

LAW OFFICES OF  
**LOUIS E. GITOMER, LLC.**

LOUIS E. GITOMER  
Lou@lgraillaw.com

MELANIE B. YASBIN  
Melanie@lgraillaw.com  
410-296-2225

600 BALTIMORE AVENUE, SUITE 301  
TOWSON, MARYLAND 21204-4022  
(410) 296-2250 • (202) 466-6532  
FAX (410) 332-0885

November 29, 2012

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

233420

Re: Finance Docket No. 35522, *CSX Transportation, Inc. -Acquisition-* ENTERED  
*Grand Trunk Western Railroad Company*

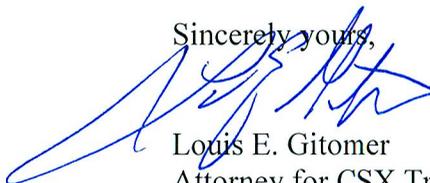
Dear Ms. Brown:

Office of Proceeding  
November 29, 2012  
Part of Public  
Record

Enclosed for e-filing is the Rebuttal of CSX Transportation, Inc.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer  
Attorney for CSX Transportation, Inc.

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. FD 35522

---

CSX TRANSPORTATION, INC.—ACQUISITION—  
GRAND TRUNK WESTERN RAILROAD COMPANY

---

REBUTTAL OF CSX TRANSPORTATION, INC.

---

Peter J. Shultz, Esq.  
David A. Hoffman, Esq.  
Steven C. Armbrust, Esq.  
CSX Transportation, Inc.  
500 Water Street J-150  
Jacksonville, FL 32202  
(904) 359-1229

Louis E. Gitomer, Esq.  
Melanie B. Yasbin, Esq.  
Law Offices of Louis E. Gitomer, LLC  
600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(410) 296-2250  
Lou@lgrailaw.com

Attorneys for: CSX Transportation, Inc.

Dated: November 29, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. FD 35522

---

CSX TRANSPORTATION, INC.— ACQUISITION—  
GRAND TRUNK WESTERN RAILROAD COMPANY

---

REBUTTAL OF CSX TRANSPORTATION, INC.

---

CSX Transportation, Inc. (“CSXT”) submits this rebuttal to the comments filed by the American Train Dispatchers Association (“ATDA”) and State Representative Kelly Burke. The Illinois Chamber of Commerce (the “ICC”) filed comments in support of the Proposed Transaction. Neither the comments of ATDA nor Representative Burke raise any competitive concerns with the proposed transaction. There is no evidence of record that the Proposed Transaction will result in a substantial lessening of competition or a restraint of trade in freight surface transportation. Therefore, pursuant to the explicit language of 49 U.S.C. §11324(d), the Board “shall approve” the transaction. CSXT respectfully requests the Board to approve the application and related trackage rights transactions.

**BACKGROUND**

CSXT filed a minor application on August 13, 2012, pursuant to 49 U.S.C. §11323(a)(2) and 49 C.F.R. §1180 seeking approval from the Surface Transportation Board (the “Board”) for CSXT to acquire an exclusive, perpetual non-assignable railroad operating easement (the “Easement”) over approximately 22.37 miles of Grand Trunk Western Railroad Company’s (“GTW”) Elsdon Subdivision between the connection with CSXT at Munster, IN, milepost

31.07, and Elsdon, IL, milepost 8.7 (the “Elsdon Line”). GTW is retaining overhead and local trackage rights over the Elsdon Line.<sup>1</sup> The acquisition of the Easement over the Elsdon Line by CSXT is referred to as the “Proposed Transaction.”

In addition to the comments filed by ATDA and Representative Burke, a letter in support of the Proposed Transaction was filed by the Illinois Chamber of Commerce. No comments were filed concerning the two related transactions, the grant of trackage rights to the B&OCT and the GTW Affiliates.

CSXT and GTW entered an Agreement for Exchange of Perpetual Easements dated as of August 13, 2012 (the “Agreement”) (See Volume II of the Application)<sup>2</sup> to effectuate the Proposed Transaction for CSXT to improve the efficiency of its operations in and through the Chicago, IL area, referred to as the “Chicago Terminal.”<sup>3</sup> Under the Proposed Transaction, CSXT will operate up to 21 trains per day over segments of the Elsdon Line, while GTW will operate significantly fewer trains.<sup>4</sup> As provided in the Agreement, and is necessary considering

