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Justin J. Marks
T 202.772.0916
F 202.772.0930
Email: jmarks@ClarkHill.com

Clark Hill
1001 Pennsylvania Avenue NW
Suite 1300
Washington, DC 20004
T 202.772.0909
F 202.772.0919

clarkhill.com

June 25, 2020

BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

Re: *Bessemer and Lake Erie Railroad Company – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondage, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, New York (Docket No. FD 36347)*

Dear Ms. Brown:

Finger Lakes Railway Corporation respectfully submits the enclosed Reply to the Petition of B&LE for Partial Reconsideration and the CSXT Petition for Reconsideration of the Board's April 6, 2020 Decision No. 4 in the above referenced docket. Please let me know if there are any questions regarding this filing.

Sincerely,



Justin J. Marks
Counsel to Finger Lakes Railway Corp.

Enclosure

Before the
SURFACE TRANSPORTATION BOARD

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, NY

FINGER LAKES RAILWAY CORP.
REPLY TO PETITION OF B&LE FOR PARTIAL RECONSIDERATION
AND CSXT PETITION FOR RECONSIDERATION

Eric M. Hocky
Clark Hill PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
Clark Hill PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

Counsel for Finger Lakes Railway Corp.

Dated: June 25, 2020

Before the
SURFACE TRANSPORTATION BOARD

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, NY

FINGER LAKES RAILWAY CORP.
REPLY TO PETITION OF B&LE FOR PARTIAL RECONSIDERATION
AND CSXT PETITION FOR RECONSIDERATION

Finger Lakes Railway Corp. (“FGLK”) respectfully submits this Reply in opposition to the Petition for Partial Reconsideration submitted by Bessemer and Lake Erie Railroad Company (“B&LE Petition”) and the Petition for Reconsideration submitted by CSX Transportation, Inc. (“CSXT Petition”).¹ Both petitions seek Board reconsideration of the condition imposed on the approval of the Transaction in Decision No. 4 (served April 6, 2020) requiring B&LE and CSXT to “modify or eliminate section 5.14(b) of the PSA governing the Transaction...” (the “Condition”). Neither Petition meets the Board’s standard for granting petitions for reconsideration because B&LE’s and CSXT’s refusal to comply with the Board’s imposed Condition does not constitute either new evidence or a changed circumstance. Further, the Board did not commit material error when it exercised its broad conditioning authority requiring B&LE and CSXT to modify Section 5.14(b) to address the Board’s long-standing concerns regarding permanent restrictions on competition.

¹ Bessemer and Lake Erie Railroad Company is defined herein as “B&LE” and CSX Transportation, Inc. is defined herein as “CSXT.” B&LE and CSXT are sometimes referred to herein collectively as “Petitioners.” Other capitalized terms and abbreviations not defined herein shall have the meaning set forth in the Board’s Decision No. 4.

I. PROCEDURAL HISTORY

On October 10, 2019, B&LE filed an application for a minor transaction to acquire the Massena Lines from CSXT (the “Transaction”). The Board ultimately issued Decision No. 4 on April 6, 2020, authorizing the Transaction subject to the Condition (ordering paragraph 3) that “B&LE and CSXT modify or eliminate section 5.14(b) of the PSA governing this Transaction to address the Board’s concerns” due to the anticompetitive effects of section 5.14(b).² Decision No. 4 at 14.

In Decision No. 4, the Board explained that Section 5.14(b) is analogous to an interchange commitment because it places restrictions on B&LE that limit B&LE’s ability to interchange with carriers other than CSXT. *Id.* at 9. Further, the Board found (1) that Section 5.14(b) would put B&LE (and any potential new shippers generated by FGLK or NYSW) in a less favorable competitive position than other carriers in its same position (*Id.* at 9-10), and (2) that Section 5.14(b) is the type of provision “that the Board has cautioned requires heightened scrutiny, because section 5.14(b) is a ‘total ban’ on B&LE seeking access and extends in perpetuity.” *Id.* at 10. The Board rejected other requests for conditions and established a procedural schedule giving B&LE and CSXT until May 6 to submit a proposal to modify or remove Section 5.14(b).

On April 27, May 8, and May 20, the Board granted successive requests of B&LE and CSXT to extend the procedural schedule so that they could negotiate a proposal regarding Section 5.14(b) in order to satisfy the Condition. In the final extension request, they stated:

² As cited by the Board, Section 5.14(b) provides in relevant part: “The Parties agree that [CSXT] will not grant to Buyer, and Buyer will not seek, directly or indirectly, before or after Closing, through the transactions contemplated by this Agreement or other means, access to the New York, Susquehanna and Western Railway (“NYSW”) or the Finger Lakes Railway Corporation (“FGLK”) or any successor or assign of NYSW or FGLK.” Decision No. 4 at 3.

