

SURFACE TRANSPORTATION BOARD

DECISION

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.

Digest:<sup>1</sup> In this decision, the Board authorizes, subject to conditions, Bessemer and Lake Erie Railroad Company to acquire from CSX Transportation, Inc., and to operate 236.3 miles of rail line in New York.

Decision No. 4

Decided: April 6, 2020

On October 11, 2019, Bessemer and Lake Erie Railroad Company (B&LE or Applicant), an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (CNR), filed an application seeking Surface Transportation Board (Board) approval under 49 U.S.C. §§ 11323-25 to acquire from CSX Transportation, Inc. (CSXT), a Class I railroad, and to operate approximately 236.3 miles of rail line in New York. This proposal is referred to as the Transaction. The Board now approves B&LE's application, subject to conditions.

BACKGROUND

B&LE seeks the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 to acquire and operate certain CSXT lines, collectively known as the Massena Lines, from Woodard, N.Y., to the U.S.-Canadian border near Fort Covington, N.Y. (Appl. at 1-2.) More specifically, these lines consist of CSXT's St. Lawrence Subdivision between CSXT milepost QM 3.0 at or near Woodard and CSXT milepost QM 183.1 at or near Fort Covington, on the U.S.-Canadian border, a distance of approximately 179.2 miles; CSXT's Fulton Subdivision between CSXT milepost QMF 7.2 at or near a connection to CSXT's St. Lawrence Subdivision near Woodard and CSXT milepost QMF 37.95 at or near Fort Ontario, N.Y., a distance of approximately 31 miles; CSXT's Balmat Industrial Track between CSXT milepost QMB 0 at or near a connection with CSXT's St. Lawrence Subdivision near CSXT milepost QM 107 and CSXT milepost QMB 9, a distance of approximately 9 miles; CSXT's Rooseveltown Industrial

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Track between CSXT milepost QMR 63 at or near a connection with the St. Lawrence Subdivision at Helena, N.Y., and CSXT milepost QMR 68 at or near Rooseveltown, N.Y., a distance of approximately 5 miles; and CSXT's Carthage Branch between CSXT milepost QMC 86.8 at or near a connection with CSXT's St. Lawrence Subdivision near Philadelphia, N.Y., and CSXT milepost QMC 74.7 at or near Regis, N.Y., a distance of approximately 12 miles and CSXT's connection with Mohawk, Adirondack, and Northern Railroad Corporation. (*Id.* at 21-22.) The Transaction is part of a larger purchase agreement, under which CNR and B&LE have agreed to acquire from CSXT approximately 278.1 miles of rail line (including the 236.3 miles that comprise the Massena Lines) between Beauharnois, Que., and Woodard, pursuant to a Purchase and Sale Agreement (PSA)<sup>2</sup> that was executed on August 29, 2019.<sup>3</sup> (*Id.* at 1-2, 7 & Ex. 2, PSA.)<sup>4</sup>

The Transaction would move the current interchange between the CN System<sup>5</sup> and CSXT from Huntingdon, Que., to Woodard, where the ends of each railroad would meet. (*Id.*, Ex. 15 at 5.)<sup>6</sup> However, B&LE states that there are not adequate facilities at Woodard for physically interchanging traffic, nor could such facilities easily be added. (*Id.* at 22.) B&LE would therefore physically interchange traffic with CSXT at CSXT's Belle Isle Yard (near Solvay, N.Y.) or CSXT's Dewitt Yard (near Syracuse, N.Y.), depending on the type and direction of traffic. (*Id.* at 22, 25, Ex. 15 at 5.) According to Applicant, CSXT would grant operating rights that would allow B&LE to operate over CSXT's tracks between the Massena Lines and the two CSXT yards solely for the purpose of effectuating interchange with CSXT. (*Id.* at 25 n.25, Ex. 15 at 5-6.) Indeed, the PSA governing the Transaction discusses B&LE's limited operating rights over CSXT's trackage near Syracuse and expressly prohibits B&LE from seeking access

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<sup>2</sup> Applicant submitted a copy of the PSA with its application and designated the PSA as "highly confidential." As such, the PSA is subject to the provisions of the protective order issued by the Board on October 22, 2019.

<sup>3</sup> Applicant identifies CSX Intermodal Terminals, Inc., and St. Lawrence and Adirondack Railway Company, together with CSXT, as "CSX Parties" to the PSA. (Appl. 7.)

<sup>4</sup> In its application, B&LE states that CNR plans to seek formal discontinuance of inactive trackage rights on the St. Lawrence Subdivision between Fort Covington and Massena. (Appl. 13-14.) In Canadian National Railway—Discontinuance of Trackage Rights Exemption—in St. Lawrence & Franklin Counties, N.Y., Docket No. AB 279 (Sub-No. 7X), CNR filed its verified notice of exemption to discontinue these trackage rights. Notice of the exemption was served and published in the Federal Register on March 26, 2020 (85 Fed. Reg. 17,157). The exemption is scheduled to become effective on April 25, 2020.

<sup>5</sup> Applicant defines "CN" as CNR's U.S. rail operating subsidiaries, including B&LE, and "CN System" as the rail system operated in Canada by CNR and in the United States by CN. (Appl. iv.)

<sup>6</sup> Additional background can be found in the Board's decision in Bessemer & Lake Erie Railroad—Acquisition & Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y. (Decision No. 1), FD 36347, slip op. at 2-3 (STB served Nov. 8, 2019).

to two nearby rail carriers, New York Susquehanna and Western Railway (NYSW) and Finger Lakes Railway Corp. (FGLK). Specifically, section 5.14(b) of the PSA states:

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. In the event such access is acquired or required to be afforded prior to, or as a condition of Closing, either Party shall have the right to terminate the Transaction pursuant to Section 11.02 hereof. Buyer shall be entitled to the limited use of certain trackage as described in the Operative Documents for the purpose of effectuating interchange, with [CSXT] only, at each of Belle Isle and in Dewitt Yard *provided* that such interchange shall not be used for the purpose of achieving access to NYSW or FGLK. This Section 5.14(b) shall survive Closing.

(Id., Ex. 2 at 32-33.)