---

<sup>1</sup> In the directly related proceedings, CSXT is granting trackage rights over the Elsdon Line to: (1) Chicago, Central & Pacific Railroad Company, Elgin, Joliet and Eastern Railroad Company, Illinois Central Railroad Company, and Wisconsin Central Ltd., collectively the “GTW Affiliates” in Docket No. FD 35522 (Sub-No. 2), *Chicago, Central & Pacific Railroad Company, Elgin, Joliet and Eastern Railroad Company, Illinois Central Railroad Company, and Wisconsin Central Ltd.-Trackage Rights Exemption-CSX Transportation, Inc.*; and (2) the Baltimore & Ohio Chicago Terminal Company (the “B&OCT”), a subsidiary of CSXT in Docket No. FD 35522 (Sub-No. 1), *Baltimore & Ohio Chicago Terminal Company- Trackage Rights Exemption-CSX Transportation, Inc.*

<sup>2</sup> CSXT and GTW have agreed to an easement swap, whereby CSXT obtains the Easement on the Elsdon Line and GTW obtains an exclusive, perpetual non-assignable railroad operating easement over approximately 2.1 miles of CSXT’s Memphis Terminal Subdivision, between Leewood, TN, milepost 00F371.4, and Aulon, TN, milepost 00F373.4 (the “Leewood Easement”), in order for GTW and its affiliates to have greater control of the operation of their north-south trains between the Gulf of Mexico and Chicago. See *Grand Trunk Western Railroad Company-Acquisition of Operating Easement-CSX Transportation, Inc.*, Docket No. FD 35661 (served September 12, 2012) (the “Leewood Acquisition”). CSXT and GTW will retain trackage rights over the respective lines.

<sup>3</sup> Each day, about 800 passenger and 500 freight trains move through the Chicago Terminal rail network, which includes about 2,800 route-miles of track, 1,100 viaducts and bridges, and 78 railroad yards.

<sup>4</sup> Pursuant to the November 15, 2012 monthly operational report filed with the Board by Canadian National Railway Company, 9.4 trains per day operate between Griffith and Thornton Jct., 8.3 trains per day between Thornton Jct. and CN Jct., 2.9 trains per day operate between CN Jct. and Blue Island, 0.2 trains per day operate between Blue Island and Hayford, and 0.0 trains per day operate between Hayford and Elsdon. Among the traffic between Griffith and Blue Island between two to four trains per day are operated by CSXT pursuant to the trackage rights cited in

that CSXT will be the primary user of the Elsdon Line, CSXT will assume the responsibility for the maintenance, dispatching and capital improvements on the Elsdon Line. The Chicago Terminal has the densest concentration of railroad lines in the United States. CSXT currently operates over several rail lines that are owned by other railroads and where the maintenance, dispatching, and capital improvements are controlled by those railroads. In becoming the operator of the Elsdon Line, CSXT will be able to reduce congestion on the other lines that it uses to operate through the Chicago Terminal, increase the efficiency of its operations in the Chicago Terminal, and generate savings in excess of \$2 million per year. These benefits will be generated without a reduction in competition.

Today, GTW operates over the Elsdon Line and the GTW Affiliates operate over the Elsdon Line pursuant to trackage rights granted by GTW. CSXT also operates over the Elsdon Line pursuant to trackage rights granted to CSXT by GTW.<sup>5</sup> CSXT and GTW have agreed that CSXT will not be assigned the existing trackage rights agreements between GTW and the GTW Affiliates. Instead, CSXT has agreed to grant trackage rights over the Elsdon Line to the GTW Affiliates.

The Proposed Transaction will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. The Proposed Transaction will not result in a reduction in the number of rail carriers serving any shipper. All of the railroads operating in the Chicago Terminal today will continue to serve the Chicago Terminal. CSXT's use and control of the Elsdon Line will not restrain trade since GTW and the GTW Affiliates will be able to continue to jointly use the

---

footnote 6.

<sup>5</sup> *CSX Transportation, Inc.-Trackage Rights Exemption-Grand Trunk Western Railroad Company*, STB Finance Docket No. 35326 (STB served February 12, 2010).

Elsdon Line via trackage rights and other railroads will continue to be able to use their own routes. Volume I of the Application at pages 22-25. The benefits of the Proposed Transaction will be CSXT's more efficient operation in the Chicago Terminal saving CSXT in excess of \$2 million per year and reducing congestion on other lines within the Chicago Terminal that CSXT is using today. The improved operations within the Chicago Terminal will also yield network benefits, as CSXT incurs inefficiencies on its rail lines outside of the Chicago Terminal in terms of staging and holding trains because of Chicago congestion and operating challenges. A full description of CSXT's current and proposed operations is contained in Volume I of the Application at pages 9-18.