“[T]he parties made significant progress on an alternative proposal” to address the Board’s concerns, but asserted that the parties needed additional time to reach a potential agreement. *B&LE/ CSXT Letter* May 18, 2020. In that letter, B&LE and CSXT further stated each party’s intention to file a petition seeking reconsideration of the Board’s Condition and at the same time indicated that they would continue their negotiations to reach a proposed resolution. During this period, neither Petitioner approached FGLK to determine if there were a possible commercial resolution that would address both the Board’s and FGLK’s concerns. By letter dated May 26, 2020 (the extended due date for submission of proposals), B&LE and CSXT advised the Board that they would, in fact, not be submitting any proposal in response to, or propose any language to address, the Condition.

Now B&LE and CSXT have filed their Petitions seeking reconsideration of the Board’s Condition. B&LE and CSXT assert that the inability of the parties to negotiate a proposal to address the Condition is a changed circumstance or new evidence. *B&LE Petition* at 14; *CSXT Petition* at 4. The Petitioners argue that it is the Board’s imposition of the Condition that is preventing the Transaction from proceeding, and that the Board should remove the Condition or else they will not proceed with the Transaction. *B&LE Petition* at 10; *CSXT Petition* at 4.

Decision No. 4 was not the only instance where the Board invited B&LE and CSXT to offer suggestions on how to mitigate the anticompetitive impact of Section 5.14(b). In Decision No. 3, issued February 7, 2020, the Board required “B&LE and CSXT to submit supplemental information addressing the potential anticompetitive effect of Section 5.14(b) of the PSA.”

Decision No. 3 at 4. The Board also sought input on whether FGLK’s other requested conditions seeking a direct commercial connection with B&LE for the benefit of customers on its lines would adequately address anticompetitive effects of the PSA and whether modifications to

FGLK's requested conditions would be appropriate. Decision No. 3 at 4.³ Despite this invitation, neither B&LE nor CSXT addressed whether modifications of FGLK's requested conditions would be appropriate, and neither party responded to the Board's request for suggestions on how FGLK's requested conditions might be modified. Instead, they merely sought to have all conditions rejected.

Petitioners have ignored multiple opportunities to explain how the Condition presently or in the future will jeopardize either B&LE, CSXT or the public benefits of the Transaction. Without explaining how this Condition would have the major consequence of terminating the Transaction, Petitioners now ask the Board to ignore its well-founded concerns with the anticompetitive effects of Section 5.14(b) solely because they are unwilling to comply with the Board's Condition.

II. LEGAL STANDARD FOR PETITIONS FOR RECONSIDERATION

Under 49 CFR §1115.3(b), a petition for reconsideration will be granted “only upon a showing of one or more of the following points: (1) The prior action will be affected materially because of new evidence or changed circumstances. (2) The prior action involves material

³ Although, FGLK is not seeking reconsideration, it notes that its December 9, 2019 Comment expressed concern that adding B&LE as an additional carrier on the Fulton Secondary would add complexity and expense to moves to and from customers on that line and that allowing CSXT to remain as a bridge carrier in movements between FGLK customers and Canada would introduce an additional carrier to moves to/from Montreal would result in higher pricing for the moves. FGLK Comment at 5-6. This view is supported by recent commentary in *Railway Age* noting the additional delay and added switching expense (to cover yarding costs, plus each railroad's charges to cover their respective costs and profit margins) of interline hauls. Blaze, Jim, *Railway Age*, Railroad Mega-mergers: To be Feared, or a Path to Business Growth *available at* <https://www.railwayage.com/freight/class-i/railroad-mega-mergers-to-be-feared-or-a-path-to-business-growth/>. In addition to seeking elimination of Section 5.14(b), FGLK sought trackage rights for either FGLK or B&LE to either Woodard or Solvay, or haulage by CSXT between Solvay and DeWitt Yard for physical interchange with B&LE there (the same as CSXT and B&LE plan to do). *See FGLK's Reply to Supplemental Information* at 12 (submitted Feb. 21, 2020).

error.” As the Board has previously held: “[I]n a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error.”⁴

III. ARGUMENT

The Board should reject the B&LE and CSXT Petitions because neither Petition meets the Board’s standard for granting reconsideration under 49 CFR §1115.3(b).

