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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, N.Y.

REPLY TO PETITIONS FOR RECONSIDERATION

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Dated: June 25, 2020

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Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY), submits this reply to the two petitions, filed June 5, 2020, one by Bessemer & Lake Erie Railroad Company (B&LE), and the other by CSX Transportation, Inc. (CSXT), for reconsideration of the Board's April 6, 2020 Decision No. 4, approved the proposed sale of CSXT's Massena lines to B&LE, a non-connecting rail carrier subsidiary of Canadian National Railway Company.^{1/}

The two petitions have drawn recent support at the STB from nine separate filings, eight

^{1/} SMART/TD-NY throughout challenged the status of B&LE as a bogus CNR subsidiary to avoid class 1 rail regulatory rules in this proceeding, see: V.S. NASCA-4, 1-2; V.S. NASCA-1, 4; V.S. NASCA-2, 1. B&LE in its current June 6 filing, now openly acknowledges the transaction is a "line sale where one Class I is selling to another Class I carrier." (B&LE Reconsid./Pet., at 9, final para; 16, lines 2-3).

from individual non-party ocean shipping interests based at the Port of New York/New Jersey area, and one based at Vancouver, BC. Heretofore, apart from a single shipper on the Fulton Subdivision (that later withdrew, Decision 4, 4n.7), there have been no active shipper parties to the proceeding. ^{1/}

SMART/TD-NY recognizes, as does CSXT and dissenting Board Member Fuchs, along with B&LE, that the April 6 Decision 4 did not weigh the anticipated public benefits of the transaction against anticompetitive harm—a statutory requirement of 49USC 11324(d)(2), apparently on a theory that primary harm would be reduced by removal of § 5.14(b) in the Purchase & Sale Agreement (PSA), or its modification, by the parties, or the transaction restructured to satisfy future requirements. CSXT Pet./Reconsid. 4; Decision 4, Fuchs Dissent 17; B&LE 13-14).

The B&LE and CSXT, in lengthy petitions for reconsideration, now seek an opportunity to furnish additional material (argument-only one verified statement) to support an effort have the Board provide the necessary balancing of anticompetitive effects against the public interest as required by 49 USC 11324(d)(2). In essence, this is now a new proceeding under the statutory balancing requirements. In this reconsideration(sic) process, B&LE gives considerable attention to employee (labor) matters, concluding that all conditions in the April 6, 2020 Decision No. 4 be removed, other than the reduced labor protection imposed by the Board, with a 30-day

^{2/} These eight are: A.P. Moller-Maersk; MSC Mediterranean Shipping Company; Hapag-Lloyd; CMA-CGM; Atlantic Container Line; Evergreen Shipping; Maher Terminals; and Holt Logistics Corp.; the Canadian west coast support is GCT Global Container Terminals (Vancouver, BC).

transaction effective date thereafter (B&LE Pet./Reconsid. 20).

In this reply, SMART/TD-NY urges that the employee conditions imposed in the April 6, 2020 Decision 4, would not be appropriate for a revised transaction with its § 5.14(b) restored, just as the employee conditions originally proposed by the applicants and adopted by the STB were inadequate. ^{1/}

I. RECONSIDERATION SHOULD BE DENIED; IF NOT
DENIED, THE PROCEEDING SHOULD BE REOPENED
FOR DENIAL OF THE APPLICATION.

SMART/TD-NY is opposed to the transaction. Our arguments previously advanced in the NASCA submissions, need not be unnecessarily repeated, and are incorporated herein. CSXT and B&LE have publicly stated the STB's decision is unacceptable with the PSA §5.14(b) removed, thus their petitions of June 5, 2020, seeking reconsideration here, rather than any modification.

The B&LE and CSXT petitions for reconsideration are not persuasive. Any public benefits or public interest considerations are most speculative.^{1/} The petitions should be denied.