Applicant states that more than 45% of current carload traffic on the Massena Lines is overhead traffic exchanged between the CN System and CSXT, for which the Massena Lines provide a direct connection and gateway to the U.S. rail network. (Id. at 9.) According to B&LE, acquiring the Massena Lines would preserve the CN System’s direct connection with CSXT for overhead traffic that currently moves over the Massena Lines and ensure that traffic using the Massena Lines would continue to move directly between the two systems, rather than through an additional, unaffiliated railroad. (Id.) Applicant states that, following the proposed acquisition, it would have opportunities to improve efficiencies of operations along the Massena Lines and would work with customers on the Massena Lines to understand their rail service needs, develop efficient plans for rail operations to their facilities, and help them grow their future businesses. (Id. at 10.)

On November 8, 2019, the Board issued Decision No. 1, which accepted B&LE’s acquisition application, established a procedural schedule, and preliminarily determined that the proposed transaction is a minor transaction as defined by the Board’s regulations. Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is considered to be minor if a determination can be made that (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. The Board preliminarily determined, based on the application and the record at that time, that the transaction would clearly not have anticompetitive effects and that, if any anticompetitive effects did exist, it appeared that they would be clearly outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. Decision No. 1, FD 36347, slip op. at 6. The Board explained, however, that its findings regarding anticompetitive effects were preliminary and that it would carefully consider any claims that the transaction would have anticompetitive effects that were not apparent from the application and the record at that time. Id. at 1. In making that determination, the Board

reserved the right to require the filing of supplemental information as necessary to complete the record. Id. at 5.

Substantive comments and/or requests for conditions were filed by the following: U.S. Senator Charles E. Schumer; CSXT; FGLK; the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division (collectively, Allied Rail Unions); Port of Oswego Authority (the Port); the Transport Union Workers of America (TWU); Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY); and the New York State Department of Transportation (NYSDOT). Comments in support of the Transaction were filed by North Country Chamber of Commerce, Canadian/American Border Trade Alliance, the Port Authority of New York and New Jersey, and Attis Ethanol Fulton, LLC (Attis).<sup>7</sup>

On February 7, 2020, in Decision No. 3, the Board sought additional information regarding potential anticompetitive effects raised by FGLK, namely concerns regarding section 5.14(b) of the PSA, which would prevent B&LE from seeking direct access to FGLK, despite B&LE operating less than 600 feet from FGLK's Solvay Yard. The Board required B&LE and CSXT to submit supplemental information addressing the potential anticompetitive effect of section 5.14(b) of the PSA and invited other interested parties to address potential anticompetitive effects on shippers served by FGLK. On February 14, 2020, B&LE, CSXT, and FGLK each filed supplemental information, and on February 21, 2020, B&LE, CSXT, and FGLK each filed a reply to the supplemental information.

## DISCUSSION AND CONCLUSIONS

Statutory Criteria. Under 49 U.S.C. § 11323(a)(2), a purchase, lease, or contract to operate property of one rail carrier by another rail carrier requires prior Board approval. See also 49 U.S.C. § 11324. Here, B&LE seeks to purchase the Massena Lines from CSXT. Because this transaction does not involve the merger or control of two or more Class I railroads, it is governed by § 11324(d), which directs the Board to approve the application unless it finds that: (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 § 11324(d), the Board's primary focus is on the anticipated competitive effects. The Board must approve the application unless there would be adverse competitive impacts that are both "likely" and "substantial." And, even if the Board were to find that there would be likely and substantial anticompetitive impacts, the Board may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and

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<sup>7</sup> Attis initially filed comments on the application on December 9, 2019, seeking certain conditions related to the Fulton Subdivision of the Massena Lines. By letter filed January 8, 2020, however, Attis withdrew its filing and stated its support for the Transaction.

cannot be mitigated through conditions. See Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H), FD 35873, slip op. at 14 (STB served May 15, 2015); Paducah & Louisville Ry.—Acquis.—CSX Transp., Inc., FD 34738, slip op. at 4 (STB served Nov. 18, 2005); Canadian Nat’l Ry.—Control—Wisc. Cent. Transp. Corp., FD 34000, slip op. at 10 (STB served Sept. 7, 2001); Kan. City S. Indus., Inc.—Control—Gateway W. Ry., FD 33311, slip op. at 4 (STB served May 1, 1997); CSX Corp.—Control—Ind. R.R., FD 32892, slip op. at 5 (STB served Nov. 7, 1996).

After considering the application and the full record in this proceeding, the Board finds that, apart from the potentially anticompetitive effect of a particular contractual provision discussed below, B&LE’s acquisition of the Massena Lines from CSXT, in itself, would not likely cause a substantial lessening of competition or create a monopoly or restraint of trade.<sup>8</sup> The Transaction is an end-to-end acquisition involving approximately 236.3 miles of rail line in the state of New York. As the Board noted in Decision No. 1, the Transaction itself would maintain the competitive status quo. As noted above, B&LE states that 45% of current carload traffic on the Massena Lines is overhead traffic exchanged between the CN System and CSXT; with the sale of the Massena Lines to B&LE, the CN System’s direct connection with CSXT for overhead traffic would be preserved. Local customers located on the Massena Lines are exclusively served by CSXT now and would be exclusively served by B&LE post-Transaction. Nothing in the record indicates that any shippers would experience reduced competitive rail service options or a reduction in the number of transloading or intermodal service options as a result of the Transaction.

Even if there were potential anticompetitive effects of the acquisition transaction (other than the contractual provision discussed below), they would be outweighed by the public benefits of this Transaction. As noted in the application, CSXT announced in June 2018 that it was selling several lines, including the Massena Lines, that CSXT identified as not being core to its business but that it believed could be more valuable to other operators well positioned to improve the lines and better serve local customers. (See Appl. 8-9.) With B&LE acquiring the Massena Lines, the Transaction would ensure that overhead traffic currently moving over the Massena Lines between the CN System and CSXT would continue to move directly between the two systems on that route, rather than via a third, bridge carrier on that route or via a different direct CN System-CSXT gateway that likely would be longer and less efficient than the current route. Further, as B&LE notes, upon acquisition of the Massena Lines, it could improve the efficiencies of operations along the Massena Lines, such as eliminating two CSXT transfer assignments now operating between Massena and Huntingdon. (See id. at 10.) B&LE states that elimination of these two transfer assignments would avoid delays and improve overall efficiency of operations by reducing estimated total transit time by approximately 24 hours and reducing switching activity at the Massena Yard. (Id.)