A. The PSA has not been modified, and the failure of B&LE and CSXT to modify the PSA is not new evidence or a changed circumstance.

B&LE and CSXT argue that it is either new evidence or a changed circumstance that they are unable to modify or eliminate Section 5.14(b) to satisfy the Condition and comply with Decision No. 4. The Board should reject this assertion. By choosing not to comply with the Board’s Condition, B&LE and CSXT have left the Board with the same PSA that it analyzed previously, and there is no reason that the Board should now analyze the effects of Section 5.14(b) any differently than it did prior to issuing Decision No. 4 and imposing the Condition. Neither B&LE nor CSXT has presented any new evidence or changed circumstance that would suggest that the Board’s prior analysis of the anticompetitive effects of Section 5.14(b) was materially wrong. Their refusal or failure to respond to the Condition cannot be considered new evidence or changed circumstances justifying reexamination of the Condition. Neither should their threat not to consummate the Transaction unless the Condition is removed. B&LE and CSXT were accorded the opportunity to accept or reject the imposed Condition, and in choosing not to abide by the Board’s Decision, Petitioners are the ones responsible for determining the outcome not to proceed with the Transaction.

⁴ *Norfolk Southern Ry Co. – Acquisition & Operation – Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.* STB Finance Docket No. 35873, slip op. at 7 (served Oct. 18, 2016).

B. The imposition of the Condition was within the Board’s broad authority to impose conditions to address anticompetitive effects of a proposed transaction.

B&LE and CSXT also fail to substantially demonstrate that the Board’s decision to impose the Condition involves material error. B&LE states:

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 [of competitive harm] now. Reviewing whether the harm is substantial and conducting that balancing now would avoid material error in this case.

B&LE Petition at 14. Similarly, CSXT argues that “[i]t would be material error for the Board to withhold approval of the Massena Lines sale” based on the Board’s concern for long-term future competitive impacts. *CSXT Petition* 3-4.

The Board has “extraordinarily broad authority” under 49 U.S.C. §11324 to approve a minor transaction with conditions.⁵ As the Board explained in issuing Decision No. 4, the “Board has long exercised its conditioning authority to resolve competitive concerns caused by minor transactions.”⁶ In exercising its conditioning authority here, the Board has not committed material error.

The Board’s Condition requiring CSXT and B&LE to remove or modify Section 5.14(b) reflects the Board’s long-standing concerns regarding permanent restrictions on competitive options. As the Board clearly states, Section 5.14(b) is a provision, “of the type that the Board has cautioned requires heightened scrutiny” because it is a “total ban” that “extends into

⁵ Decision No. 4 at 6; *see also Kan. City S. – Control – The Kan. City S. Ry.*, STB Finance Docket No. 34342, slip op. at 16 (STB served Nov. 29, 2004).

⁶ Decision No. 4 at 10 *citing Norfolk Southern Ry. Co. – Acquisition & Operation – Certain Rail Lines of the Del. & Hudson Ry Co., Inc.* STB Finance Docket No. 35873, slip op. 18-20 (served May 15, 2015).

perpetuity.” Decision No. 4 at 10. The Board explained that it was imposing the narrowly tailored Condition:

to ensure that the Transaction does not impair B&LE’s future ability – as with any other similarly situated carrier – to seek access or interchange with nearby carriers, outside this Transaction and/or in proceedings before the Board. This condition is intended to help ensure that the shippers on the relevant lines will be less likely to be shut out of future potential competitive options.

Id. at 10.

The Condition is an important message that the Board disfavors permanent anticompetitive commitments. Again, it is important to recognize that it is not the narrow Condition that would prevent this Transaction from proceeding, it is B&LE and CSXT’s unwillingness to address the anticompetitive issues raised by the Board and to propose a reasonable modification to Section 5.14(b).

Now that B&LE and CSXT have informed the Board that they are unwilling to address the Board’s Condition to alleviate the impact of the anticompetitive Section 5.14(b), they are asking the Board to re-analyze the Condition under the standards of 49 U.S.C. §11324(d). *CSXT Petition* at 3; *B&LE Petition* at 13-14. But nothing has changed since the Board analyzed the potential effects of Section 5.14(b) the first time. Whereas the Board seeks to apply heightened scrutiny to permanent anticompetitive provisions, the Petitioners would have the Board establish a new precedent lowering regulatory scrutiny of an anticompetitive provision in situations where the parties threaten to terminate the transaction if any condition is imposed.

