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**Before the
SURFACE TRANSPORTATION BOARD**

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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**

**AMENDED AND RESTATED COMMENTS AND REQUEST FOR CONDITIONS
OF ATTIS ETHANOL FULTON, LLC**

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AMENDED AND RESTATED COMMENTS AND REQUEST FOR CONDITIONS
OF ATTIS ETHANOL FULTON, LLC

Pursuant to the procedural schedule established by the Board's November 8, 2019 decision¹ in this proceeding, Attis Ethanol Fulton, LLC ("Attis") respectfully files the following comments to the Application² of Canadian National Railway's subsidiary Bessemer and Lake Erie Railroad Company ("B&LE") to acquire certain rail lines from CSX Transportation, Inc. ("CSXT"), and request for conditions to alleviate the competitive harms FGLK and the shippers they serve will suffer as a result of this transaction.

SUMMARY OF POSITION

Attis takes no position on whether the transaction should be approved; however, if the transaction is approved by the Board, Attis requests that the Board impose the conditions

¹ *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*, STB Finance Docket 36347, slip op. at 1, 6 (Decision 1)(served Nov. 8, 2019)("Decision 1").

² Application for a Minor Transaction, *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*, STB Finance Docket 36347 (Oct. 10, 2019)(the "Application"). All references to the Application herein are to the Public Version.

requested herein to address the specific competitive harms that would be imposed by the transaction.

Attis seeks a condition to protect pricing and efficient rail operations for local shippers located on the Fulton Subdivision. The Application offers no price protections for these shippers. Further, the sale of the Subdivision will insert B&LE as an intermediate bridge carrier into movements that had performed solely by CSXT, which will require the coordination and participation of a B&LE as an additional carrier. The shippers on the Fulton Subdivision will see reduced operating efficiency, increased costs and increased transit time, and should be granted conditions to alleviate such adverse effects.

REQUESTED CONDITION

The Board should condition approval of the Application by preserving the current service to key shippers, including Attis, located on the Fulton Subdivision by (i) preserving pricing for those shippers for a period of three years, and (ii) preserving direct access to CSXT by permitting the Attis to receive switching service from FGLK on the Fulton Subdivision between CSXT and Attis. In order to provide the service, the Board should grant FGLK trackage rights, on reasonable terms and conditions, over B&LE between Attis and CSXT at FGLK's Solvay Yard CSXT's Belle Isle Yard in Solvay, NY.

I. BACKGROUND AND STATEMENT OF FACTS

A. Attis Ethanol Futon, LLC

In June 2019 Attis acquired a corn ethanol plant and grain malting operations in Fulton, New York from Sunoco LP. (the "Pilewicz V.S.") The plant is located on the Fulton Subdivision as shown on Exhibit B to the verified statement of Michael V. Smith (the "Smith V.S.") attached to the Comments and Request for Conditions of Finger Lakes Railway Corp filed

in this matter. CSXT is the interline railroad that currently serves the plant. Pilewicz V.S. at 2. Attis's industrial plant switching is performed by Finger Lakes Railway Corp. (FGLK) under a multiyear contract. *Id.*

Attis receives approximately 35 to 40 unit trains per year (approximately 3,600 carloads) of inbound corn at the Fulton Plant. *Id.* All of the corn originates in the Midwest United States.*Id.* Attis also ships outbound carloads of DDGs (about 1320 carloads), CO2 (about 1020 carloads) and a little corn oil (about 88 carloads) that are byproducts of our production process. *Id.* The destinations for Attis's outbound carloads are likewise all located in the United States. *Id.* The outbound moves are handled by CSXT from Fulton to Syracuse three days per week – Sunday, Tuesday and Thursday. *Id. at 3.* Based on the above, it is Attis's understanding that it is the largest shipper on the Fulton Subdivision. *Id. at 2-3.*

After the transaction, B&LE will handle the traffic on the Fulton Subdivision all of which will need to be interchanged with CSXT near Solvay – introducing an additional carrier and interchange to the routes. *Id. at 3.*

B. Effects of the Transaction on Attis.

As part of the Application, B&LE/CN will acquire CSXT's Fulton Subdivision. The Fulton Subdivision is between CSXT milepost QMF 7.2 at or near a connection to CSXT's St. Lawrence Subdivision near Woodard, NY and QMF 37.95 at or near Fort Ontario, NY, a distance of approximately 31 miles. Application at 21. See M. Smith VS, Exhibit B.