One party objects to the Board’s classification of the Transaction as minor in Decision No. 1. However, the Board finds no merit to SMART/TD-NY’s argument that this Transaction should be classified as significant, rather than minor. (See SMART/TD-NY Comment 5, Dec. 9,

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<sup>8</sup> The Board will ameliorate the potential anticompetitive effect by requiring B&LE and CSXT to modify the relevant PSA provision, as discussed below.

2019.) Contrary to SMART/TD-NY's argument, the Port Authority of New York and New Jersey's and NYSDOT's participation in this proceeding do not necessarily make the Transaction one of regional or national transportation significance. See NS/D&H, FD 35873, slip op. at 3 (noting participation of several public agencies and governmental officials, including NYSDOT, in a minor transaction). SMART/TD-NY also makes general allegations that the Transaction would result in a change in the competitive movements for overhead business between U.S. and Canadian ports (see SMART/TD-NY Comment 6, Dec. 9, 2019) but provides no evidence that would undermine the Board's conclusion that the Transaction is minor. (See id., V.S. Nasca 3-4 (generally referencing competition between overhead traffic routed on the Massena Lines and traffic routed over Delaware and Hudson Railway Company, Inc., and CSXT's lines between Rouses Point Junction, N.Y. and New York, N.Y., but failing to explain how B&LE's purchase of the Massena Lines would negatively impact such competition).)

Conditions Sought. Several parties have asked the Board to impose certain conditions upon its approval of the Transaction. Under 49 U.S.C. § 11324(c), the Board has broad authority to impose conditions on a transaction subject to § 11324(d). See Grainbelt Corp. v. STB, 109 F.3d 794, 798 (D.C. Cir. 1997) (the agency "has 'extraordinarily broad discretion' in deciding whether to impose protective conditions in the context of railroad consolidations"). Typically, the Board uses its conditioning authority to ameliorate competitive harm that would result from the transaction. See Kan. City S.—Control—Kan. City S. Ry., FD 34342, slip op. at 16 (STB served Nov. 29, 2004). In doing so, the harm caused by the transaction "must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . i.e., pre-existing disadvantages that will neither be caused nor exacerbated" by the transaction. Canadian Nat'l Ry.—Control—Duluth, Missabe & Iron Range Ry., FD 34424, slip op. at 14 (STB served Apr. 9, 2004); see also NS/D&H, FD 35873, slip op. at 14, 22 (STB served May 15, 2015). The Board's conditioning power is thus "used to preserve competitive options (not to expand them)." Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN/SF Merger 1995), 10 I.C.C.2d 661, 745 (1995). The Board will address the parties' requested conditions below.<sup>9</sup>

*St. Lawrence Subdivision Conditions.* The St. Lawrence Subdivision is the approximately 179.2-mile main line of the Massena Lines that runs between Woodard and Fort Covington, on the U.S.-Canadian border. FGLK, a Class III railroad headquartered in Geneva, N.Y., filed comments, taking no position on whether the Transaction should be approved but requesting conditions to alleviate alleged competitive harms that would impact FGLK traffic moving between Canada and the United States on the St. Lawrence Subdivision. FGLK asserts that the provision in the PSA preventing B&LE from seeking direct access to FGLK (without first interchanging with CSXT) would prevent FGLK from competing for Canadian traffic

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<sup>9</sup> NYSDOT takes no position on the proposed Transaction but notes that the sale of the Massena Lines would render B&LE a bottleneck carrier for traffic currently moving south through CSXT's Syracuse gateway, post-Transaction. NYSDOT does not request any specific conditions but encourages B&LE to ensure that services, rates, and routings through Syracuse remain competitive. Similarly, Senator Schumer does not request any specific conditions but urges the Board to consider the impacts of the Transaction on jobs, competitive services, prices, and routing.

moving over the Massena Lines to and from the Syracuse area, leaving “FGLK at the mercy of CSXT who controls the FGLK’s gateway to the CN System despite [CSXT’s] minimal participation in such moves.” (FGLK Comment 8, Dec. 9, 2019.) FGLK states that, under the proposed operating plan, B&LE, and by proxy, CNR, would come within 2.8 miles of a direct connection to FGLK via the CSXT mainline near FGLK’s Solvay Yard. (*Id.* at 6.) Additionally, according to FGLK, with the operating rights CSXT would grant B&LE for interchange at CSXT’s Belle Isle Yard, B&LE/CNR trains would operate only 528 feet from FGLK’s interchange point with CSXT at Solvay Yard. (*Id.*) FGLK asserts that “[t]he option of a direct connection to the CN System through a FGLK-B&LE interchange might provide a more efficient and lower cost service to these markets; however, the forced inclusion of CSXT makes it unlikely.” (*Id.* at 8.) FGLK notes that “the PSA contains no such restrictions on short line carriers that will have a direct interchange with B&LE/CN,” nor any restrictions on other short line carriers “that may have an indirect connection with B&LE/CN via CSXT (other than [NYSW]).” (*Id.* at 7-8.)<sup>10</sup>

Accordingly, FGLK requests two conditions to address these alleged harms of the Transaction: (1) the Board should condition its approval on the removal of the PSA restriction on B&LE/CNR accessing or seeking to access FGLK; and (2) the Board should grant FGLK trackage rights, on reasonable terms and conditions, over CSXT to interchange with B&LE and the CN System at the Woodard Yard; alternatively, the Board should grant B&LE and the CN System trackage rights, on reasonable terms and conditions, to FGLK’s interchange point at Solvay Yard. (*Id.* at 16.)

In their respective replies and supplemental comments, B&LE and CSXT argue that the Board should reject the conditions sought by FGLK as they seek to create new competitive options rather than to ameliorate competitive harms created by the Transaction. (B&LE Reply 24-25, Jan. 8, 2020; CSXT Reply 13, Jan. 8, 2020.) B&LE and CSXT note that CSXT is currently the intermediate carrier for overhead movements between points on the FGLK system and points on the CN System in Canada, and that, after the Transaction, nothing would change for such movements except for the interchange point between the CN System and CSXT, as FGLK’s existing tracks do not physically connect with the CN System today on the Massena Lines or anywhere else. (B&LE Reply 24, 35-37, Jan. 8, 2020; B&LE Supp. 3-4, 11, 16, Feb. 14, 2020; CSXT Reply 13, 18-19, 20, Jan. 8, 2020; CSXT Supp. 13-14, Feb. 14, 2020.) B&LE and CSXT note that there are no customers located on FGLK who currently ship or receive carloads in movements by CSXT to or from the U.S. Massena Lines. (B&LE Reply 36, Jan. 8, 2020; B&LE Supp. 7, Feb. 14, 2020; CSXT Supp. 7-8, Feb. 14, 2020.) B&LE and CSXT further assert that a change in the number of carriers involved in a movement is the natural and inevitable result of a line sale and does not necessarily raise competitive concerns. (B&LE Reply 29, Jan. 8, 2020; CSXT Supp. 8-10, Feb. 14, 2020.) Thus, B&LE and CSXT argue that