B&LE and CSXT assert contradictory arguments that Section 5.14(b) will have no adverse effects on competition, but simultaneously assert that the provision is a critically essential element of the Transaction – so essential that the Petitioners are willing to terminate the

Transaction instead of complying with the Board's Condition to modify or remove the provision. On the one hand, CSXT argues, "the scope of Section 5.14(b) ensures that there will be no adverse effects on competition in the future" (*CSXT Petition* at 5), while B&LE states, "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." *B&LE Petition* at 16-17. On the other hand, both B&LE and CSXT assert – without explanation – that the provision is so fundamental to the economics of the Transaction that if the Board does not reconsider the Condition and allow this anticompetitive provision as written, the parties will terminate the Transaction. *CSXT Petition* at 4; *B&LE Petition* at 10. It certainly appears that Section 5.14(b) must have broader competitive implications than B&LE and CSXT are willing to admit, and therefore, the Board's imposition of the Condition to address those competitive implications was certainly not material error.

B&LE and CSXT argue that Section 5.14(b) only prevents B&LE from seeking access to FGLK (and NYSW), but does not prevent shippers or nearby carriers from seeking access to B&LE. However, judging by B&LE's and CSXT's rejection of FGLK's requests to create limited commercial access through trackage rights or haulage solutions, it is clear that B&LE and CSXT do not intend to consider reasonable requests for access to B&LE. Moreover, as the Board noted, its concerns go beyond the limits in the PSA in that including the "broad, prohibitive provision in the transaction 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 relative to other carriers that also connect to CSXT going forward." *Decision 4* at 9.

The "sophisticated buyer" justification asserted by B&LE and CSXT is also without

merit, and the Board should reject it because it implies that transactions under the Board's jurisdiction should not be subject to the Board's regulation and scrutiny if the parties are sufficiently sophisticated. The Board – not sophisticated buyers – has the authority (and the obligation) to impose conditions to ameliorate competitive harm caused by a transaction. The Board – not sophisticated buyers – is responsible for exercising the Board's statutory objectives to provide carriers and their customers access to the Board to resolve competitive issues. Simply because B&LE does not object to the anticompetitive provision does not mean that the provision is beyond Board regulation. Moreover, as the Board made clear in its decision (and as discussed above), the Condition is not just about whether B&LE needs protection, but also whether all involved carriers (including FGLK) and their shippers need protection from the anticompetitive effects of Section 5.14(b). B&LE's sophistication and size does not demonstrate that the Board committed a material error in imposing the Condition.

In Decision No. 3, when the Board invited parties to submit input on whether modifications to FGLK's requested conditions would be appropriate, neither B&LE nor CSXT provided any suggestions. In Decision No. 4, when the Board approved the Transaction subject to a proposal from B&LE and CSXT to modify or eliminate Section 5.14(b), B&LE and CSXT provided no proposal. Now, they ask the Board to ignore the well-founded concerns over Section 5.14(b) and approve the Transaction without the Condition, but neither party explains why this provision cannot be modified or removed other than to say that it is an essential component of the Transaction. B&LE and CSXT are essentially instructing the Board to approve the Transaction as the parties proposed or they will terminate it. That threat does not mean the imposition of the Condition was a material error.

A number of shippers have submitted form letters to the Board supporting the

Transaction. But, none of these shippers specifically address the anticompetitive effects of Section 5.14(b) (which presumably does not affect them) or why the Condition which protects other shippers should be removed. If these shippers truly want to reap the promised benefits of the Transaction, instead of asking the Board to approve B&LE's request for reconsideration, they should be urging B&LE and CSXT to address the Board's concerns and modify Section 5.14(b). As FGLK has repeatedly stated, it does not oppose the Transaction, and would welcome B&LE and CSXT reaching an accommodation that adequately addresses the Board's anticompetitive concerns.

If, as it should, the Board rejects the Petitioners' requests for reconsideration and refuses to waive its concerns over Section 5.14(b), FGLK would not object if the Board were to extend the procedural schedule to allow B&LE and CSXT to continue their negotiations and make another attempt to satisfy the Condition.⁷

IV. CONCLUSION

For the above stated reasons, FGLK respectfully requests that the Board deny the B&LE and CSXT Petitions because neither Petition meets the standard for granting petitions for reconsideration. The fact that B&LE and CSXT determined not to amend the PSA and thus not to comply with the Board Condition is not new evidence or a changed circumstance. Further, the Board did not commit material error when it exercised its broad conditioning authority to address

⁷ Perhaps B&LE and CSXT could utilize the Board's mediation services to assist their efforts to reach agreement on how to modify Section 5.14(b) to satisfy the Condition.

the Board's long-standing concern regarding permanent restrictions on competition to prevent harm to carriers and their customers.