The Board found the Proposed Transaction to be a "minor transaction." *Application Acceptance* at 7.

The Proposed Transaction will enable CSXT to more efficiently move freight to, from, and through the Chicago Terminal. The improved efficiencies will benefit CSXT, its rail partners, its customers, and the Chicago community as a result of CSXT's enhanced ability to expeditiously move rail freight within the Chicago Terminal. These benefits will not be limited to CSXT's operations and network within the Chicago Terminal, but will improve CSXT's operations beyond the Chicago Terminal by enabling CSXT to reduce its reliance on the rail lines of partner rail carriers within the Chicago Terminal and utilize more rail lines that it controls. This will enable CSXT to better operate to and from major connections and terminals within the Chicago Terminal without waiting for approval of other carriers to traverse segments of their rail infrastructure.

The Board (and the ICC before it) "have long recognized that operating arrangements

designed by carriers to promote more efficient or economical operations promote the national [rail] transportation policy and should be encouraged. *Joint Use By CSX Transportation, Inc. and Burlington Northern Railroad Company of Facilities at Memphis, TN*, ICC Finance Docket No. 31448 slip op. at 2-3 (ICC served June 19, 1989). The operating arrangements that CSXT is proposing in the Chicago Terminal will result in more efficient and more economical operations.

### REBUTTAL OF COMMENTS

Comments were filed by ICC, ATDA and Representative Burke. It is worth noting that no opposition to the Proposed Transaction was filed by any railroad, other entities providing transportation in competition with CSXT, or shippers who use CSXT's service or other railroads' service. Moreover, no allegations that competitive harm would result from the Proposed Transaction were filed with the Board.

**Illinois Chamber of Commerce.** The ICC supports the Proposed Transaction. ICC states that "this transaction will result in another efficiency improvement to help promote better movement of freight in the region." The ICC also concludes that the Proposed Transaction" will be of great benefit to the region." CSXT welcomes, and concurs in the comments of the ICC.

**American Train Dispatchers Association.** ATDA Filed comments on November 8, 2012 (the "ATDA Comments"). ATDA does not support or oppose the Proposed Transaction.<sup>6</sup>

ATDA is apparently in agreement that the *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), as modified by *Wilmington Term. RR, Inc.-Pur. & Lease-CSX Transp., Inc.*, 6 I.C.C.2d 799 (1990) (the "*Labor Protective Conditions*") are the appropriate labor protective conditions for the Proposed Transaction. However, because CSXT did not specifically mention dispatch employees, ATDA requests that the Board expressly state that

---

<sup>6</sup> CSXT is responding separately to the comments filed by ATDA in the Leewood Acquisition.

those conditions apply to CSXT and Wisconsin Central, Ltd. (“WCL”) train dispatchers impacted by the Proposed Transaction. ATDA speculates that dispatching desks will be abolished if the territory covered by those desks is reduced, ultimately leading to the potential loss of dispatcher jobs. ATDA Comments at 2. Because CSXT is acquiring responsibility for a rail line, as CSXT explained in its Application, CSXT does not expect any of its employees, including train dispatchers, to be adversely affected by the Proposed Transaction. There will actually be more work for CSXT dispatchers. Moreover, as explained in CSXT’s Application (at 30) and Appendix I to that Application, GTW only expects to abolish maintenance of way positions, not dispatch positions, as a result of the Proposed Transaction.

But, it is premature at this point to address whether any dispatchers will actually be adversely affected some day as a result of the Proposed Transaction. CSXT does not believe so, but if they are, then the *Labor Protective Conditions* will apply. If there is a future dispute whether there was an adverse impact on any particular employee or employees, that will be addressed under the dispute resolution provisions in the *Conditions*. CSXT reiterates its acceptance of the statutorily mandated *Labor Protective Conditions*. GTW is separately responding to ATDA’s comments. However, CSXT understands that GTW and the GTW Affiliates consent to the imposition of the *Labor Protective Conditions*.