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<sup>10</sup> FGLK also asserts that the restriction would negate the rights of FGLK to connect with B&LE/CNR under the Railroad Industry Agreement (RIA) that allows short lines to avoid paper and steel barriers under specified circumstances. (FGLK Comment 8, Dec. 9, 2019.) B&LE and CSXT state that section 5.14(b) does not and cannot override any potential application provision of the RIA. (B&LE Reply 38-39, Jan. 8, 2020; B&LE Supp. 21, Feb. 14, 2020; CSXT Reply 15-16, Jan. 8, 2020.)

granting trackage rights to facilitate a direct connection between FGLK and B&LE would effectively enhance FGLK's current competitive position—reducing the number of interchanges for such local traffic—rather than address any anticompetitive impacts of the Transaction. (B&LE Reply 21, Jan. 8, 2020; B&LE Supp. 12, Feb. 14, 2020; CSXT Reply 21-22, Jan. 8, 2020.) B&LE and CSXT also argue that the trackage rights sought by FGLK would amount to affirmative relief requiring a responsive application, which is not permitted in a minor transaction proceeding under 49 U.S.C. § 11325(c) and 49 C.F.R. §§ 1180.3(h), 1180.4(d)(1). (B&LE Reply 16-17, Jan. 8, 2020; CSXT Reply 10, 21, Jan. 8, 2020; CSXT Supp. 13, Feb. 14, 2020.) B&LE and CSXT argue that the proximity of B&LE's operations to FGLK's Solvay Yard does not diminish competition and is not relevant to a competitive analysis. (B&LE Supp. 18-19, Feb. 14, 2020; CSXT Supp. 3-6, Feb. 14, 2020.) B&LE and CSXT also describe the operational difficulties that would arise should the Board grant trackage rights along CSXT's main line between Solvay Yard and Woodard. (B&LE Supp. 16-18, Feb. 14, 2020; CSXT Supp. 11-12, Feb. 14, 2020.)

With respect to section 5.14(b) of the PSA, B&LE and CSXT contend that it preserves the status quo where CSXT operates between the CN System and FGLK. They assert that, unlike an interchange commitment, section 5.14(b) does not prohibit an interchange with FGLK; it only restricts B&LE, not FGLK, from seeking to create a direct connection between the two carriers. (B&LE Supp. 20, Feb. 14, 2020; CSXT Reply 14-15, Jan. 8, 2020; CSXT Supp. 7, Feb. 14, 2020.) CSXT further states that, should FGLK create a direct physical connection with B&LE, 49 U.S.C. § 10742 would require B&LE to allow the interchange and section 5.14(b) would not prevent it. (CSXT Reply 15, Jan. 8, 2020.) CSXT asserts that the main purpose of section 5.14(b) is to keep B&LE from undermining the economic assumptions underlying the negotiated terms of the Transaction by taking actions that would eliminate or restrict CSXT's ability to participate in movements to and from Canada. (CSXT Supp. 7, Feb. 14, 2020.)

In its supplemental comments and reply, FGLK acknowledges that no FGLK customers currently originate or terminate traffic on the Massena Lines; however, FGLK maintains that demand for such moves exists. (FGLK Supp. 2, Feb. 14, 2020; FGLK Supp. Reply 10, Feb. 21, 2020.) FGLK asserts that CSXT has not been willing to quote truck-competitive rates and that the likelihood of shippers obtaining competitive pricing to or from points on the Massena Line would further diminish with the addition of another carrier into the route. (FGLK Supp. Reply 10, Feb. 21, 2020.) FGLK also states that its shippers that currently route traffic to and from Canada west through Buffalo could easily be routed over the Massena Lines if CSXT were to competitively price this route. FGLK asserts that, post-Transaction, CSXT would use section 5.14(b) to continue to act as a gatekeeper, pushing this traffic through Buffalo and eliminating the Massena Lines as a competitive option for FGLK shippers. (Id. at 9-10.)

FGLK's request for trackage rights over CSXT, between Solvay and Woodard, will be denied. As noted by B&LE and CSXT, a request to grant trackage rights to a third party amounts to a responsive application, which is not permitted in a minor transaction proceeding under 49 U.S.C. § 11325(c) (providing for applications inconsistent with the primary application in only major and significant transactions) and 49 C.F.R. §§ 1180.3(h) (defining responsive applications to include inconsistent applications and requests for affirmative relief such as trackage rights), 1180.4(d)(1)§ 1108.4(d)(1) (prohibiting responsive applications in minor



transactions). See NS/D&H, FD 35873, slip op. at 24-25. Even if such relief were permissible, the Board finds that no likely or substantial competitive harm would result from the Transaction itself that would warrant the trackage rights relief sought by FGLK. As for overhead traffic, CSXT currently is, and post-Transaction would remain, the bridge carrier between points on FGLK and points on the CN System in Canada. Post-Transaction, the interchange point between CSXT and the CN system would move from Huntington to Woodard, but movements between FGLK shippers and the CN System in Canada would continue to be moved by FGLK, CSXT, and the CN System. As for local traffic, FGLK acknowledges that there is “no current traffic moving between points on the Massena Lines and FGLK shippers[.]” (FGLK Supp. Reply 10, Feb. 21, 2020.) Accordingly, there is no traffic currently routed from FGLK to CSXT where the routing would result in the addition of a third intermediate carrier (B&LE/CN System) post-Transaction. Nor has any local shipper indicated a reduction in competitive options or other anticompetitive conduct as a result of the Transaction.<sup>11</sup>

However, the Board does have serious concerns about section 5.14(b) of the PSA, which restricts B&LE from *ever* seeking access to FGLK and NYSW—whether “directly or indirectly,” “before or after” the Transaction, even through means other than the Transaction. Although the Board recognizes that B&LE is not being granted operating rights to reach or interchange with FGLK and NYSW as part of the Transaction, section 5.14(b) would apply far beyond this Transaction, by preventing B&LE from *ever* exercising its rights, under the Board’s statutes and regulations, to seek access to those carriers. The inclusion of this 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. Cf. Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1), slip op. at 14-15 (STB served Oct. 30, 2007); see also 49 U.S.C. § 10101.

