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**Before the**  
**SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36347

**BESSEMER AND LAKE ERIE RAILROAD COMPANY**  
**-ACQUISITION AND OPERATION-**  
**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA,**  
**OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, NY**

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**COMMENTS AND REQUEST FOR CONDITIONS**  
**OF FINGER LAKES RAILWAY CORP.**

*(includes color images)*

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Dated: December 9, 2019

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**OF FINGER LAKES RAILWAY CORP.**

Pursuant to the procedural schedule established by the Board's November 8, 2019 decision<sup>1</sup> in this proceeding, Finger Lakes Railway Corp. ("FGLK") respectfully files the following comments to the Application<sup>2</sup> 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**

FGLK takes no position on whether the transaction should be approved, but believes that the Board must mitigate the anti-competitive features of the PSA and simultaneously consider treating the Montreal Secondary and Fulton Subdivision as separate issues in its deliberations.

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<sup>1</sup> *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").

<sup>2</sup> 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.

In the PSA, FGLK is precluded from having a competitive connection with B&LE/CN which is counter to the Board's charge of promoting competition, and that is an issue that must be addressed.

In addition, B&LE/CN's arguments in support of their acquisition of the Montreal Secondary are contradicted in its purchase of the Fulton Subdivision. An argument in support of the one should not be ignored in the justification of the other. There are major differences in the operations and markets of the two lines. The Montreal Secondary is a "Bridge" between CSXT customers in the US and CN's in Canada. The elimination of the Bridge carrier and the lengthening of CN's line haul (given that most Canadian economic activities are within 50 miles of the border) should result in more business generation. However, the Fulton Subdivision is an originating and terminating line. Inserting B&LE/CN as a "Bridge" on what is almost exclusively a CSXT market only adds operating complexity and expense. B&LE/CN makes a persuasive argument against this arrangement in their justification of the Montreal Secondary purchase. Consistency, in this case would be a virtue.

Accordingly, FGLK supports the requests of shippers on the Fulton Subdivision that seek to protect pricing and efficient rail operations by providing a direct connection to CSXT through expanded switching via trackage rights, and the request of the Port of Oswego (the "Port") for the right to establish a shuttle service on the line.

### **REQUESTED CONDITIONS**

(1) The Board should condition approval of the Application on removal of the prohibition on B&LE accessing or seeking to access FGLK directly or indirectly. The Board should grant FGLK trackage rights, on reasonable terms and conditions, over CSXT to interchange with B&LE, and via B&LE the CN System at the Woodard Yard, NY. Alternatively, the Board

should grant B&LE, and via B&LE the CN System, trackage rights to FGLK's interchange point at Solvay Yard – a location in close proximity to trackage rights that CSXT has already granted to B&LE.

(2) The Board should adopt the conditions proposed by Attis Ethanol Fulton, LLC (“Attis”) and the Port in their separate filings<sup>3</sup> to preserve the current service to these key shippers located on the Fulton Subdivision by (i) preserving pricing for those shippers as they have requested, (ii) preserving direct access to CSXT by permitting the shippers to receive switching service from FGLK on the Fulton Subdivision between CSXT and those shippers and CSXT, and (iii) for the Port, allowing the establishment of a shuttle service with another shipper, Novelis. In order to provide the service, the Board should grant FGLK trackage rights, on reasonable terms and conditions, over B&LE between the shippers and CSXT at FGLK's Solvay Yard and CSXT's Belle Isle Yard in Solvay, NY, and between the Port and Novelis. Shippers requiring the service would be Attis and the Port.

## **I. BACKGROUND AND STATEMENT OF FACTS**

### **A. Finger Lakes Railway Corp.**

FGLK is a Class III railroad headquartered in Geneva, New York that has been operating in the Finger Lakes region since 1995. FGLK operates 167 miles of track in six counties in the Central and Finger Lakes regions of upstate New York as shown on the map attached as Exhibit A to the Verified Statement of Michael V. Smith (the “Smith VS”) attached hereto. *See* Smith VS.

