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Ms. Cynthia T. Brown
Chief, Section of Administration
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:

Applicant Bessemer and Lake Erie Railroad Company (“B&LE”) respectfully submits its Petition for Partial Reconsideration (designated as BLE-8) of Decision No. 4, served in this proceeding on April 6, 2020. One version of the Petition, 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 the protective order served in this proceeding on October 22, 2019. The filing fee of \$350, required by 49 C.F.R. § 1102.2(f)(61)(i), was paid through pay.gov.

Sincerely,

/s/ Claire M. Maddox

*Counsel for Bessemer and
Lake Erie Railroad Company*

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**

**PETITION OF BESSEMER AND LAKE ERIE RAILROAD COMPANY
FOR PARTIAL RECONSIDERATION**

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June 5, 2020

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY

— ACQUISITION AND OPERATION —

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**PETITION OF BESSEMER AND LAKE ERIE RAILROAD COMPANY
FOR PARTIAL RECONSIDERATION**

Bessemer and Lake Erie Railroad Company (“B&LE”)¹ respectfully petitions the Board for partial reconsideration of its Decision No. 4 (“Approval Decision”) in this proceeding, to seek removal of the condition that instructed B&LE and CSXT to propose for the Board’s review modification to or elimination of Section 5.14(b) of the PSA (the “Condition”). The parties have been unable to agree on a proposed response to the Board’s Condition, and the Transaction is in jeopardy unless the Condition is removed. B&LE respectfully requests that the Board remove the Condition so the Transaction can proceed without further delay and advance the significant benefits in the public interest.

¹ Abbreviations and short forms not defined herein have the meanings set forth in the Table of Abbreviations found in the Reply of Bessemer and Lake Erie Railroad Company in Support of its Minor Application (filed Jan. 8, 2020) (BLE-5 at v-viii).

PREFACE

CSXT announced in June 2018 that it was rationalizing its system by divesting the Massena Lines. CSXT has explained that the Massena Lines were not core to CSXT's network and could be operated more effectively by another railroad that may have greater incentives to invest in the line and a greater focus on service for customers on the line. CSXT invited potentially interested parties to bid for the Massena Lines, and CNR submitted the winning bid.

Under the Purchase and Sale Agreement ("PSA") executed on August 29, 2019, the U.S. Massena Lines would be acquired by B&LE, an indirect wholly owned subsidiary of CNR that operates lines in Pennsylvania and Ohio that are not contiguous with the Massena Lines. As CSXT explained in its filing on January 8, 2020, the economics of the Transaction are based on CSXT's expectation that B&LE will not seek a connection with NYSW or FGLK, two shortline railroads whose lines do not physically connect with the U.S. Massena Lines, that would cut CSXT out of its participation in traffic moving on the Massena Lines.

B&LE and CNR ("Buyer") agreed to Section 5.14(b) because absent doing so, they would have no Transaction at all. They believe that Section 5.14(b) does not limit B&LE's ability to serve customers after the Transaction is consummated and does not result in a reduction in competition. B&LE believed, and continues to believe, that the Transaction would have significant benefits for the public, even with the Section 5.14(b) limitation on B&LE.

B&LE filed its Application with the Board, seeking authority for the acquisition and operation of the U.S. Massena Lines, and disclosed Section 5.14(b)'s limitation on B&LE's seeking access to FGLK or NYSW. B&LE explained that it looked forward to providing safe and reliable rail service to customers over the U.S. Massena Lines after closing.

A broad range of stakeholders—including customers, shortline railroads, Members of Congress, the largest and busiest port on the U.S. East Coast and other stakeholders—have supported the Transaction. They include Alcoa and Attis, two customers on the U.S. Massena Lines, as well as MSTR and NYOG, two of the short lines that directly connect to the lines that B&LE is acquiring. The Port Authority of New York and New Jersey has stated that the Transaction “will benefit the Port of New York and New Jersey by preserving local and efficient rail service on the Massena Lines, which is important to our future.” And U.S. Representatives John Katko and Elise Stefanik, whose districts include most of the acquired lines, welcome the “enhanced competition and new service opportunities” that they see the Transaction as offering.

FGLK sought conditions, including trackage rights over CSXT’s tracks to reach B&LE at Woodard, NY. On February 7, 2020, the Board directed B&LE and CSXT, and invited shippers on FGLK’s lines and others, to submit supplemental information on the potential anticompetitive impacts of Section 5.14(b).² No customers on FGLK’s lines responded.

On April 6, 2020, the Board issued its Approval Decision subject to the Condition, which instructed B&LE and CSXT to propose eliminating or modifying Section 5.14(b) for the Board’s review. Board Member Fuchs agreed it was appropriate to approve the Transaction, but he dissented from the Board majority’s imposition of the Condition. In Member Fuchs’s view, the Condition “deviates from the Board’s statutory requirements and precedent, jeopardizes the public benefits of the Transaction, and potentially chills future rail-related investment and improvement.”³

² Decision No. 3, slip op. at 1.

³ Approval Decision at 15 (Fuchs, Bd. Member, concurring in part and dissenting in part).