The Board recognizes that section 5.14(b) is not a traditional interchange commitment under our regulations because B&LE’s operations would not connect with FGLK’s lines (although they will run within 600 feet of FGLK’s lines). See 49 C.F.R. § 1180.4(g)(4)(i). But the Board in recent years has taken a more expansive view of what may constitute an interchange restriction. See, e.g., Piedmont & Atl. R.R.—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry., FD 35841, slip op. at 2-3 (STB served Sept. 18, 2014) (rejecting an interpretation of interchange commitment that excluded provisions where there is no third-party connection, or reasonable possibility of a connection, to the line being leased). In any event, section 5.14(b) is at the very least analogous to an interchange commitment, in that it places restrictions on a purchaser (here, B&LE, a short line) that “limit the incentive or the ability of the purchaser . . . to interchange traffic with rail carriers other than the seller[.]” Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1), slip op. at 1. Even if B&LE wanted to explore new competitive options with FGLK or NYSW, including those requiring Board intervention, it would be contractually prohibited from doing so, despite the fact that B&LE owns a nearby line. Thus, the Transaction as currently structured would put B&LE (and any potential new shippers generated by FGLK or NYSW) in a less favorable competitive

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<sup>11</sup> Cf. NS/D&H, FD 35873, slip op. at 25-27 (denying conditions to short lines that would experience the addition of a carrier to their routes as a result of the transaction).

position than other carriers in its same position. Moreover, the PSA provision here is of the type 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. See Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1), slip op. at 15.<sup>12</sup> Whereas, in the absence of section 5.14(b), the CN System would have the same rights as other carriers to seek access over CSXT (or otherwise access FGLK and NYSW) through means other than the Transaction, the presence of section 5.14(b) bars at least one part of the CN System, B&LE, from doing so in perpetuity. It would limit regional rail competition in the long run, reducing the potential public benefits of the Transaction.

The Board has long exercised its conditioning authority to resolve competitive concerns caused by minor transactions. See, e.g., NS/D&H, FD 35873, slip op. at 18-20 (conditioning minor line sale on parties’ voluntary agreements ensuring continued shipper and short-line access to multiple carriers). Due to the competitive concerns caused by this one aspect of the Transaction, the Board will impose a condition to ensure that this 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 shippers on the relevant lines will be less likely to be shut out of future potential competitive options. Due to the Board’s concerns regarding section 5.14(b), B&LE and CSXT will be required, as a condition of the Board’s approval of the Transaction, to modify or eliminate section 5.14(b) to adequately address the Board’s concerns described above. The parties must submit their proposed changes to section 5.14(b) to the Board by May 6, 2020. The Board will review the submission and, unless stayed by subsequent order of the Board, this decision will be effective May 21, 2020.

In response to B&LE’s and CSXT’s arguments that the Board may not use its conditioning authority to create new competitive options or to address pre-existing competitive circumstances,<sup>13</sup> the Board notes, *first*, that its condition requiring revision of section 5.14(b) does not create new competitive options (for FGLK, NYSW, or B&LE); it merely ensures that B&LE is not *forever* foreclosed from seeking new competitive options in the future through means other than this Transaction. *Second*, to 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,<sup>14</sup> but rather ensures that the current physical circumstance does not forever bar a short-line purchaser from exercising its statutory/regulatory rights to seek access to other carriers made newly proximate through a line-sale transaction.

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<sup>12</sup> CSXT argues that antitrust law recognizes that restrictions like section 5.14(b) in sales agreements are often pro-competitive. (CSXT Reply 17-18, Jan. 8, 2020.) However, even under antitrust law, restrictive covenants are enforceable (and pro-competitive) only when reasonably limited in scope and duration. See, e.g., Perceptron, Inc. v. Sensor Adaptive Machines, Inc., 221 F.3d 913, 918-20 (6th Cir. 2000); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265-67, 269 (7th Cir. 1981).

<sup>13</sup> (See CSXT Reply 19-21, Jan. 8, 2020; B&LE Reply 15-16, Jan. 8, 2020).

<sup>14</sup> Cf. NS/D&H, FD 35873, slip op. at 32-33 (denying condition seeking full removal of a contractual restriction negotiated prior to the underlying line sale transaction).

*Fulton Subdivision Conditions.* The Fulton Subdivision is an approximately 31-mile branch line of the Massena Lines that runs between Fort Ontario, and the connection with the St. Lawrence Subdivision at Woodard. The Port of Oswego Authority is a full intermodal center that is located on the Fulton Subdivision and is currently served by CSXT. The Port notes that it “has been in discussions with [FGLK] with respect to FGLK becoming a rail operator at the Port.” (Port Comment 5.) The Port states that, as a result of the Transaction, the Port would no longer receive direct service from CSXT, and B&LE would act as an intermediate carrier between the Port and CSXT. (*Id.* at 2.) The Port contends that this would require “an additional interchange” and “coordination and participation of a third carrier,” which would eventually cause reduced operating efficiency, increased costs, and increased transit time. (*Id.* at 2-3.)

The Port also asserts that the transaction would result in the loss of a potential rail option on the Fulton Subdivision, between the Port and Novelis, an aluminum ingot receiver located four miles from the Port. The Port notes that, while the Port and Novelis have not been able to establish rail service between themselves and CSXT, such a rail service may be unavailable post-Transaction, because CN directly competes with the Port for traffic to Novelis through CN’s transloading facility in Brockville, Ontario. (*Id.* at 3.) The Port further asserts that, while CSXT has shown little willingness to establish a rail shuttle to transport corn between the Port and Attis on the Fulton Subdivision and has, the Port contends, introduced pricing and other entry barriers, CN would seek to impose a similar entry barrier to providing corn to Attis. (*Id.* at 4.) The Port also expresses concern about the lack of price protections following the expiration of the Port’s contracts with CSXT and concern that competing grain products moved by CN from Canada would have a negative economic impact on the business model in place due to currency exchanges between the U.S. and Canadian dollars. (*Id.* at 3, 4.) Lastly, the Port notes that, in an effort to get the Fulton Subdivision designated as an intermodal line, it has held discussions with CSXT to correct deficiencies on the Port Industrial Lead. (*Id.* at 4.)