In the first 10 months of 2019, FGLK has handled over 14,082 carloads of switch traffic. As relevant here, FGLK handled 291 carloads of traffic that were interchanged with CSXT for

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<sup>3</sup> Attis and the Port are each parties of record in this proceeding. FGLK understands that each will be filing requests for the conditions discussed herein.

handling east over the lines that are the subject of this proceeding, to and from CN. *See Smith VS.* After the transaction, CSXT will only be providing a short haul of approximately 7.9 miles between the Solvay interchange and Dewitt Yard where CSXT and B&LE/CN will interchange traffic. Although the transaction does not introduce an additional carrier to the route, it allows CSXT to move from line haul participant to gatekeeper, and to control FGLK's Canadian traffic opportunities. FGLK believes that there would be additional traffic opportunities if there were a direct connection between FGLK and B&LE and the CN System, including opportunities to convince CN that FGLK's existing facilities could offer more efficient destinations / transloads rather than CN setting up new competing facilities off of the lines it is purchasing. *See Smith VS.*

FGLK also provides non-carrier switching services for Attis which is located on the Fulton Subdivision as shown on the map attached as Exhibit B to the Smith VS. As the switching provider, FGLK has handled approximately 35 - 40 inbound unit trains of corn (about 3600 carloads), and approximately 2400 outbound carloads of DDGS (distilled dried grains with soluble centers), CO2 and corn oil, all of which has been handled in interline service by CSXT. *See Smith VS; Attis Comment/Request for Conditions ("Attis Comment") and accompanying Verified Statement of Greg Pilewicz ("Pilewicz VS").* All of the traffic inbound and outbound has been developed based on the US domestic markets served by CSXT and its US connections. 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. *See Pilewicz VS of Attis Comment.]*

The Port faces a similar problem.<sup>4</sup> Its business is domestically focused and will also suffer from the introduction of another interline carrier to what was a CSXT direct route. The Port also would be best served if its direct connection with CSXT could be preserved. *See* Smith VS.

The Port also seeks to establish a 4-mile shuttle with a nearby shipper Novelis that it does not believe would or can be handled by B&LE, and thus seeks trackage rights over the Fulton Subdivision for such service.

#### **B. Effects of the Transaction on FGLK**

Under the proposed transaction, Canadian National Railway Company (“CN”) and B&LE, an indirect wholly owned rail carrier subsidiary of CN, will acquire 278.1 miles of rail line from CSXT in the United States and Canada. B&LE will acquire the 236.3 miles of rail line (the “Massena Line”) located in the United States and subject to the Board’s jurisdiction.

As described above, FGLK is a Class III carrier that operates over tracks in New York’s Central and Finger Lakes regions. FGLK interchanges with CSXT, Norfolk Southern Railway Company, and the New York Susquehanna & Western Railroad.

Under the Application, B&LE, for itself and as a proxy for its parent CN will come within 2.8-miles of a direct connection to FGLK via the CSXT mainline near Solvay Yard. *See* Smith VS, Exhibit B; Application, Exhibit 1- Map D(2). Moreover, with the trackage rights CSXT is granting B&LE/CN for interchange at CSXT’s Bell Isle Yard, B&LE/CN will operate in close proximity (528 feet) of FGLK’s interchange point with CSXT at Solvay. *See* Application at 22, 24-25, Exhibit. 1 - Map D(2). Despite this fact, B&LE/CN and CSXT have

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<sup>4</sup> Although the Port is not currently served by FGLK, the Port and FGLK are in discussions under which FGLK would become the rail service provider at the Port.

included a broad provision in the PSA to prohibit B&LE/CN from accessing or seeking to access, directly or indirectly FGLK.

B&LE contends in the Application that the proposed transaction will not reduce competition, stating that the transaction "is not likely to substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States."

Application at 2. However, under the PSA, the B&LE (and by implication CN) agrees not to seek access to FGLK:

The Parties agree that CSX will not grant to Buyer, and Buyer will not seek, directly or indirectly, before or after Closing, through the transactions 9 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.