ATDA contends “that there has not been an adequate showing that transfer of train dispatching responsibilities is necessary to the effectuation of the transportation efficiencies CSXT declares as the objective of the transaction.” ATDA Comments at 3. CSXT and GTW have agreed that CSXT is to “assume control of and responsibility for dispatching”. Section 1.2(a) of the Agreement in Volume 2 of the Application. The transfer of dispatching is an

integral part of the transaction, which is that the Elsdon Line will functionally become part of CSXT's rail system. ATDA is ignoring CSXT's central goal in the Proposed Transaction of enhancing efficiency by controlling the movement of its trains through the Chicago Terminal instead of relying on other railroads. A key component of that control is the control of dispatching. Moreover, ATDA's contention that CSXT has not shown that transportation efficiencies cannot be realized unless it assumes responsibility for dispatching is made in the context of ATDA's argument that such a showing is necessary in order to override a collective bargaining agreement. Here, ATDA is referring to "WC's contractual obligations under its collective bargaining agreement with ATDA . . . ." ATDA Comments at 3. But ATDA never explains how the fact that CSXT will dispatch the Elsdon Line by virtue of its acquisition of an easement from GTW will violate the GTW-WCL collective bargaining agreement. It does not point to any provision in that agreement that needs to be overridden or otherwise bars GTW from selling an easement to CSXT. Its failure to do so is not surprising since the seller's or lessor's collective bargaining agreements typically cease to apply to a line that has been sold or leased to another carrier.<sup>7</sup> CSXT notes that its dispatchers are also represented by the ATDA and CSXT's dispatch of the Elsdon Line will come under the CSXT-ATDA agreements. And, again, besides lacking any merit, any claim by ATDA that implementation of the Proposed Transaction would require an override of its collective bargaining agreement with WCL would be a matter for the

---

<sup>7</sup> The Board has recognized that the sale of an easement is analogous to the sale of a rail line. For example, when CSXT sold its easement to operate freight service over a certain line to Massachusetts Coastal, the Board imposed the *New York Dock* conditions as modified by *Wilmington Terminal*. See *Massachusetts Coastal Railroad, LLC—Acquisition—CSX Transportation, Inc.*, STB Finance Docket No. 35314 (served May 19, 2010). CSXT notes that the ATDA never claimed that CSXT's dispatchers had to continue dispatching the track after the transaction or that CSXT's labor agreement had to be overridden.

dispute resolution procedures of the *Labor Protective Conditions*.<sup>8</sup>

Next, ATDA argues that if it is not necessary for CSXT to dispatch the Elsdon Line, then the WCL train dispatchers' right to dispatch the Elsdon Line should be preserved. As explained above, there is no need for the Board to make any determination at this time regarding necessity, and, in any event, the ATDA has failed to identify any requirement in its collective bargaining agreement with WCL that WCL dispatchers follow the work if a GTW rail line is acquired by another railroad. Nor is there any such requirement that the WCL dispatchers continue to dispatch the Elsdon Line in the *Labor Protective Conditions*. The *Wilmington Terminal* decision recognizes that

there is no privity of contract (due to lack of employment relationship) between the seller's employees and the buyer to support the right of seller's employees to bargain with the buyer concerning the impacts of the transaction. In legal terms, bargaining rights do not 'run with the property,' but flow, if at all, from the contractual relationship between labor and management. Thus, there is no reason for the buyer or its employees to be parties to any negotiations between the seller and its employees. Nor is there any right for the seller or the seller's employees to require the buyer to enter into negotiations with the seller's employees or to enter into an employment relationship with the seller's employees unless the buyer voluntarily undertakes to do so.

*Wilmington Term. RR, Inc.-Pur. & Lease-CSX Transp., Inc.*, 6 I.C.C.2d 799, 816 (1990), *pet. for review denied sub nom. Railway Labor Executives Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991).

The STB and its predecessor have also repeatedly rejected arguments that the *Labor Protective Conditions*, require "portability" of collective bargaining agreements. *See, e.g.*, 6 I.C.C.2d at 819-20. Thus, ATDA's argument that the Board condition the Proposed Transaction on "the preservation of the train dispatchers' rights under the ARDA-WC CBA" is contrary to fact and

---

<sup>8</sup> It is Board policy not to become involved prematurely in such disputes. *See, e.g., Canadian National, et al.—Control—Illinois Central, et al.*, 4 S.T.B. 122, 163 (1999).

long established and followed legal precedent.

**State Representative Kelly Burke.** Representative Burke raises issues that have been fully addressed and resolved in the Draft Environmental Assessment in the instant proceeding that was served by the Board's Office of Environmental analysis on October 5, 2012. CSXT is confident that OEA will fully address Burke's comments in the Final Environmental Assessment. Representative Burke does not indicate that the Proposed Transaction will result in a substantial lessening of competition or a restraint of trade in freight surface transportation.

**Argument.** The Board "shall approve" a transaction unless it finds both 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.

49 U.S.C. § 11324(d). The Proposed Transaction will result in CSXT rerouting some trains from existing routes in the Chicago Terminal to the Elsdon Line. GTW and the GTW Affiliates will continue to use the Elsdon Line pursuant to the retained and granted trackage rights, respectively. The other railroads in the Chicago Terminal will be able to continue to operate as they do today. No shipper served by two railroads or more today will see a reduction in service options as a result of the Proposed Transaction. No shippers or competitors of CSXT have raised competitive issues about the Proposed Transaction.