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As Janet Drysdale explains in the attached verified statement on B&LE's behalf, B&LE and CSXT have made diligent efforts to respond to the Board's Condition.⁴ Nonetheless, in the eight weeks since the Board's Approval Decision, B&LE and CSXT were unable to agree on a proposed modification or elimination of Section 5.14(b) for the Board's review. {{ [REDACTED]

[REDACTED] }} Accordingly, B&LE and CSXT jointly informed the Board on May 26, 2020, that they had been unable to agree on a proposed modification or elimination of Section 5.14(b) and that absent reconsideration of the Condition, the Transaction would not proceed.

In light of the uncertainty regarding the Board's Condition, B&LE has halted its planning work to integrate the Massena Lines after closing. As Ms. Drysdale explains, those efforts included B&LE's outreach to customers on the U.S. Massena Lines in person or by phone in an effort to plan for a seamless and safe transition for operations and service after closing. B&LE has sought to understand and identify those customers' rail service needs, develop efficient plans to serve their facilities, and help them grow their future businesses. As Ms. Drysdale explains, customer feedback has been very positive.

Likewise, B&LE's proactive efforts to hire employees and work with Rail Labor have ceased. Beyond the labor protection requested by the parties and imposed by the Board, the Transaction as structured by the parties would have additional benefits for CSXT employees on

⁴ Ms. Drysdale's statement could not have been submitted previously, as it focuses on events after B&LE's previous submissions and that bear directly on issues relevant to reconsideration. It thus constitutes new evidence and is not cumulative. *Cf.* 49 C.F.R. § 1115.3(b)(1), (c).

the U.S. Massena Lines. B&LE agreed in the PSA to extend priority hiring consideration to adversely affected CSXT employees who are actively at work on the U.S. Massena Lines as of the date of the Closing. Moreover, in an effort to plan for a safe and seamless transition of operations, B&LE's Labor Relations team reached out to the union representatives of the CSXT employees to lay the groundwork for an efficient and mutually beneficial transition of operations. In those discussions, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } If the Board removes its Condition, B&LE is ready to resume its efforts in earnest.

SUMMARY OF ARGUMENT

The Board may grant reconsideration of the Condition based on changed circumstances, new evidence, or material error.⁵ In this Transaction, the Board was directed by 49 U.S.C. § 11324(d) to approve the end-to-end line sale unless it found that both:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In its Approval Decision, the Board anticipated that the parties could propose a modification or elimination of Section 5.14(b). Since the Approval Decision, it has become clear that the parties are unable to agree on a proposed response to the Condition. The fact that the

⁵ 49 C.F.R. § 1115.3(b).

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parties have been unable to do so, however, should not prevent the Transaction from proceeding. The Board has recognized that the Transaction would have significant benefits. It would be contrary to the public interest for those benefits to be lost because the Transaction cannot proceed under these circumstances.

In imposing the Condition, the Board speculated about potential future harm to B&LE from the limitation in Section 5.14(b), but it never addressed whether such a concern was substantial. The Board's speculative concerns regarding the Transaction do not rise to the level of a "substantial lessening of competition." Nor did the Board address whether the significant benefits of the Transaction would outweigh any potential harm as required by the statute. Such balancing would clearly weigh in favor of approving the Transaction without the Condition so that the Transaction may proceed. Reviewing whether the harm is substantial and conducting that balancing now would avoid material error in this case. It would also permit the Transaction to proceed and its significant public benefits to be realized.

ARGUMENT

I. THE BOARD'S CONDITION IS UNWARRANTED BECAUSE SECTION 5.14(B) WOULD NOT LIMIT B&LE'S ABILITY TO SERVE CUSTOMERS AFTER THE TRANSACTION IS CONSUMMATED.

B&LE wants to proceed with the Transaction notwithstanding significant economic uncertainty and disruptions in customer demand that has arisen since the Transaction was announced, as a result of the COVID-19 pandemic. B&LE is comfortable that Section 5.14(b) does not diminish its ability to serve customers after the Transaction is consummated. Nor does it result in a reduction of competition. Any such concern is highly speculative and would not rise to

the level of a “substantial lessening of competition” required in the statute to justify the imposition of a condition.

To the extent the Board was concerned with protecting B&LE from the limitations in Section 5.14(b), it need not be. CNR/B&LE is a sophisticated buyer that thoroughly weighed the potential benefits of the Transaction subject to the Section 5.14(b) limitation. B&LE’s overriding concern is with the competitive disadvantage it will suffer if it is unable to consummate the proposed Transaction. Those include the disruption of the existing direct gateway between the CN System and CSXT that accounts for more than 45% of the carload traffic transiting over the Massena Lines. Given that CSXT has indicated that the Massena Lines are not core to its network, the CN System was concerned that CSXT will seek to sell the Massena Lines to another carrier if this Transaction is not consummated. B&LE reasonably concluded that {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

Section 5.14(b) imposes no restrictions on B&LE’s ability to serve customers on the U.S. Massena Lines or provide service over those lines for overhead traffic. Customers moving traffic over the Massena Lines can ship any traffic they want to points on FGLK’s tracks and vice versa. CSXT will be in the route because such shipments go over tracks CSXT owns and maintains. As a well-informed buyer, B&LE reasonably concluded that pursuing the Transaction made sense, even with Section 5.14(b) limiting B&LE from seeking access to FGLK or NYSW.