Application at Exhibit. 2, PSA, Section 5.14(b). As part of this prohibition on access to FGLK, the PSA limits B&LE's and CN's use of trackage rights being granted for interchange with CSXT (although B&LE will be passing by FGLK's Solvay Yard) for interchange with CSXT:

Buyer shall be entitled to the limited use of certain trackage as described in the Operative Documents for the purpose of effectuating interchange, with CSX 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.

Application at Exhibit. 2, PSA, Section 5.14(b). B&LE/CN and CSXT then agree that if access to FGLK "is acquired or required to be afforded prior to, or as a condition of Closing," either party may terminate the transaction. *Id.*

The PSA contains no such restrictions on short line carriers that will have a direct interchange with B&LE/CN including (1) Mohawk, Adirondack, and Northern Railroad Corporation at Carthage, NY; (2) New York and Ogdensburg Railway Company, Inc., and (3) Massena Terminal Railroad Company. Application at 11. Nor are there

restrictions on any other short line carriers that may have an indirect connection with B&LE/CN via CSXT (other than NYS&W).

Although perhaps unintended, the language of the PSA is not geographically limited, and as written would prohibit B&LE from "accessing" FGLK if FGLK were to acquire or begin operations anywhere along B&LE's lines. As noted above, FGLK and the Port are in discussions for FGLK to be the railroad operator at the Port. Under the language of the PSA, B&LE would not be permitted to access FGLK even though it would be the only connecting carrier, and a refusal to access FGLK would be a violation of its mandatory obligation to interchange under 49 USC §10742.

The restriction will prevent FGLK from competing for Canadian traffic moving over the lines being purchased to and from the greater Syracuse area, and leaves FGLK at the mercy of CSXT who controls the FGLK's gateway to the CN System despite its minimal participation in such moves. The 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. Without those alternatives, CN could decide to set up new transload facilities on the lines being purchased which could dry up FGLK's Canadian business.

Moreover, the prohibition would go so far as to negate the rights of FGLK to connect with B&LE/CN under the Railroad Industry Agreement, as amended (the "RIA"), a copy of which is attached hereto as Exhibit 1. The RIA was negotiated by the short line railroads and the Class I railroads to allow short lines to avoid paper and steel barriers under specified circumstances. These would include a requirement for a Class 1 carrier, like CSXT, to provide haulage or trackage rights over up to 15 miles for a short line, like FGLK, to connect to another

Class I carrier, like BLE/CN. RIA, Example 7. But even those limited provisions apparently will not be honored here by CSXT and B&LE/CN.

B&LE in the Application has failed to provide the Board with any justification for this anti-competitive provision singling out FGLK.

**C. Effects of the Transaction on Shippers Located on the Fulton Subdivision**

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 and the Port are two shippers located on the Fulton Subdivision. FGLK provides a non-carrier switching service to Attis under a multi-year contract, and is in discussions with the Port to be the railroad operator at the Port.

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, CSX will maintain the competitive status quo by substituting direct CN service for direct CSX 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 and the Port located on the Fulton Subdivision who also have single line CSXT service now, but after the transaction will not have CN System direct service. Instead, those shippers will see the introduction of B&LE as an intermediate carrier between themselves and CSXT. They will see another interchange (between CSXT and B&LE) requiring coordination and participation of a third carrier. They will see reduced operating efficiency, increased costs and increased transit time –all of the inefficiencies and issues that B&LE/CN say will be eliminated on the Massena Line by

elimination of CSXT as an intermediate carrier. This is why the Board should analyze the acquisition of the Fulton Subdivision, and the effects on shippers, differently than the Massena Line to Woodard.