Attis is located on the Fulton Subdivision. FGLK provides non-carrier switching service to Attis under a multi-year contract.

CSXT currently operates on the Fulton Subdivision 6 days a week operating out of CSXT's Fulton Yard. It transfers traffic between the Fulton Yard and its Dewitt Yard. CSXT

serves customers on the Fulton Subdivision at Fulton and Oswego, NY. Application, Exhibit 15 Operating Plan – Minor at 4. B&LE states that it plans to operate assignments serving local customers on the Fulton Subdivision. Further, B&LE asserts that “it does not anticipate significant changes to operations at Fulton Yard.” Application, Exhibit 15 Operating Plan – Minor at 9.

Although, not specifically referencing customers on the Fulton Subdivision, B&LE/CN state generally that those customers that currently receive direct service from a single carrier, CSXT, will maintain the competitive status quo by substituting direct CN service for direct CSXT service, with no reduction in the number of competitive rail options available. Application at 12.

Further, in the Application, B&LE/CN maintain that they will provide equivalent service to customers on the Massena Line as CSXT provided, and assert that Board approval of the Application would not result in “significantly higher rates or significantly worsened service” Application at 18. B&LE/CN does not discuss specifics, but state that they “will work with customers on the U.S. Massena Lines to understand their rail service needs, develop efficient plans for rail operations to their facilities, and help them grow their future businesses.” Application, Exhibit 15 Operating Plan – Minor at 7.

In addition to assuring the Board that the Application will not result in service changes, B&LE/CN also claim that the Application will provide improved efficiencies by reducing the need for a bridge carrier as compare to if a carrier outside of the CN System purchased the Massena Line:

If the acquirer of the Massena Lines were a rail carrier outside of the CN System, then an additional railroad would operate as a bridge carrier between the CN System and CSX, adding another interchange and requiring coordination with and participation of a third carrier. This would reduce operating efficiency, increase costs, and increase transit time to the detriment of existing interline customers of the CN System and of CSX that move overhead traffic over the U.S. Massena Lines.

Application at 9.

These claims, however, do not ring true for shippers like Attis who also have single line CSXT service now, but after the transaction will not have CN System direct service. Instead, Attis will see the introduction of B&LE as an intermediate carrier between themselves and CSXT. Attis will have another interchange (between CSXT and B&LE) requiring coordination and participation of a third carrier. Attis will have reduced operating efficiency, increased costs and increased transit time—all of the inefficiencies and issues the B&LE/CN say will be eliminated on the Massena Line by elimination of CSXT as an intermediate carrier. For this reason, the Board should analyze the acquisition of the Fulton Subdivision, and the effect on Attis and other shippers, differently than the Massena Line to Woodard.

The Application notably provides no protections to Attis following the expiration of contracts Attis currently has with CSXT. Attis has price commitments only through September 2020 and is concerned that after the expiration of that commitment, prices will rise due to the introduction of another interline carrier to the route. In Attis's discussions with CSXT about the transaction, CSXT would only commit to rates on inbound corn through September 30, 2020, and those commitments were subject to a total annual commitment, and 75% private cars. The short-term rate commitment conflicts with Attis's multi-year arrangement with FGLK switching services. *Pilewicz V.S.* at 3. Additionally, Attis is also concerned about service inefficiencies in the handling of the traffic between CSXT and B&LE that could delay inbound shipments and outbound pickups. *Id.*

II. ARGUMENT

A. Statutory Criteria

The acquisition by a Class I rail carrier of a line of railroad of another rail carrier requires Board approval pursuant to 49 U.S.C. §§11323-11325. Because the proposed transactions in this proceeding do not involve the merger or control of two or more Class I railroads, the Board examines the Application under 49 U.S.C. §11324(d), which directs that the Board should approve the Application unless it finds:

- (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 surface 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 assessing transactions subject to Section 11324(d), the Board's primary focus is on whether the proposed transactions will have adverse competitive impacts that are both likely and substantial. Even if there will be likely and substantial anticompetitive impacts, the Board may not disapprove the transactions unless those impacts outweigh the public benefits and cannot be mitigated through the imposition of conditions. Moreover, "harms caused by the merger must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not 'merger-related' (i.e., pre-existing disadvantages that will neither be caused nor exacerbated by the merger)." *Norfolk Southern Railway Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB Docket No. FD 35873, slip op. at 14 (Decision No. 6) (served May 15, 2015) ("NSR/D&H Transaction").