Nor will Section 5.14(b) result in a loss of competition. B&LE is part of CN's Class I system, which gives it opportunities to work with customers to get their goods to markets, including in direct rail service and in interline service working with other carriers. CN's Class I system has many interchanges with other carriers in the State of New York for locations that are not served by the CN System. This Transaction enables B&LE to preserve its existing direct gateway with CSXT over the Massena Lines, in addition to the existing gateway with CSXT at Buffalo. The CN System also has gateways to other carriers in the east. For example, the CN System connects to Norfolk Southern at the Buffalo gateway and at the Rouses Point gateway via Canadian Pacific. In addition, the CN System already has indirect access to FGLK via a bridge carrier. Such access is not barred by Section 5.14(b), and FGLK has not contended otherwise. B&LE is thus confident there is no reduction in competition from the limitations in Section 5.14(b).

The actual scope of the limitation in Section 5.14(b) is very narrow. It applies only to the Buyer. As CSXT has recognized, the provision thus does not restrict FGLK, NYSW, or any shippers that may locate on their lines in the future from seeking access to B&LE through processes at the Board or otherwise.

Section 5.14(b) causes no harm in the present day and no current impact to shippers moving traffic to or from FGLK.⁶ The Board has been focused on customers on FGLK's lines (i.e., local traffic that originates or terminates on FGLK's lines). There is no traffic originating or

⁶ Approval Decision at 16 (Fuchs) ("Section 5.14(b) does more to preserve the competitive status quo (i.e., CSXT's continued participation, albeit over a shorter distance, in movements between the CN System and FGLK) than to cause any competitive harm.") (footnote omitted).

terminating on FGLK's lines that moves to points on the Massena Lines. The Board recognized that the small amount of traffic for a single customer on the FGLK's lines transiting over the Massena Lines to destinations in Canada served by CNR is not impacted by Section 5.14(b). For that customer, which has not participated in this proceeding, the only change resulting from the Transaction is to move the interchange between the CN System and CSXT to Woodard. CSXT will continue to participate in traffic that moves south of Woodard, NY. Indeed, the Board recognized CSXT would not be eliminated from the route after consummation, even with the agency's Condition.⁷

At most, the Board appears concerned about potential future traffic that does not exist today and whose contours and likelihood of existing in the future remain highly uncertain. FGLK alleges that there is demand for future service that it hopes to establish once Section 5.14(b) is lifted and the Transaction consummated. This speculative claim by FGLK is an inappropriate basis for the Board to exercise its conditioning authority.⁸ To the extent such new traffic arises in the future, it will move via FGLK-CSXT-CN System, unless FGLK obtains a connection with B&LE after closing.

The Section 5.14(b) language is unique in this end-to-end line sale where one Class I is selling to another Class I carrier. The buyer is extending its reach more than 230 miles into a new geography (the State of New York). The Transaction merely moves the interchange between the

⁷ *Id.* at 10 (“...CN System currently needs to interchange with CSXT in order to reach FGLK or NYSW, the Board’s condition does not eliminate that circumstance”).

⁸ *Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry.*, FD 35873, slip op. at 24 (STB served May 15, 2015) (conditioning authority should not be used to expand competitive options “for a carrier seeking to enter the market or expand its current business”); *Burlington N. Inc.—Control & Merger—Santa Fe. Pac. Corp.*, 10 I.C.C. 2d 661, 745 (1995) (the “conditioning power is used to *preserve* competitive options (not to *expand* them)”).

CN System and CSXT from Huntingdon, QC to Woodard, NY. B&LE agreed in Section 5.14(b) that it would not seek to connect with FGLK or NYSW, because Section 5.14(b) would not limit B&LE's ability to serve customers and will not result in a reduction in competition. CSXT's tracks connecting with FGLK and NYSW are not part of this Transaction, and neither FGLK nor NYSW connects to the U.S. Massena Lines being sold. Section 5.14(b) is thus not an interchange commitment and does not limit FGLK or NYSW.⁹

II. IT IS NOW EVIDENT THAT IF THE BOARD'S CONDITION IS NOT REMOVED, THE SIGNIFICANT BENEFITS OF THE TRANSACTION WILL BE LOST.

A. The Transaction is in Jeopardy Unless the Board Removes the Condition.

The reality of the situation is that the Transaction is in jeopardy unless the Board withdraws the Condition. The parties previously executed the PSA as part of a detailed commercial negotiation, and the Board's Condition essentially plucks a single provision from the Transaction, which CSXT has described as central to its economics, out for renegotiation. The parties are unable to agree to any alterations of Section 5.14(b), and B&LE is concerned the Transaction will not proceed if such a Condition remains on the Transaction. It is therefore apparent that if the Board continues to insist that Section 5.14(b) be modified or eliminated, or imposes any other condition diminishing or minimizing Section 5.14(b), the Transaction will be unable to proceed. Rather than prevent the Transaction from proceeding, with consequent loss of significant benefits, the Board should remove the Condition.