Under the governing statutory criteria, the Board's primary focus is on the probable competitive effects of the Proposed Transaction. *See, e.g., Canadian Pacific Ltd., and Soo Line R.R.— Control— Davenport, Rock Island & North Western Ry.*, ICC Finance Docket No. 32579 (ICC served February 10, 1995), at 5; *Wilmington Term. RR, Inc.—Pur. & Lease—CSX*

*Transp., Inc.*, 6 I.C.C. 2d 799, 803 (1990), *pet. for review denied sub nom. Railway Labor Executives Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991). The Board has stated that “our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial.” *Canadian National Railway Company and Grand Trunk Corporation-Control-EJ&E West Company*, STB Finance Docket No. 35087, Decision No. 16, slip op. at 13 (STB served December 24, 2008) The public interest factors are considered only where significant anticompetitive effects are found. *Id.*

The parties have not raised any competitive issues. The unrefuted Application demonstrates that the Proposed Transaction will **not** result in a substantial lessening of competition or a restraint of trade in freight surface transportation. Since there are no significant anticompetitive effects that will result from the Proposed Transaction the Board does not need to consider the public interest factors. However, CSXT contends that the reduced time traveling through the Chicago Terminal and accompanying efficiency savings result in a substantial public interest benefit. Service improvements and cost reductions are public benefits. *Union Pacific-Control-Missouri Pacific: Western Pacific*, 366 I.C.C. 459, 489 (1982).

A finding of competitive harm under Section 11324(d)(1) must be grounded on a showing that any adverse competitive effects are both “likely” and “substantial.” *Wisc. Central Transportation Corporation, et al.*, 9 I.C.C.2d 233, 238 (1992). Examples of adverse competitive impacts that would trigger the balancing of the public interest factors under Section 11324(d)(2) “would be the likelihood of significantly higher rates or significantly worsened service, or the likelihood of a combination of the two.” *Blackstone Cap. Partners—Cont. Exempt.—CNW Corp. et al.*, 5 I.C.C.2d 1015, 1019 (1989). The Proposed Transaction will not

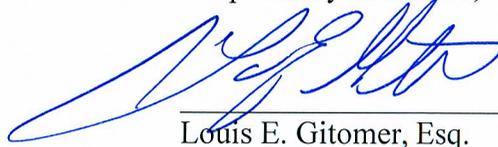
lead to higher rates or worsened service. In fact, the opposite will occur. The Proposed Transaction will allow CSXT to move its trains off of other carriers' lines, thus providing those carriers with more capacity and will provide CSXT with more flexibility in routing traffic. Greater flexibility will allow CSXT to achieve greater efficiencies and will also allow CSXT to provide better service to its shippers.

Even though the Board does not need to consider public interest factors, the Proposed Transaction is in the public interest because it will allow CSXT to operate more efficiently in the Chicago Terminal and will reduce congestion on lines that CSXT is using today. Additionally, the Proposed Transaction supports CREATE Project's goals of reducing rail congestion in and around the Chicago Terminal.

## CONCLUSION

The Proposed Transaction will **not** result in a substantial lessening of competition or a restraint of trade in freight surface transportation. The Proposed Transaction will result in public benefits and efficiency. CSXT respectfully requests the Board to grant this Application subject to the conditions for the protection of employees in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), as modified by *Wilmington Term. RR, Inc.-Pur. & Lease-CSX Transp., Inc.*, 6 I.C.C.2d 799 (1990).

Respectfully submitted,



Peter J. Shudtz, Esq.  
David A. Hoffman, Esq.  
Steven C. Armbrust, Esq.  
CSX Transportation, Inc.  
500 Water Street J-150  
Jacksonville, FL 32202  
(904) 359-1229

Louis E. Gitomer, Esq.  
Melanie B. Yasbin, Esq.  
Law Offices of Louis E. Gitomer, LLC  
600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(410) 296-2250  
Lou@lgraillaw.com

Attorneys for: CSX Transportation, Inc.

Dated: November 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Rebuttal in Finance Docket 35522, *CSX Transportation, Inc.—Acquisition—Grand Trunk Western Railroad Company*, to be served electronically and by first class mail, postage pre-paid on the American Train Dispatchers Association, State Representative Kelly Burke, the Illinois Chamber of Commerce, and the Grand Trunk Western Railroad Company.



---

Louis E. Gitomer  
November 29, 2012