Respectfully submitted,



Eric M. Hocky
Clark Hill PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
Clark Hill PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

Counsel for Finger Lakes Railway Corp.

Dated: June 25, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2020, I served a copy of the foregoing

Reply on the following persons by the method indicated:

By email:

Louis E. Gitomer
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
Lou@lgraillaw.com

William W. Scriber
Port of Oswego Authority
1 East Second Street
Oswego, NY 13126
wscriber@portoswego.com

Claire M. Maddox
James Guinivan
Dentons US LLP
1900 K Street, NW
Washington, DC 20006
claire.maddox@dentons.com
james.guinivan@dentons.com

Peter F. Young
Vermont Rail System
One Railway Lane
Burlington, VT 05401
pyoung@vrs.us.com

Keith D. Martin
NYS Department of Transportation
Office of Counsel, 6th Floor
50 Wolf Road
Albany, NY 12232
keith.martin@dot.ny.gov

Jeffrey A. Bartos
Guerrieri Bartos & Roma, PC
1900 M Street, NW, Suite 700
Washington, DC 20036
jbartos@geclaw.com

Richard J. Dreger
Richard J. Dreger, Attorney at Law, PC
2101 Macy Drive
Roswell, GA 30076
rick@rdregerlaw.com

Erika A. Diehl-Gibbons
United Transportation Union
24950 Country Club Blvd., Suite 340
North Olmsted, OH 44070
ediehl@smart-union.org

Raziya Brumfield
Guerrieri Bartos & Roma, PC
1900 M Street, NW, Suite 700
Washington, DC 20036
rbrumfield@geclaw.com

Anthony J. LaRocca
Peter W. Denton
Sally Mordi
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
alarocca@steptoe.com
pdenton@steptoe.com
smordi@steptoe.com

Kate Chmielowiec
Bond, Schoeneck & King PLLC
One Lincoln Center
Syracuse, NY 13202-1355
kchmielowiec@bsk.com

Towns Agnew
A.P.Moller - Maersk
9300 Arrowpoint Blvd.
Charlotte, NC 28273
Towns.agnew@maersk.com

Thomas Engel
Hapag-Lloyd (America) LLC
399 Hoes Lane
Piscataway, NJ 08854
Thomas.Engel@hlag.com

CMA CGM (America) LLC
5701 Lake Wright Drive
Norfolk, VA 23502
usa.jawilliams@cma-cgm.com

Maher Terminals LLC
1210 Corbin Street
Elizabeth, NJ 07201
GCross@maherterminals.com

MSC Mediterranean Shipping Company USA
Inc.
Robert Milazzo
420 Fifth Avenue
New York, NY 10018
rmilazzo@msc.us

J. Gregory Pilewicz
Attis Ethanol Fulton, LLC
12540 Broadwell Road, Suite 2104
Milton, GA 30004
gpilewicz@attisind.com

James D. Phillips
Canadian/American Border Trade Alliance
PO Box 929
Lewiston, NY 14092
canambta@aol.com

Brian McBride
Atlantic Container Line
50 Cardinal Drive
Westfield, NJ 07090
bmcbride@aclcargo.com

GCT Global Container Terminals Inc.
375 Water Street
Suite 610
Vancouver, BC V6B 5C6
DGrosman@globalterminals.com

Mohawk, Adirondack & Northern Railroad
Corp.
Thomas F. McFarland
208 South LaSalle Street
Suite 1666
Chicago, IL 60604-1228
mcfarland@aol.com

By U.S. mail, postage prepaid:

Gordon P. MacDougall
1025 Connecticut Avenue, NW
Washington, DC 20036

Richard S. Edelman
Mooney Green Saindon Murphy
& Welch, PC
1920 L Street, NW, Suite 400
Washington, DC 20036

Attorney General of the United States
c/o Assistant Attorney General,
Antitrust Division, Room 3109
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Bethann Rooney
The Port Authority of New York and
New Jersey
4 World Trade Center
150 Greenwich Street, 17th Floor
New York, NY 10007

Garry Douglas
North Country Chamber of Commerce
PO Box 310
7061 Route 9
Plattsburgh, NY 12901

Secretary of Transportation
United States Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590



Justin J. Marks