⁹ As Member Fuchs explained, "...[S]ection 5.14(b) is not an interchange commitment because FGLK does not actually interchange with the CN System, it is worth noting that section 5.14(b) also does not prevent interchange if a new connection were to be established." Approval Decision at 17 n.14

B. If the Transaction is Terminated, then the Significant Benefits in the Public Interest that the Board has Recognized Will be Lost.

The risk of termination puts in jeopardy the significant public interest benefits of the Transaction. Some of these benefits are achievable only with B&LE as buyer and may not occur if CSXT sells the Massena Lines to another buyer. With these significant benefits, it is understandable why customers, short lines, and others support the Transaction.

The Board has recognized the Transaction's significant benefits. The Transaction would ensure that, upon CSXT's planned divestiture of the Massena Lines, the direct gateway over the Massena Lines between the CN System and CSXT will be maintained. This maintains the efficiency of what is now two-carrier service over the Massena Lines gateway and avoiding possible alternatives of a longer, less efficient route that could make certain traffic, such as time-sensitive interline intermodal traffic, less competitive. The overhead carload traffic between the CN System and CXST accounts for more than 45% of traffic transiting over the Massena Lines.

The CN System's acquisition of the Massena Lines also helps customers on the Massena Lines that ship or receive traffic from points in Canada. Those customers could receive direct rail service from the CN System after consummation whereas they currently receive interline CN System-CSXT service. The Transaction would allow reduced transit time between Syracuse and Montréal by the elimination of two CSXT transfer assignments now operating between Massena, NY and Huntingdon, Quebec. This could improve transit times over the Massena Lines by 24 hours. The Massena Lines will also benefit from the CN System's plan to invest in the lines and the Massena Lines' proximity to the CN System's core eastern routes. Finally, the CN System will bring its experience in operating long rail lines under harsh winter conditions.

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These significant benefits are now in jeopardy as a result of the Board's Condition. If the Transaction cannot proceed, then transit times between Syracuse and Montréal would not be reduced, impacting all customers whose traffic transits over the U.S. Massena Lines. The switching activity in Massena Yard will not be reduced. Carloads moving between Canada and the U.S. Massena Lines would not have the opportunity to move in direct rail service as they would if B&LE operates the line. And if the Transaction does not proceed and CSXT instead chooses a different buyer for the Massena Lines, it is unlikely that the new owner would have the same incentives or ability as CNR and B&LE to invest and maintain the Massena Lines as an efficient gateway for CN System-CSXT interline traffic moving between eastern Canada and the U.S. East Coast, much less to improve it. {{ [REDACTED]

[REDACTED]
[REDACTED]}}

The adversely impacted CSXT employees working on the U.S. Massena Lines would benefit from the Board's six years of labor protection that was requested and imposed on the Transaction. This labor protection would be lost if the Transaction does not proceed. Nor would those employees benefit from B&LE's commitment to priority hiring consideration for adversely affected CSXT employees who are actively at work on the U.S. Massena Lines as of the date of closing. B&LE has no existing employees in the State of New York. A regional or short line operator would not face the same level of labor protection as B&LE does (if any), nor would it have the same incentive to voluntarily recognize union representation or apply existing collective bargaining agreements. Indeed, B&LE even agreed to share a portion of CSXT's anticipated labor protection costs, in recognition that CSXT could have minimized or eliminated labor protection cost had it selected a different buyer. For B&LE, the benefits of this transaction have

not been based on a reduction in staffing or wage rates. The benefits are derived from maintaining the gateway and improving service to an important link in the CN System's rail network, and improving rail service for existing and potential customers on the Massena Lines.

CSXT has indicated that the Massena Lines are not core to its network. If this Transaction does not proceed and CSXT were to sell the Massena Lines to a different buyer, whether a non-carrier or a short line, such a transaction is likely to be much less favorable to the interests of CSXT's employees actively working on the U.S. Massena Lines.¹⁰ Those adversely affected CSXT employees would have no guaranteed priority hiring rights with the buyer, and the buyer may have no collective bargaining agreements or relationships with Rail Labor.

The loss of these substantial benefits provides a compelling basis for the Board to remove the Board's Condition so that the Transaction may proceed.

III. GIVEN THE SIGNIFICANT BENEFITS THAT WOULD BE LOST DUE TO THE BOARD'S CONDITION, AND THE LACK OF NEED FOR THAT CONDITION, RECONSIDERATION AND REMOVAL OF THE CONDITION IS WARRANTED.

The Board did not find that the Transaction, subject to Section 5.14(b), would cause a substantial lessening of competition. Nor has the Board balanced the significant anticipated

¹⁰ If the acquiring entity is a Class III rail carrier, the Board may not impose labor protection. Such labor protection is similarly foreclosed if the acquiring entity is a non-carrier. Even a sale to a Class II rail carrier would have limited labor protection under the Board's conditions – a maximum of one year of severance pay for adversely impacted employees. At a minimum, current CSXT employees could expect that the acquirer would seek to negotiate wage rates and other terms of employment that would mirror the acquirer's other short line or regional operations. An acquiring entity could even seek to unilaterally impose initial terms and conditions of employment without the agreement of Rail Labor. Such a prospective buyer may seek to maximize returns on its purchase of a stand-alone line, and would have less incentive work cooperatively with their union representatives.

benefits of the Transaction against the perceived potential future harm of Section 5.14(b), as directed by 49 U.S.C. § 11324(d).¹¹ While the Board acknowledged in its Approval Decision the substantial benefits of the Transaction, it does not appear that the Board compared those benefits to the perceived potential future harm of Section 5.14(b). The Board never had to determine how “likely” and “substantial” the perceived potential future impact is because it anticipated that the parties would propose a response to the Condition. Now it is clear that this is not possible.