To alleviate alleged competitive harms that the Port would suffer as a result of the proposed transaction, the Port requests that the Board condition its approval of the Transaction on: (1) granting FGLK trackage rights over the Fulton Subdivision to provide “expanded switching access” between the Port and CSXT and to provide a four-mile rail “shuttle” service between the Port and Novelis; (2) maintaining current pricing on all commodities listed in B&LE’s application for a period of five years and imposing a fixed rate of \$600/freight car including track spot placement on all new commodities shipped by the Port for a period of five years; (3) requiring CN to work with the Port to correct any deficiencies on the Port Industrial Lead between milepost 34.80 and the Port and designate the Fulton Subdivision as an intermodal line; and (4) prohibiting Canadian grain imports into the Port whenever the exchange rate of \$1.00/CA is greater than \$0.80/US. (*Id.* at 5-6.)

FGLK supports the Port’s request for maintaining current pricing, as well as “preserving direct access to CSXT by permitting FGLK to provide extended switching service via trackage rights, on reasonable terms and conditions” on the Fulton Subdivision. (FGLK Comment 16, Dec. 9, 2019.) FGLK also supports the Port’s request that the Board condition approval on requiring B&LE to allow the Port to establish a shuttle service with Novelis by granting trackage rights to FGLK between the Port and Novelis. (*Id.* at 3, 9-11, 16-17.)

B&LE and CSXT argue that these conditions address pre-existing circumstances and do not relate to any reduction in competition, as shippers on the Fulton Subdivision currently have access to a single rail carrier—CSXT—and will continue to be served by one carrier—B&LE—after the Transaction. (B&LE Reply 27-28, Jan. 8, 2020; CSXT Reply 22, Jan. 8, 2020.) CSXT asserts that the request for FGLK to operate on the Fulton Subdivision is based on speculation that prices may increase or service levels may decline because of the costs associated with introducing an additional carrier on the route. But CSXT asserts that granting B&LE operating rights to the DeWitt and Belle Isle Yards would minimize any operational inefficiencies that could result from B&LE's participation in traffic moving on the Fulton Subdivision and further notes that possible price increases or service declines unrelated to any change in competition are outside the scope of the Board's conditioning authority. (CSXT Reply 23-24, Jan. 8, 2020.) B&LE argues that the sought conditions would protect or improve FGLK's competitive position by increasing the number of railroads that currently operate on the Fulton Subdivision and that such conditions are inappropriate without showing that they are necessary to prevent anticompetitive effects. (B&LE Reply 21, Jan. 8, 2020.) B&LE and CSXT further argue that there is no basis for the imposition of conditions that would set price guarantees, require facility improvements, or prohibit Canadian grain imports, as the request for these conditions is not based on any anticompetitive harm. (B&LE Reply 25-26, 32-35, Jan. 8, 2020; CSXT 24, 25, Jan. 8, 2020.)

The requested conditions will be denied. As discussed above, the granting of trackage rights to third parties is not permitted in minor transactions under 49 U.S.C. § 11325 and 49 C.F.R. §§ 1108.3(h), 1180.4(d)(1). See NS/D&H, FD 35873, slip op. at 24-25. Neither FGLK nor the Port has shown a likely or substantial adverse competitive impact or reduction of competitive rail service options on the Fulton Subdivision as a result of the Transaction. The Port and other shippers on the Fulton Subdivision are currently served by one carrier and would continue to be served by one carrier post-Transaction. Granting FGLK trackage rights on the Fulton Subdivision would directly expand, rather than preserve, competitive options, which falls outside the scope of the Board's conditioning authority. See BN/SF Merger 1995, 10 I.C.C.2d at 745; see also NS/D&H, FD 35873, slip op. at 24 (denying a request for trackage rights that would expand competitive options and increase competition to levels of service that did not currently exist).

The Port contends that the Transaction would result in the Port losing a direct connection to CSXT; however, the Port has not shown how loss of single-line service, which typically occurs in any line sale, would be anticompetitive. While a line sale may add a carrier to certain movements or may increase the complexity of routing options by adding an interchange point for certain traffic, the Port has not shown how the addition of an intermediate carrier would necessarily result in a reduction of service or have an anticompetitive effect. Cf. NS/D&H, FD 35873, slip op. at 27. As CSXT notes, the actual handling of traffic would not change significantly, as traffic would continue to move through Belle Isle Yard, as it does currently. (See CSXT Reply 8, Jan. 8, 2020.) The Board expects B&LE to work with customers on the acquired lines to establish efficient rail service. Moreover, the Port's proposal to grant FGLK trackage rights on the Fulton Subdivision would not address any of the alleged impacts of losing single-line service, as it would add an additional carrier to the current traffic movements.

Given that neither the Port nor FGLK has shown a reduction in competition or any other substantial or likely anticompetitive impact directly related to the Transaction (other than the effects of the contractual provision discussed above), the Board finds no basis for granting any of the other conditions sought by the Port and FGLK pertaining to the Fulton Subdivision. The Port provides no support for imposing fixed price commitments for commodities shipped by the Port, nor any showing of competitive harm. The Port's request for a condition requiring CN to work with the Port to correct deficiencies at its facility is unrelated to any purported anticompetitive impact of the Transaction and appears to be addressing a pre-existing condition, as the Port has been unable to reach an agreement with CSXT regarding this potential track expansion project. Lastly, the Port provides no authority that would support a Board-imposed condition that would restrict Canadian grain imports based on currency exchange rates.

### Employee Protection

Under 49 U.S.C. § 11326(a), the Board must impose employee protective conditions on its approval of this transaction. Because this transaction is a line sale under 49 U.S.C. § 11323(a)(2), the appropriate employee protective conditions to impose are those set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C. 2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).

SMART/TD-NY opposes the Transaction but argues that, should the Board approve the Transaction, it should impose the employee protection conditions under New York Dock, rather than New York Dock, as modified by Wilmington Terminal. (SMART/TD-NY Comment 4, Dec. 19, 2019.) SMART/TD-NY argues that the labor conditions in Wilmington Terminal are only applicable to the lease or acquisition of a Class III carrier from a Class I carrier. SMART/TD-NY suggests that, because B&LE is part of the CN System, it is a Class I carrier and thus “full employee conditions are applicable” here. (Id.) TWU and Allied Rail Unions assert that the Wilmington Terminal modifications to New York Dock are not permitted under ICCTA, but acknowledge that, under Board and ICC precedent, the modified conditions are imposed in transactions like this one and should be imposed if the Board approves the Transaction here. (Allied Rail Unions Comment 2; TWU Comment 1-2.)