^{3/} Although this SMART/TD-NY is immediately concerned with employee protection, we do not agree with the major contention of B&LE and CSXT--running repeatedly through many pages of their June 5 petitions for reconsideration-- that the STB in its April 6, 2020 Decision 4, found the line sale would reap public benefits. The STB's "public benefits" "factual" finding, as asserted in the STB Decision 4, at p. 5, derives from B&LE counsel, and is most meager--embracing solely a possible elimination of certain CSXT internal train operations, asserting an estimated one-day improvement with future B&LE service between Montreal, Que. & Syracuse, NY. See: B&LE Pet/Reconsid. 11. B&LE failed to offset its claimed benefit against new B&LE/CSXT interchange costs in the Syracuse area. Moreover, any transit improvement is something which "could" occur--not actually promised.

^{4/} The governing statute, 49 USC §11324(d)(2), requires a finding the public interest must meet

If the Board is somehow considering reinstatement of PSA § 5.14(b), in the process, it should take another look at the entire transaction, leading to denial of the application—which denial currently is the de facto status of the proceeding.

We urge the last-minute entry into the proceeding, through letters of support for B&LE’s position, from major ocean carriers and ocean terminal operators, requires special STB attention. Among new other questions, such as with developments at the Panama Canal, and Port harbor dredging activities, brings to mind the former so-called “Canadian Differential” ICC litigation and arbitration controversies involving freight and passenger traffic moving between U.S. origin and U.S. destination through Canada, transcontinental or otherwise, sometimes to the detriment of U.S. carriers and their employees. Indeed, such prospect ordinarily should require, after denial of reconsideration here, a new and broad national transportation inquiry.

II. ANY RECONSIDERATION REQUIRES REVISED EMPLOYEE PROTECTION CONDITIONS

SMART/TD-NY urges at this proceeding stage, if PSA §5.14(b) is to be restored, that the agency revise the employee protection (Decision 4, at 13-14), so as to impose the standard New York Dock conditions, without the Wilmington Terminal modification. Our position on this score is of record. The 1990 Wilmington Terminal decision for line sales has been superseded by subsequent Congressional legislation, and STB implementation. NASCA-2, at 3-4. (ID300207); NASCA-4, at 2-4 (ID300254). Contrary to Decision 4, at 13, NYD is not confined to “consolidations” or “merger or common control” STB cases where an entity ceases

“significant” transportation “needs,” not here shown.

to exist as a separate entity. This is recent STB fabrication, NYD-Wilmington Terminal was first followed in several small and uncontested cases, but thereafter in a large proceeding, NS/D&H, but where employee and management parties settled protection issues without turning to judicial review.^{5/}

Some examples of loss of benefits by substitution of Wilmington Terminal modification for straight NYD , include B&LE's unilateral dictation of certain priority of hiring terms for CSXT employees (B&LE Pet./Reconsid. 4-5, 12, 19), and unilateral determined collective bargaining terms. (Ibid., at 5 & Drysdale, at 7).^{6/} These B&LE conditions are in lieu of negotiation and mandatory arbitration of differences under. NYD, 360 I.C.C, 60, 84-9.

Moreover, the B&LE employee protection in many instances appears to cover only adversely affected CSXT employees who are actively at work on the involved Massena lines at the date of closing. (B&LE Pet./Reconsid. 5, 12; Drysdale 5). Such protection commitment limitation is contrary to NYD protections covering seniority rights and various allowances., and collective bargaining provisions.

The recent filing of submissions by various ocean carriers and terminal operators suggest adverse impacts of the proposed transaction could be enlarged to embrace many other CSXT lines, and other rail carrier lines, and their employees. Such other employees thus stand to be adversely affected, and entitled to protection.

^{5/} NASCA-4, at 3-5. (ID300254).

^{6/} Highly Confidential B&LE filing.

Conclusion

The petitions for reconsideration should be denied. If the proceeding is nevertheless reopened, and the transaction revised, the minimum employee protection provisions are those imposed in New York Dock, 360 I.C.C. 60 (1979), affd 609 F.2d 83 (1979).

Respectfully submitted,

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June 25, 2020

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Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Dated at
Washington DC
June 25, 2020

/s/ Gordon P. MacDougall

Gordon P. MacDougall