With the changed circumstances and new evidence of the parties’ inability to propose a response to the Board’s Condition, it is necessary for the Board to grapple with these issues now. Reviewing whether the harm is substantial and conducting that balancing now would avoid material error in this case. Indeed, where the Board cannot make findings that would allow it to deny approval of a transaction, the agency’s “analysis is at an end,”¹² and the proposed transaction must be approved without the Condition.

The Board recognized, “Nothing in the record indicates that any shippers would experience reduced competitive service options or a reduction in the number of transloading or intermodal service options as a result of the Transaction.”¹³ Such perceived potential future impact of Section 5.14(b) is not “likely” and is not “substantial.” Accordingly, balancing any such effects against the benefits of the Transaction is unnecessary, and the Transaction must be approved. Even if the Board concluded that balancing was necessary, the significant benefits in

¹¹ Approval Decision at 17 (Fuchs) (“In imposing the Condition, the Decision does not seem 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).”).

¹² *Illinois v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982).

¹³ Approval Decision at 5.

the public interest would outweigh the speculative potential future harm of Section 5.14(b) to B&LE. The Board's Condition should be removed.

The Board majority acknowledged that its Condition would not change CSXT's participation in traffic moving between the CN System and FGLK after closing: "[T]o the extent the CN System currently needs to interchange with CSXT in order to reach FGLK or NYSW, the Board's condition does not eliminate that circumstance...."¹⁴ Instead, the Board's concerns with Section 5.14(b)'s limitation on B&LE seem to focus solely on future potential traffic that does not exist today and whose contours and likelihood remain highly uncertain. The Board speculated that Section 5.14(b)'s limitation on B&LE "would limit regional rail competition in the long run, reducing the potential public benefits of the Transaction."¹⁵ The Board similarly expressed concerns that Section 5.14(b) "runs contrary to the statutory objectives of providing carriers and their customers access to the Board to resolve competitive issues and puts B&LE (and FGLK and NYSW) at a competitive disadvantage."¹⁶ However, those concerns—regarding speculative harm to future potential traffic plus concern for B&LE's interests—do not support a finding of "likely" and "substantial" anticompetitive effects that would outweigh the substantial benefits of the Transaction in the public interest.

The Board appears to have imposed its Condition in an effort to improve the Transaction—either for the benefit of potential future shippers on FGLK that may never materialize, or for the benefit of B&LE out of concern that B&LE waived its ability to pursue a

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 9.

future competitive access case against CSXT. But that is not what the Board is charged with doing in its review of such a minor transaction as this, an end-to-end line sale between two Class I railroads. This is especially true in this case, where the Board’s Condition { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } So long as a transaction satisfies 49 U.S.C. § 11324(d) and is therefore “consistent with the public interest,” the Board’s mission is to approve that transaction, not to require that it be modified or improved to expand the transaction beyond the scope contemplated by the parties.

The Board expressed concern about perpetuity and cited cases for the proposition that “restrictive covenants are enforceable (and pro-competitive) only when reasonably limited in scope and duration.”¹⁷ But those cases, involving covenants not to compete in connection with sales of businesses, arise in an entirely different context from restrictive covenants in connection with a real property sale. Perpetual restrictions or easements in connection with transfers of real property are not contrary to the public policy of New York law (which governs the U.S. Massena Lines under the PSA).¹⁸ Such perpetual restrictions are enforceable under New York law.

Practically, the Board’s concerns with the scope and duration of Section 5.14(b) should be assuaged by the reality of the circumstances before and after this Transaction. There is no realistic opportunity for any pre-Transaction access between the CN System and either FGLK or

¹⁷ *Id.* at 10 n.12.

¹⁸ See *Trustees of Columbia College v. Lynch*, 70 N.Y. 440, 447 (1877); *Gibert v. Peteler*, 1862 WL 4577 (N.Y. Sup. Ct. Gen. Term 1862), *aff'd*, 38 N.Y. 165 (1868); *Quinn v. Nassau County*, 215 N.Y.S.2d 305, 307 (N.Y. Sup. Ct. 1961). PSA § 13.16(c) (BLE-1, Exhibit 2 at 56).

NYSW. There are no present opportunities that Section 5.14(b) would foreclose. And the { [REDACTED] } which are in any event free themselves to seek such access to B&LE. Given its own sensitivities, CSXT chose a conservative approach to impose a limitation on B&LE to guard against unforeseen potential future developments that would have undermined CSXT's economics in the Transaction if B&LE may have sought future access to FGLK or NYSW after consummation. The Board should not thwart this straightforward end-to-end line sale by imposing a Condition to anticipate highly speculative concerns regarding the Buyer's ability to seek future access to nearby railroads who are not at all involved in the Transaction.