New York Dock applies to 49 U.S.C. § 11323 transactions involving “consolidations” (e.g., merger or common control) in which at least one entity will cease to exist as a separate entity and, as such, requires a single negotiated umbrella agreement covering all involved employees. See NS/D&H, FD 35873, slip op. at 28-29. Wilmington Terminal modifies the New York Dock conditions by providing that no umbrella agreement is required for line sales under 49 U.S.C. § 11323, as each side of the transaction negotiates with its own employees: seller negotiating solely with seller's employees, and buyer negotiating solely with buyer's employees. Id. As the Transaction is clearly a line sale under 49 U.S.C. § 11323(a)(2), the correct employee protective conditions for this case are New York Dock, as modified by Wilmington Terminal. See Mass. Coastal R.R.—Acquis.—CSX Transp., Inc., FD 35314 (STB served May 19, 2010) (stating that “[i]n approving line sales under [49 U.S.C.] §§ 11323-25 that involve a Class I rail

carrier, the appropriate employee protection conditions under § 11326(a) are New York Dock, as modified by Wilmington Terminal."); see also Union Pac. R.R.—Acquis. & Operation Exemption—Brownsville & Matamoros Bridge Co., FD 35791 et al. (STB served March 13, 2014); BNSF Ry.—Acquis. & Operation Exemption—Neb. Ne. Ry., FD 35644 (STB served Oct. 18, 2012); Union Pac. R.R.—Acquis. & Operation Exemption—San Pedro R.R. Operating Co., FD 35666 (STB served Sept. 7, 2012). Contrary to SMART/TD-NY's suggestion, this is the applicable standard regardless of the size of the railroads involved. See Wilmington Terminal, 6 I.C.C.2d at 815-16; NS/D&H, FD 35873, slip op. at 29; Canadian Pac. Ltd.—Control—Davenport, Rock Island & N. W. Ry., FD 32579, slip op. at 6-7 (I.C.C. served Feb. 10, 1995).

Environmental Issues. The traffic levels involved in the proposed acquisition transaction fall below the Board's thresholds for environmental review in 49 C.F.R. § 1105.7(e)(4) and (5). Therefore, the Transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2), and no environmental review is required. Furthermore, no historic review is required for this line sale. See 49 C.F.R. § 1105.8(b)(1) & (3).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. B&LE's application to acquire and operate CSXT's Massena Lines is approved.
2. Approval of the Transaction is subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991).
3. Approval of the Transaction is further subject to the condition that B&LE and CSXT modify or eliminate section 5.14(b) of the PSA governing this Transaction to address the Board's concerns described above. B&LE and CSXT must submit their proposed changes to section 5.14(b) to the Board by May 6, 2020, for review.
4. Any condition requested by any party in this proceeding that has not been specifically approved in this decision is denied.
5. Petitions for reconsideration of this decision must be filed by April 27, 2020. Requests for stay must be filed by May 13, 2020.
6. This decision will be effective on May 21, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Fuchs dissented in part with a separate expression.

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BOARD MEMBER FUCHS, concurring in part and dissenting in part:

I agree that B&LE’s application to acquire and operate CSXT’s Massena Lines should be approved, and I dissent only on the imposed condition that B&LE and CSXT modify or eliminate section 5.14(b) of the PSA (Condition). This decision (Decision) finds that “the Transaction itself would maintain the competitive status quo” because no shipper would experience reduced competitive options. Decision 5. Indeed, the Decision identifies no likely or substantial competitive harm caused by any of the proposed operational changes under the Transaction. *Id.* at 9, 13. The Decision also finds that the Transaction would lead to meaningful public benefits, such as reduced transit times. *Id.* at 5. Despite these key findings, the majority concludes that the terms of the Transaction must be changed. In my 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.

In assessing the Transaction under 49 U.S.C. § 11324(d), the Decision does not demonstrate that section 5.14(b) causes competitive harm warranting disruption of a carefully negotiated line sale.<sup>1</sup> The Condition is premised on protecting a sophisticated buyer, B&LE, from voluntarily negotiating away its own rights in order to secure a purchase. Because the Condition is premised on the rights of a carrier, rather than on competitive harm to specific shippers, it is worth reviewing the pertinent dynamics between carriers pre- and post-Transaction. Currently, the CN System and FGLK are separated by more than 230 miles,<sup>2</sup> and CSXT serves as an intermediate carrier. After the Transaction, B&LE (part of the CN System) and FGLK<sup>3</sup> would be separated by just 2.8 miles,<sup>4</sup> and CSXT would continue to participate in movements between the CN System and FGLK.<sup>5</sup> The CN System and FGLK still would not

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<sup>1</sup> As the Decision explains, under § 11324(d), the Board must approve a transaction unless it would cause adverse competitive effects that are both “likely” and “substantial” and those adverse effects would not be outweighed by the anticipated benefits. *See* Decision 4-5.

<sup>2</sup> (FGLK Comment, V.S. Smith 1, Dec. 9, 2019.)

<sup>3</sup> In addition to its activities as a rail carrier, which are the focus of the analysis here, FGLK provides non-carrier switching service to a shipper on the Fulton Subdivision. (FGLK Comment 6, Dec. 9.) Section 5.14(b) does not prevent B&LE from handling this traffic switched by FGLK. (CSXT Reply, 15, Jan. 8, 2020; B&LE Reply 38, Jan. 8, 2020.)

<sup>4</sup> (FGLK Comment 6, Dec. 9, 2019.)

<sup>5</sup> Currently, for movements between the CN System and FGLK, CSXT serves as the intermediate carrier for rail traffic moving to and from points in Canada, and it would remain so under the Transaction. (B&LE Reply 3, Feb. 14, 2019.) The record shows that there are no FGLK customers who currently ship or receive rail traffic to or from points on the Massena Lines. Decision 9. The movements for that traffic, if it existed, would involve three carriers, rather than two, following the Transaction. However, the Decision rejected that possibility as justifying the trackage rights condition requested by FGLK, *id.* at 9, and the same reasoning ought to apply to the Condition. *Cf. Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H)*, FD 35873, slip op. at 25-27 (STB served May 15, 2015).

directly connect,<sup>6</sup> but their newfound close proximity would theoretically create a more realistic path to a competitive access order or build-out, allowing the carriers to cut out CSXT from movements in which it currently participates. Given that CSXT would not agree to sell the Massena Lines if it were then to be cut out of such movements,<sup>7</sup> CSXT and B&LE negotiated and agreed to section 5.14(b).