As we understand Attis and the Port will note, the Application notably provides no protections to shippers following the expiration of contracts shippers on the Fulton Subdivision currently have with CSXT. Attis has price commitments only through September 2020, and is worried that after the expiration of that commitment, prices will rise due to the introduction of another interline carrier to the route. The short term rate commitment conflicts with Attis's multi-year arrangement with FGLK switching services. *See Pilewicz VS of Attis Comment.* Additionally, Attis is also worried about service inefficiencies in the handling of the traffic between CSXT and B&LE that could delay inbound shipments and outbound pickups, all of which are time sensitive given the amount of traffic that must be moved through its facility. *See Pilewicz VS of Attis Comment.*

## **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”).

The Board has looked particularly hard at the adverse effects of a transaction on short line railroads. When Conrail was split between NS and CSXT, the Board noted:

In our merger decisions we have given special consideration to shortline interests, generally providing protections similar to those afforded shippers. For example if a merger would cause a short line to lose one of its two Class I connections, it has been our practice to impose conditions where feasible to preserve a second connection. Similarly, if a shortline carrier has a build-out option to reach a second Class I carrier, we have attempted to preserve that option as well. ...

We are keenly aware that shortlines are an important part of the national rail transportation system. They provide a valuable service in gathering and distributing traffic that generally flows over the lines of the Class I carriers, and they are usually able to provide this type of service at a lower cost than the larger carriers can achieve. . . . Nevertheless, where conditions are warranted to protect the interests of particular shortlines, or shortlines in general, from the adverse impacts of this transaction, we will impose them as appropriate.

*CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, slip op. at 78 (Decision No. 89)(served July 20, 1998)(“CSX/NS/Conrail”).* Similarly, the Board should use its broad conditioning powers to impose on any approval of the Application, the conditions requested by FGLK.

**C. Adverse Effects of the Proposed Transaction.**

FGLK is adversely affected by the proposed transaction by the specific prohibition on B&LE and CN from seeking access with FGLK, a broad prohibition not imposed on other short lines in the region (other than NYS&W). According to the PSA, the parties “agree that CSX will not grant to Buyer [B&LE/CN], 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 Finger Lakes Railway Corporation.” Application at Exhibit 2, PSA, Section 5.14(b). Following this broad prohibition, the PSA provides B&LE and CN with trackage rights over CSXT for the “purpose of effectuating interchange, with CSX only ... provided that such interchange shall not be used for the purpose of achieving access to NYSW or FGLK.” *Id.* These provisions place an unfair, anticompetitive restriction on FGLK’s ability to develop Canadian traffic via B&LE and its parent CN. B&LE provides no explanation to the Board to justify this provision.

In the first 10 months of 2019, FGLK handled only 291 carloads of eastern CN Canadian business via CSXT. If CSXT wanted to protect its participation in this business, it could have imposed a more limited restriction that would have allowed FGLK have direct access to B&LE

and CN to explore new business opportunities with the CN System. Instead, CSXT has required that it remain as the gatekeeper for FGLK. Thus, CSXT gets to determine what Canadian traffic FGLK can participate in or try and win.

Moreover, this anti-competitive provision is expansive and not geographically limited. Under the language of the PSA, if FGLK were to acquire lines connecting to B&LE, or start up a new common carrier rail service – for example at the Port, B&LE would be prohibited from accessing FGLK, although it would have common carrier obligations to interchange.

As expressed in the Attis Comments, Attis is concerned about its rates. In discussions with 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. *See Pilewicz VS of Attis Comment.*

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. *See Pilewicz VS of Attis Comment.* 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 on the Fulton Subdivision, and will be subject to all of the service and pricing inefficiencies that the introduction of an additional carrier brings, as B&LE describes in its “Bridge Line” example for the Massena Line.

FGLK understands that Port also has similar concerns arising from the introduction of another carrier into what was its CSXT direct service, and the potential price increases and service inefficiencies that will result. The Port is also concerned about the loss of the ability to have a potential shuttle to Novelis, a large aluminum ingot receiver that is located four miles from the Port. FGLK understands the Port is raising these concerns in its separate Comments.

#### **D. Proposed Conditions**

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

The Board should condition approval of the Application on removal of the prohibition on B&LE/CN accessing or seeking to access FGLK directly or indirectly.

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 – a location in close proximity to trackage rights that CSXT is already granting to B&LE.

FGLK supports the request for conditions set forth by Attis and the Port in their separate Comment and also 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 the periods requested by each, 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.

The Board should condition approval of the Application on a requirement that BLE allow the Port to establish a shuttle service with Novelis by granting trackage rights, on reasonable terms and conditions to FGLK, between the Port and Novelis.