To the extent the Board imposed the Condition for Buyer's benefit, the fact that B&LE opposes it should carry great weight. Imposition of the Condition has prevented the Transaction from proceeding and will lead to the loss of a Transaction that would clearly serve the public interest. It is understandable that the parties could not reach agreement on a response to the Board's Condition. The PSA was built on a carefully balanced set of considerations and interdependent provisions that would be undermined if the Board decided to pluck out a single provision from the PSA and order the parties to amend it. The parties' efforts to agree on a proposal in response to the Condition have failed. It is doubtful the Board could succeed where the parties have failed, and it should resist the urge to try.

The Board's Condition is directed at a speculative possibility of the Transaction having some effect on competition at some future time. Section 5.14(b) limits only the Buyer. If anyone, such as FGLK, wants to pursue access to B&LE in the future, it has a variety of means to do so. None of those means is prevented by Section 5.14(b). As CSXT explained, if FGLK believes there are grounds under the Board's competitive access regulations for a Board order

establishing a direct connection between FGLK and B&LE, nothing in Section 5.14(b) would prevent FGLK from bringing such a claim or prevent B&LE from complying with a Board order requiring such a connection.¹⁹ Similarly, if FGLK believes it has grounds to seek relief under the Railroad Industry Agreement (“RIA”) for new traffic that arises in the future, nothing in Section 5.14(b) would prevent FGLK from pursuing an arbitration before the Board. If FGLK obtains such a connection to B&LE in the future through RIA or otherwise, Section 5.14(b) does not prevent B&LE from interchanging with FGLK. FGLK could also seek future consideration by the Board if it believed it had a basis to seek reopening of the Transaction or seek a supplemental order.²⁰ B&LE reserves its rights to oppose any such future request by FGLK or anyone else.

In short, FGLK is not without process, and any potential future arguments that FGLK may make in any such proceeding are not affected by Section 5.14(b). Any such arguments should be considered in due time if FGLK has a basis for asserting them and elects to pursue them. Given the availability of such forums for FGLK to assert various future claims for consideration, hypothetical concerns about future impacts of Section 5.14(b) should not be a basis for the Board to impose a condition on this Transaction. Any such a concern should be addressed on a case-by-case basis when and if the alleged factual circumstances actually arise. Those potential future arguments should not prevent the Transaction from proceeding now. B&LE thus respectfully suggests the Board should not attempt to guard against remote and speculative possibilities that may never arise by imposing a Condition that would have immediate adverse consequences for B&LE and customers that rely on the Massena Lines.

¹⁹ Reply Comments of CSX Transportation, Inc. at 14-16 (filed Jan. 8, 2020).

²⁰ See 49 U.S.C. §§ 1322(c)(1), 11327; 49 C.F.R. § 1115.4.

Even if the Board were to find a substantial lessening of competition from Section 5.14(b)'s limitation on B&LE, removal of the Board's Condition is appropriate in this proceeding because the significant benefits in the public interest would greatly outweigh the speculative potential future harm of Section 5.14(b) to B&LE. The Board recognized the significant benefits of the Transaction. Those benefits are described above and include maintenance of the direct gateway between the CN System and CSXT, improvement of the transit times over the U.S. Massena Lines by approximately 24 hours, and a reduction in switching activity in Massena Yard. B&LE will provide rail service to customers on the U.S. Massena Lines after the Transaction, and some of those customers will now receive direct rail service for shipments to or from points in Canada served by CNR. These benefits are in addition to B&LE's plan to offer priority hiring to CSXT's adversely impacted employees who actively work on the U.S. Massena Lines at the time of the Transaction.

Of course, no public benefits will be realized from a transaction that never takes place. And it is now evident that the choice before the Board is between a Transaction that satisfies the statutory standard for approval and is in the public interest, but contains the limitations on B&LE contained in Section 5.14(b), versus no Transaction at all. If the Board is to fulfill its statutory mandate to authorize transactions that are "consistent with the public interest,"²¹ it cannot do so by imposing a condition that prevents such a transaction from occurring.

Given the unique circumstances of this Transaction and this proceeding, removal of the Board's Condition would create no undesirable precedent for future cases. This is not a spinoff by a Class I railroad of one of its marginal lines to a new short line that may have less bargaining

²¹ 49 U.S.C. § 11324(c).

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power. It is a sale to B&LE, a sophisticated buyer that is part of the Class I CN System and that is fully capable of looking out for its own interests in negotiations. Here, FGLK and NYSW already each have access to two Class I systems, and nothing in the Transaction will change that. Nor is the Condition needed for transparency as B&LE, CSXT, and FGLK fully developed the record regarding the very narrow impact of the limitation of Section 5.14(b) on B&LE. The record is clear that Section 5.14(b) imposes no limitation on the CN System's ability to handle traffic exactly as it wants to, including serving customers over the Massena Lines, and that Section 5.14(b) will not result in a loss of competition from the Transaction.

CONCLUSION

For the reasons set forth above, B&LE respectfully requests that the Board partially reconsider its Approval Decision to remove its Condition and that the Board approve the Transaction without conditions, other than labor protection as imposed by the Board, and allow it to become effective thirty days after its decision.

