status quo. . . . Nothing in the record indicates that any shippers would experience reduced competitive rail service options or a reduction in the number of transloading or intermodal service options as a result of the Transaction." April 6 Decision, slip op. at 5. Instead, the Board was concerned about the possible impact of Section

5.14(b) in the *long-term future*. Indeed, the Board’s concern was that restrictions in Section 5.14(b) that were acceptable and reasonable *today* might nevertheless become a problem in the *future*. But the Board could not, and did not, point to any particular circumstances where Section 5.14(b) would have an identifiable or measurable competitive impact in the future. The problem for the Board was the fact that the restriction would last into perpetuity – *i.e.*, so far into the future that it is *not possible* to know what effect it will have. But the mere speculation that Section 5.14(b) might have an effect in the far-off future -- without identifying or analyzing the effect, the magnitude of its impact, the likelihood of it ever occurring, or the availability of regulatory mechanisms that might be available to address any competitive concerns in the future – cannot and should not be sufficient grounds to prevent a line sale with real, identifiable and present public benefits from going forward. It would be material error for the Board to withhold approval of the Massena Line sale based only on such speculative future effects.

Second, as observed by Board Member Fuchs, the Board did not appear to “weigh the anticipated benefits of the Transaction, including efficiencies such as reduced transit times, against the perceived competitive harm of section 5.14(b).” April 6 Decision, slip op at 17. This may have been because the Board intended to instruct the parties to see if they could reach an agreement on changes to Section 5.14(b), and a full weighing of effects would not be possible until the results of the parties’ subsequent discussions became known. If so, changed circumstances now require reconsideration. It is now clear that the transaction will not proceed without removal of the Condition. Section 5.14(b) has always been and continues to be an essential element of the proposed transaction, and the parties have been unable to agree to any proposed modification to the underlying transaction. Accordingly, the Board is now in a position to conduct the required weighing of benefits and competitive effects.

The result of such a weighing analysis is clear. Not only was the Board unable to identify any concrete future circumstances where Section 5.14(b) might raise competitive concerns, the scope of Section 5.14(b) itself ensures that there will be no adverse effects on competition in the future. As CSXT and CN/B&LE pointed out in their prior comments, the restrictions in that PSA provision only apply to “Buyer” (B&LE and CNR). Section 5.14(b) does not preclude a direct connection between B&LE and shortline railroads in the Syracuse area; it only precludes Buyer from seeking such a connection. If market conditions lead shippers or other railroads to desire a direct connection with B&LE in the future, nothing in Section 5.14(b) prevents them from pursuing such a connection. Under these circumstances, the Board could not possibly conclude that “the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.” 49 U.S.C. 11324(d)(2).

Third, the Board was wrong to focus on the potential that B&LE would be adversely affected by Section 5.14(b). As Board Member Fuchs noted, “[t]he Condition is premised on protecting a sophisticated buyer, B&LE, from voluntarily negotiating away its own rights in order to secure a purchase.” April 6 Decision, slip op. at 15. But it has long been the law that the Board and its predecessor should focus on potential harms to *competition*, not harm to particular competitors.² As explained above, *competition* is not affected by Section 5.14(b) because shippers and other railroads have no restrictions under that provision from seeking access to B&LE if market conditions were to justify such efforts. Moreover, B&LE needs no protection from the Board. It is fully capable of evaluating the commercial impacts of a

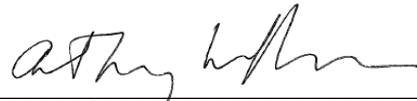
² See, e.g., *Burlington N., Inc.—Control and Merger—St. Louis—San Francisco Ry. Co.*, ICC Finance Docket No. 28583 (Sub No. 1F), 360 I.C.C. 788, 944 (1980) (“[W]e look only to preservation of essential rail service when imposing protective conditions, not to the protection of corporate entities.”); *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp.*, STB Finance Docket No. 33388, 3 S.T.B. 196, 278 (1998) (“[A] condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.”).

transaction and determining whether a provision in the transaction agreement is likely to impede its ability to compete in the future. B&LE clearly determined that the transaction was beneficial and advanced its commercial objectives as well as those of its customers. The Board should not try to protect B&LE's interests by preventing it from engaging in a transaction that it wishes to pursue.

For the reasons set out above, the Board should reconsider its April 6 Decision and remove the Condition that the Board placed on its approval of the U.S. Massena Lines sale to B&LE.

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Respectfully submitted,



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Attorneys for CSX Transportation, Inc.

Dated: June 5, 2020

CERTIFICATE OF SERVICE

I certify that I have, on June 5, 2020, served copies of this Petition for Reconsideration on all parties of record in this proceeding.

A handwritten signature in cursive script that reads "Sally Mordi".

Sally Mordi
Attorney for CSX Transportation, Inc.