#### **E. Feasibility of Proposed Conditions**

Allowing B&LE/CN access to FGLK is of course feasible, and required in any future situation where B&LE and FGLK connect directly. Allowing B&LE and FGLK to connect directly via trackage rights to or from the Solvay interchange is also feasible.<sup>5</sup> The 6-mile lines of CSXT and B&LE/CN between Solvay and Woodward are only scheduled to have two trains a day in each direction, leaving plenty of windows to schedule a FGLK trackage rights train to Woodward and back. Alternatively, if the Board were to require that B&LE be given trackage rights to FGLK, it is clear that those rights would be feasible, as B&LE already has been granted trackage rights by CSXT to Belle Island Yard and Dewitt Yard, each of which essentially passes by the lead to FGLK's Solvay Yard.

The conditions requested by and for Attis and the Port are also feasible. It is of course feasible for B&LE/CN and CSXT to make extended price commitments to protect shippers from the potential price increases 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 and from the Port 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, and it has locomotives and train crews at both Solvay and Fulton to

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<sup>5</sup> The industry has already agreed under the RIA FGLK should at least be able to directly access B&LE for certain traffic opportunities given the close proximity between the two carriers.

perform the service. Similarly, there are plenty of windows to operate the Port's requested shuttle to Novelis.

**F. Public Benefits of Proposed Conditions**

The conditions proposed are pro-competitive and preserve the pre-transaction status quo by eliminating the anti-competitive provision limiting B&LE/CN's ability to access FGLK, and by maintaining a CSXT connection to shippers on the Fulton Subdivision.

This Application imposes an entirely new limitation on FGLK's right to interchange with B&LE/CN, and FGLK's requested trackage rights condition alleviates this competitive harm.

Further, the Syracuse area was formerly a major rail distribution location for product moving into the middle Atlantic and New England States. Mergers and abandonment have reduced central New York's competitiveness in this arena and while B&LE's entrance into the region may be helpful in improving the region's participation in this market, the prohibition of a direct access FGLK-B&LE/CN interchange limits the value of that entry. FGLK's customers and communities, and the Central New York Region, would benefit greatly from a direct FGLK-B&LE/CN connection.

Attis and the Port are major employers and significant purchasers of local services and products that rely on the Fulton Subdivision for rail service. The proposed conditions requested by Attis and the Port, and supported by FGLK, for the Fulton Subdivision, seek 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 conditions requested herein.

Respectfully submitted,



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*Counsel for Finger Lakes Railway Corp.*

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

Comment and Request for Conditions on the following persons by the method indicated:

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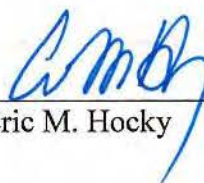
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c/o Assistant Attorney General,  
Antitrust Division, Room 3109  
Department of Justice  
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United States Department of Transportation  
1200 New Jersey Avenue, SE  
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Eric M. Hocky

## EXHIBIT 1



**AMERICAN SHORT LINE AND  
REGIONAL RAILROAD ASSOCIATION**

*The Voice of America's Independent Railroads*

**William E. Loftus  
President and Treasurer**

September 24, 1998

**To: ASLRRRA Railroad Members**

**From: Bill Loftus, President**

**Re: SIGN UP YOUR RAILROAD FOR THE RAILROAD INDUSTRY AGREEMENT!**

The rate-related portions of the Railroad Industry Agreement, which I forwarded to you last week, were submitted to the Surface Transportation Board for its review and approval. That approval was granted by the Board on an interim basis effective September 22, 1998. Final approval is expected later this fall following an opportunity for comments from any interested parties.

Following the STB's action, all sections of the Railroad Industry Agreement are now in effect. The next step is for small railroads that wish to become party to the agreement to sign on, indicating their intention to participate. A "Subscription Agreement" form is attached for that purpose. All of the Class I's have already signed on.

A separate form should be filled out and signed for each railroad company you represent that wants to participate. Please photocopy the attached blank form if you need multiple copies. The forms for Class II and Class III railroads should be returned to ASLRRRA at the address shown below. The list of participating Class II and Class III railroads will be compiled by the Association and made available to interested parties.