Respectfully submitted,

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Attorneys for Bessemer and Lake Erie Railroad Company

June 5, 2020

**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**

**VERIFIED STATEMENT OF
JANET DRYSDALE
IN SUPPORT OF PETITION FOR PARTIAL RECONSIDERATION**

My name is Janet Drysdale. I am Vice-President Financial Planning for Canadian National Railway Company (“CNR”), the indirect parent of B&LE.¹ B&LE appreciates the hard work of the Board in this proceeding to develop a thorough record and issue its April 6, 2020 decision (“Approval Decision”) approving the end-to-end line sale of the U.S. Massena Lines. I previously submitted two verified statements in this proceeding, detailing B&LE’s plan for safely and reliably operating the U.S. Massena Lines, as safety is a core value at CNR and the entire CN System. My prior statements also explained that the Transaction will not reduce the number of current competitive rail alternatives for customers and would have no anticompetitive effects.

¹ Unless otherwise defined, abbreviations in this Verified Statement have the meanings given in the Table of Abbreviations found at pages v-viii of the Reply of Bessemer and Lake Erie Railroad Company in Support of Its Minor Application (“B&LE’s Reply”).

This statement supports B&LE's Petition for Partial Reconsideration seeking removal of the Board's condition asking the parties to propose modification or elimination of Section 5.14(b) of the executed line sale agreement ("Condition"). Section 5.14(b) in the purchase and sale agreement ("PSA") limits B&LE from seeking access in the future to two short line railroads whose lines do not physically connect with the U.S. Massena Lines that B&LE is acquiring. In this statement, I discuss the following: (i) B&LE's continued commitment to acquiring the U.S. Massena Lines under the terms of the PSA, including Section 5.14(b); (ii) B&LE's and CSXT's inability to agree on a proposed response to the Board's Condition, and consequent inability to proceed unless the Board removes the Condition; and (iii) B&LE's halting of its plan for smooth transitioning of ownership and operation for the U.S. Massena Lines, including its outreach to customers on the U.S. Massena Lines and hiring employees, because of the uncertainty caused by the Board's Condition. The significant benefits from the Transaction are now in jeopardy as a result of the Board's Condition, meaning that absent removal of the Condition, the significant public benefits of the Transaction will not be realized.

I. B&LE REMAINS COMMITTED TO THE TRANSACTION AND WANTS TO PROCEED UNDER THE PSA AS NEGOTIATED BY THE PARTIES.

B&LE remains dedicated to the Transaction notwithstanding significant economic uncertainty and disruptions in customer demand that have arisen since the Transaction was announced as a result of the COVID-19 pandemic. The executed PSA was the result of a detailed commercial negotiation. CSXT has made clear from the beginning that it would not proceed with the Transaction unless Section 5.14(b) was included. As a sophisticated buyer that is part of the Class I CN System, B&LE thoroughly considered the limitation on it in Section 5.14(b) and fully understood what it was agreeing to.

From our perspective, Section 5.14(b) would not limit B&LE's ability to serve customers after the Transaction is consummated and will not result in a reduction in competition. Section 5.14(b) does not limit B&LE's ability to serve customers on or over the Massena Lines. Nor does Section 5.14(b) limit FGLK, NYSW, or any customer in the future from seeking a connection to B&LE through the Surface Transportation Board, Rail Industry Agreement, or otherwise. And if one of the shortlines obtained such a connection in the future, Section 5.14(b) does not limit B&LE's ability to interchange traffic with that shortline. There was also no traffic that Section 5.14(b) would disrupt as there is no traffic moving between points on FGLK and points on the Massena Lines. Indeed, the only traffic moving from a point on FGLK's lines that transits over the Massena Lines moves to a destination in Canada. For that customer, both before and after the Transaction, three carriers participate in the move (FGLK-CSXT-CN System), and the only change after the Transaction is to move the interchange point between the CN System and CSXT from Huntingdon, Quebec to Woodard, New York. B&LE therefore willingly entered into the Transaction subject to the very narrow limitation in Section 5.14(b) rather than accept the alternative, which was no Transaction at all.

B&LE respectfully suggests that the Board's Condition is not necessary to protect B&LE's interests. The Transaction will enable B&LE as part of the CN System to extend its reach by more than 230 miles into the State of New York. It will ensure that the traffic interchanged between the CN System and CSXT will continue to move via this direct gateway, and this traffic accounts for more than 45% of carload traffic transiting over the Massena Lines. It will enable B&LE to provide rail service to customers on the U.S. Massena Lines, which gives those customers the ability to receive direct rail service for carloads moving between the U.S. Massena Lines and Canada. The CN System has other interchanges with carriers in New York,

including an interchange with CSXT in Buffalo plus interchanges with Norfolk Southern both at Buffalo, NY and at Rouse's Point, NY via Canadian Pacific. By contrast, failure to close on the Transaction would risk adding a carrier between the CN System and CSXT, which could make some movements over the Massena gateway less competitive, including for the expedited interline intermodal service announced by the CN System and CSXT in August 2019. {{ [REDACTED]

[REDACTED]

[REDACTED]}}

II. AS THE PARTIES ARE UNABLE TO AGREE ON A PROPOSED RESPONSE TO THE BOARD'S CONDITION, THE TRANSACTION CANNOT PROCEED UNLESS THE CONDITION IS REMOVED.