Here, the Board found that the Application is complete and determined that nothing in the record to date indicates that the transaction would have any anticompetitive effects and that, to the

extent any anticompetitive effects exist, they would be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. *Decision No. 1* at 6. However, such findings were preliminary based on the evidence presented in the Application and the record to date. The Board made clear that those findings could be rebutted by subsequent filings and after the record is fully developed, the Board will carefully review the proposed the Application to ensure that it does not "substantially lessen competition, create a monopoly, or restrain trade and that any anticompetitive effects are outweighed by the public interest." *Id.*

B. Criteria for Imposing Conditions

Even if the Board determines that the transaction overall does not adversely affect competition, or that the public benefits outweigh any competitive harm, and that the transactions should be approved, the Board can still consider appropriate conditions. Under 49 U.S.C. §11324(c), the Board has "broad authority to impose conditions" on a transaction subject to §11324(d) to ameliorate competitive harm that would result from the transactions. *See NSR/D&H Transaction*, slip op at 22 (citing *Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al*, STB Docket No. 35654, slip op. at 4 (Decision No. 5)(served December 20, 2012); *Kan. City S.—Control—The Kan. City S. Ry.*, STB Docket No. FD 34342, slip op. at 16 (served Nov. 29, 2004)). The Board will impose conditions when the concern is to the preservation of competition and essential services, not the survival of particular carriers." *Id.* The Board indicated as much when it accepted the Application as a minor transaction. *Decision No. 1* at 6 ("The Board may also impose conditions to mitigate or eliminate any anticompetitive impacts of the transaction").

C. Adverse Effects of the Proposed Transaction.

Attis is concerned that this transaction will impact its rates. In discussions between Attis and CSXT about the transaction, CSXT would only commit to rates on inbound unit train rates on corn through September 30, 2020 (and not on any rates for outbound commodities). Attis has no experience negotiating with the new carrier that will be serving it, B&LE or its parent Canadian National. Attis is concerned that with the transaction another carrier and its revenue needs will be added to all of its moves. While inbound corn moves will evidently be protected for a short time, Attis expects that the added carrier will mean added costs (higher freight rates) over time. *Pilewicz V.S.* at 2.

Attis also has concerns about the loss of any direct access to CSXT, along with the concern that its current direct rail route and rail service option will no longer be available as a result of the proposed transaction. Attis is concerned that its unit trains will no longer be handled direct, that there will need to be an interchange between CSXT and B&LE along with a change of crews, and that this will add inefficiency and delays into its service. With outbound service there will also need to be an additional interchange of the traffic that could add delays. *Id.* at 3. Thus, Attis will be adversely affected by the proposed transaction because its traffic, instead of moving CSXT direct will see the introduction of B&LE/CN as an intermediate carrier. Adding B&LE/CN on the Fulton Subdivision will subject Attis to the same service and pricing inefficiencies that B&LE cites in support of its Application. Application at 9. .

D. Proposed Conditions

Attis proposes the following two condition to address the harms of the transaction discussed above:

The Board should condition approval of the Application on the preservation of the current service to shippers located on the Fulton Subdivision by (i) preserving pricing for those shippers for a period of three years, and (ii) preserving direct access to CSXT by permitting FGLK to provide extended switching service via trackage rights, on reasonable terms and conditions, over the Fulton Subdivision between those shippers and CSXT.

E. Feasibility of Proposed Conditions

The conditions requested by Attis and other shippers are feasible. It is feasible for B&LE/CN and CSXT to make extended price commitments to protect Attis from the potential price increase that may result from the transaction's introduction of another interline carrier to the route.

It would also be feasible for FGLK to be granted extended switching rights from Attis to preserve direct access to CSXT. B&LE is only scheduled to be operating two round-trip trains per day on the Fulton Subdivision leaving plenty of windows for FGLK to operate. Further, FGLK is an experienced carrier that has the ability and willingness to provide the service to these shippers.

F. Public Benefits of Proposed Conditions

The conditions proposed are pro-competitive and preserve the pre-transaction status quo by maintaining a CSXT connection to shippers on the Fulton Subdivision.

Attis is a major employer and significant purchaser of local services and products that rely on the Fulton Subdivision for rail service. Attis's proposed condition for the Fulton Subdivision, seeks to maintain the status quo by maintaining access to CSXT without an unnecessary intermediary carrier (B&LE) complicating that access.

CONCLUSION

For all of the foregoing reasons FGLK requests that if the Board were to approve the proposed transaction, that it impose the requested conditions.

Respectfully submitted,

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Dated: December 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2019, I served a copy of the foregoing
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