I strongly encourage all ASLRRRA member railroads to sign on promptly. The agreement contains many policies, principles and features that should be of significant benefit to many small railroads. Voluntary action by the Class I's consistent with the agreement's policies and principles is the desired goal, but an arbitration process is available for prompt handling of any issues that cannot be resolved by the parties voluntarily.

Please call either myself or Alice Saylor in ASLRRRA's Washington office if you have any questions about the agreement, or the subscription process.

1120 G Street, N.W., Suite 520

Washington, DC 20005-3889

Phone: (202) 628-4500

Fax: (202) 628-6430

E-Mail: [aslrra@aslrra.org](mailto:aslrra@aslrra.org)

# RAILROAD INDUSTRY AGREEMENT

## I. BACKGROUND

On April 2 and 3, 1998, the Surface Transportation Board ("STB") conducted two days of informational hearings to examine issues of rail access and competition in today's railroad industry.

In Ex Parte No. 575, the STB described the areas of concern expressed by the Short Line Railroads:

"Paper Barriers"--Contractual obligations incurred when Short Line carriers acquired lines from larger, connecting carriers;

Inadequate car supply; and

Lack of alternative routings.

The STB noted that private-sector negotiations were already underway and urged the parties to resolve these issues expeditiously.

In order to promote a stronger rail industry, this Railroad Industry Agreement ("Agreement") is entered into by the Association of American Railroads ("AAR") on behalf of participating Large Railroads (Class I carriers as defined by the regulations of the STB who subscribe to this Agreement) and by the American Short Line and Regional Railroad Association ("ASLRRRA") on behalf of participating Small Railroads (Class II and III rail carriers as defined by the regulations of the STB who subscribe to this Agreement).

## II. DEFINITIONS AND OTHER NOTES

For purposes of this Agreement and accompanying attachments, the following apply:

"Access" means interchange, intermediate switching, or haulage (or trackage rights at grantor's option);

No new Access to industries, shippers or receivers not now served is granted or created; all Access is Railroad to Railroad;

Carrier providing interchange, switching, haulage, trackage rights, or other service will be entitled to fair compensation for use of its facilities and/or services;

"New Traffic" means traffic that (1) is not now moving by rail (except for reasons of seasonality or unusual disruptions of shipping patterns outside the control of the Large Railroad, such as plant shutdowns) and (2) does not unreasonably negatively impact the Large Railroad.

"Congestion Problem" means that Access to or through a terminal, or to or via a track segment, need not be granted because incremental traffic caused by the New Traffic cannot be handled without causing unreasonable interference with the owner's operations. If the interference can be reasonably remedied by additional facilities and/or services, the carrier seeking Access is entitled to such facilities and/or services, provided it pays fair compensation;

"Short Line" ("SL") is a Class III railroad;

"Small Railroad" ("SRR") is a Class II or III railroad;

"Large Railroad" ("LRR") is a Class I railroad;

"Non-Short Line" ("Non-SL") is a Class I or II railroad.

"Railroad" ("RR") is a Class I, II or III railroad.

### **III. PRINCIPLES OF RELATIONSHIP**

The parties agree that this Agreement shall be guided by the following public policy principles:

#### **General**

**Laws and regulations must be consistent with the fundamentals of rail economics.**

That was the genius of Staggers reforms such as permitting differential pricing, authorizing contracts and allowing most rates to be set by the market led to a rail renaissance.

**Private sector solutions are best.** Railroads and shippers are better served with market based solutions. Parties should turn to government only when the market cannot operate effectively and then only when private negotiations fail.

**U.S. freight railroads are the most efficient in the world and wholesale changes in how they are regulated should not be made in the absence of compelling evidence of significant problems.** American railroads form the world's most efficient rail system and contribute to the international growth and competitiveness of U.S. industry. It is not sound public policy to mandate major changes unless there are serious problems and proven alternatives.

**Large and Small Railroads are integral to the provision of rail service in the U.S.** The business common to each is a collective effort for the benefit of both Large and Small Railroads and the railroad shipping public, made possible by the unique contributions of each.