In the Board's Approval Decision, the Board recognized the significant benefits that would result from the Transaction, yet it imposed the Condition asking B&LE and CSXT to propose modification or elimination of Section 5.14(b) from the PSA for the Board's review. Unfortunately, the parties were unable to agree on a proposed response to the Board's Condition despite diligent efforts in extensive negotiations over eight weeks following the Approval Decision. This is understandable where the PSA was built on a carefully balanced set of considerations and interdependent provisions that would be undermined if the Board decided to pluck out a single provision from the PSA and ask the parties to propose an amendment to it. B&LE and CSXT thus submitted a joint letter to the Board on May 26, 2020, informing it that they had been unable to agree on a proposed response to the Board's Condition, that the Transaction was in jeopardy unless the Condition was removed, and that B&LE would be seeking reconsideration of the Board's Condition.

B&LE continues to believe that the Transaction, even with Section 5.14(b), would create significant benefits in the public interest . Given the very narrow impact of Section 5.14(b) on

B&LE and the fact that it does no harm to the non-connecting shortlines or any shippers, the only conceivable impact of Section 5.14(b) is perceived potential future harm. B&LE believes such theoretical harm is far outweighed by the significant benefits of the Transaction in the public interest. Those significant benefits would be lost if the Transaction is unable to proceed because of the Board's Condition.

III. BECAUSE OF THE RISK THAT THE TRANSACTION WILL BE UNABLE TO PROCEED UNLESS THE BOARD'S CONDITION IS REMOVED, B&LE HAS HALTED ITS INTEGRATION PLANNING.

B&LE continues to believe the Transaction will provide substantial benefits, including to customers, the employees actively working on the U.S. Massena Lines, the economy, and other stakeholders. As part of its planning for consummation, B&LE has worked diligently over the past six months to plan for a seamless transition, including weekly meetings with more than fifty employees representing all functions across the CN System to prioritize, plan, and execute the steps necessary to plan for integration of the Massena Lines into the CN System. Those steps include service design and the development of detailed terminal and train operations; updating safety literature and preparing key operating documentation; IT systems reconfiguration, and data testing and validation; speaking with union leadership and preparing job postings to staff the line; planning and acquiring material for essential telecom infrastructure; and reviewing ancillary agreements that B&LE would be assuming after consummation of the Transaction.

This planning has included broad outreach to customers who ship on or over the Massena Lines, to short lines that directly connect to the Massena Lines (MSTR, NYOG, and MHWA), to labor unions that represent employees actively working on the U.S. Massena Lines, and to other relevant stakeholders. In these conversations, B&LE has introduced the CN System, discussed the proposed Transaction, sought to understand the stakeholders' perspectives, and answer any

questions. The overarching goal has been to plan for the smooth transition in ownership and operation of the lines from CSXT to B&LE at consummation.

As part of its customer outreach, B&LE was making in-person site visits to customer facilities on the U.S. Massena Lines until mid-March when, with the onset of the COVID-19 pandemic, conversations switched to conference calls to maintain social distancing. Altogether, since the start of B&LE's outreach efforts, B&LE has visited in person or on the phone with a majority of the customers on the U.S. Massena Lines. B&LE's outreach efforts reflect the CN System's commitment to work with customers to understand and identify their rail service needs, develop efficient plans to service their facilities, and seek to grow their businesses.

The response from customers on the U.S. Massena Lines to B&LE's outreach has been overwhelmingly positive. Nearly all the customers contacted have responded favorably to the prospect of future rail service by B&LE. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

However,

B&LE's conversations with customers on the U.S. Massena Line halted when the parties could not agree on a response to the Board's Condition and it became apparent the Transaction will be unable to proceed unless the Board's Condition is removed.

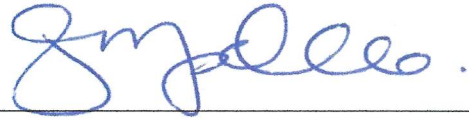
B&LE has undertaken similar efforts to plan for seamless transition with the unions representing employees actively working on the U.S. Massena Lines. The Labor Relations team for the CN System reached out to the union representatives of the CSXT employees to lay the groundwork for an efficient and mutually beneficial transition of operations. In those discussions, {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]}}

The positive responses to our outreach underscores the substantial benefits of the Transaction not only to the CN System, but also to rail customers, employees working on the U.S. Massena Lines at the time of closing, the economy, and the public. We are hopeful that the Board will remove the Condition to enable B&LE and CSXT to move forward with the Transaction as negotiated by the parties so that the significant benefits in the public interest of the Transaction may be realized.

VERIFICATION

I, Janet Drysdale, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on June 5, 2020.



Janet Drysdale
Vice-President Financial Planning
Canadian National Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have, this 5th day of June, 2020, caused copies of the foregoing Petition of Bessemer and Lake Erie Railroad Company for Partial Reconsideration (designated as BLE-8) to be served on all parties of record listed on the service list in this proceeding, by email, messenger, or first-class mail.

/s/ James M. Guinivan