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)<sup>8</sup> than to cause any competitive harm. Under Board precedent, the Board evaluates the competitive effects of a proposed transaction by examining the competitive situation that existed in the market *before* the transaction,<sup>9</sup> and the Board may use its conditioning authority to ameliorate competitive harm caused by a proposed transaction. See NS/D&H, FD 35873, slip op. at 22 (citing Kan. City S.—Control—Kan. City. S. Ry., FD 34342, slip op. at 16 (STB served Nov. 29, 2004)). Under section 5.14(b), B&LE agreed to limit itself from seeking to cut out CSXT from movements between the CN System and FGLK, but, without the Transaction, CSXT would be in no position to be removed from these movements. The record contains no indication that there is a reasonable or even remote likelihood that the 200 miles, spanning two countries, between the CN System and FGLK would be directly connected by build-out or competitive access order. Thus, compared to the competitive situation before the Transaction, it is not clear that section 5.14(b) would cause any competitive harm; both pre- and post-Transaction, CSXT would continue to participate in movements between the CN System and FGLK.<sup>10</sup>

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<sup>6</sup> (FGLK Comment 5, Dec. 9, 2019.)

<sup>7</sup> (CSXT Reply, V.S. Smith 6-8, Jan. 8, 2020.)

<sup>8</sup> As the Decision notes, section 5.14(b) also applies to B&LE seeking access to NYSW. Decision 2-3. The Board did not receive any comments from NYSW, and none of the substantive comments concerning anticompetitive effects center on any movements involving the CN System and NYSW. Given the state of the record, this dissent focuses on the CN System and FGLK, but the Condition's deficiencies extend to its applicability to any movements involving the CN System and NYSW.

<sup>9</sup> See NS/D&H, FD 35873, slip op. at 22-23 (noting that “the harm caused by the transaction ‘must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . i.e., pre-existing disadvantages that will neither be caused nor exacerbated’ by the transaction”) (citing Canadian Nat’l—Control—Duluth, Missabe and Iron Range Ry. (CN/DMIR), FD 34424, slip op. at 14 (STB served April 9, 2004); and Genesee & Wyo. Inc.—Control—RailAmerica, Inc. (GWI/RailAmerica), FD 35654 et al., slip op. at 3 (STB served Dec. 20, 2012). See also Portland & W. R.R.—Lease & Operation Exemption—Lines of Burlington N. R.R., FD 32766, slip op. at 5-6 (STB served October 15, 1997).

<sup>10</sup> In its January 8 comment, CSXT argued, “[c]ommercial sale agreements often include restrictions on future conduct, and the courts and antitrust agencies have repeatedly found such restrictions to be reasonable when they promote pro-competitive transactions, particularly when they do not reduce competition from pre-transaction levels.” (CSXT Comment 18, Jan. 8, 2020.) The Decision dismisses this point by suggesting that section 5.14(b) is not reasonably limited in



Indeed, in commenting on the deal that B&LE negotiated, FGLK laments section 5.14(b) continues a pre-existing disadvantage, stating that “CSXT has required that it *remain* as the gatekeeper[.]” (FGLK Comment 15, Dec. 9, 2019 (emphasis added).) FGLK’s view on the need for a section 5.14(b) condition sharply contrasts with the Board’s precedent. The Board has long stated it does not use its conditioning authority to address “pre-existing disadvantages that will be neither caused nor exacerbated” by the Transaction.<sup>11</sup> Understandably, FGLK desires a newly expanded market, stating “FGLK believes there would be *additional* traffic opportunities *if* there were a direct connection between FGLK and B&LE and the CN System[.]” (FGLK Comment 5, Dec. 9, 2019 (emphasis added).) But the Board does not use its conditioning authority to expand competitive options “for a carrier seeking to expand the market or expand its current business.”<sup>12</sup>

To the extent that section 5.14(b) could be seen as exacerbating a pre-existing circumstance or foreclosing a competitive option, however unlikely or remote, the magnitude of any competitive harm is moderated by the other opportunities for connections to the CN System. Section 5.14(b) does not restrict FGLK, or any party other than the B&LE, from seeking to remove CSXT as an intermediate carrier. Following the Transaction, FGLK, and any other party not involved in the Transaction, maintain all their existing rights to seek and establish a new connection with the CN System, such as by constructing a build-out or securing competitive access.<sup>13</sup> If such new connection were to be established,<sup>14</sup> section 5.14(b) would not prevent B&LE from meeting its interchange requirements under 49 U.S.C. § 10742 or cause it to violate a competitive access order. (B&LE Comment 20, Feb. 14, 2020.)

I am concerned that the Condition jeopardizes the public benefits of the Transaction and may deter future transactions that would improve the rail network. 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). And it does not seem to consider fully the possibility that the Condition might substantially delay or even end the Transaction and destroy the benefits that come with it. (CSXT Reply, V.S. Smith 6-8, Jan. 8, 2020.) Regardless of whether B&LE and CSXT still make this deal, the precedent here today may well have a chilling effect on the types of basic, minor

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scope and duration, Decision 10, but the Decision does not clearly define what it views as a reasonable scope and duration.

<sup>11</sup> See e.g., NS/D&H, FD 35873, slip op. at 22-23 (citing CN/DMIR, FD 34424, slip op. at 14; and GW/RailAmerica, FD 35654 et al., slip op. at 3).

<sup>12</sup> See NS/D&H, FD 35873, slip op. at 24; Burlington N. Inc.—Control & Merger—Santa Fe. Pac. Corp., 10 I.C.C. 2d 661, 745 (1995) (explaining that the agency’s “conditioning power is used to *preserve* competitive options (not to *expand* them)” (emphasis original)).

<sup>13</sup> For FGLK, as result of the Transaction, such a build-out or order would cover a significantly shorter distance.

<sup>14</sup> The Decision discusses the Board’s interchange commitment precedent. Decision 9-10. Besides the fact that, as the Decision acknowledges, section 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.

transactions—producing gains from trade as a buyer makes better use of a line than a seller—that lead to a better rail network to meet the needs of the public.