**Small Railroads deserve fair and workable solutions.** When a Small Railroad has a legitimate grievance, the available remedy should be as fair, quick and inexpensive as possible, particularly for minor disputes. Arbitration should be available to settle most matters.

### **Paper Barriers**

**Only legitimate "paper barriers" should be enforceable.** Paper barriers are restrictions on interchange imposed by contract at the time of the creation of the Short Line.

Legitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line. Such barriers should not restrict the Short Line's ability to develop New Traffic with another carrier if the selling or leasing Large Railroad can not or will not participate in the New Traffic. Excessive per car charges or other penalties imposed if a car is interchanged to another Large Railroad (other than legitimate paper barriers) are unreasonable and should not be permitted.

### **Routing Alternatives and Access**

**Rail networks should be operated to maximize the efficiency of the network for ALL its users.** A law or regulation that requires a Railroad to put the needs of the few ahead of the overall needs of the network is not sound public policy. Both Large and Small Railroads are dependent on interchanges and manifest train schedules.

**A Large Railroad seller/lessor should not be able to block a Short Line's reasonable attempts to gain New Traffic that the Large Railroad cannot handle or for which it cannot offer a competitive package.** The Short Line's attempt to gain New Traffic is not reasonable, however, if (1) the incremental traffic caused by the new business cannot be handled without causing unreasonable interference with the Large Railroad's operations; or (2) the Large Railroad is not adequately compensated for use of its tracks, yards and other facilities necessary to accommodate the traffic between the Short Line and another Railroad; or (3) the traffic of the Large Railroad is negatively impacted by such action.

**Rail revenues, service and routing choices are intertwined.** Railroads are networks that require huge amounts of capital investment in order to function most efficiently. A law or regulation that reduces a Railroad's ability to invest in infrastructure is not sound public policy.

### **Car Supply**

**Car supply is a problem of mutual concern to Small and Large Railroads.** The answer should not lie in government regulation, but in private industry negotiation.

#### **IV. PRINCIPLES OF AGREEMENT**

1. **Car Supply Policy** (applies to all participating Class I, II and III Railroads)

A joint committee of senior representatives of Large and Small Railroads will meet to explore opportunities where they can work together to meet customers' car supply needs for existing and new business. In general, this committee will examine a long list of potential cooperative policies and innovative programs that will enhance car supply within the bounds of sound business principles and appropriate return on investment. A detailed protocol for car supply is attached as Exhibit A.

2. **Cooperative Service Actions** (applies to all participating Class I, II and III Railroads)

Large and Small Railroads agree to develop and implement Interchange Service Agreements ("ISA's") with each other to include standards for service and measurements to be used to manage improvement. Regular meetings between Large and Small Railroad corporate and operating personnel will be scheduled to resolve issues and improve service to customers. A more detailed protocol governing service is attached as Exhibit B.

3. **Paper Barriers and New Routes** (applies to participating Class I and III Railroads)

a) **General Premise:** *If the requested Access or routing helps the connecting Short Line and does not harm the Large Railroad, then the request should be approved as it will improve shipper rail service while strengthening the rail industry.*

b) **Paper Barriers and New Routes:** The Large and Short Line Railroads agree to work cooperatively to increase rail freight business. Joint initiatives designed to increase Short Line freight business under certain circumstances include, but are not limited to, waiver of contractual interchange restrictions and Large Railroad haulage of Short Line traffic. See Exhibit C (Examples 1-7).

In other cases, Large and Short Line Railroads may voluntarily agree at any time to renegotiate the terms of sale agreements including, but not limited to, terms relating to limitations on interchange (legitimate paper barriers). The renegotiations of limitations on interchange shall include consideration of additional compensation due to the Large carrier reflecting changes to the economic and market assumptions made by the Large and Short Line carriers at the time of original sale based upon the limitations on interchange at the time of such sale as well as all other relevant factors.

4. **Switching, Heavy Axle Loads, and Certain Rate Policies** (applies to all participating Class I, II and III Railroads)

a) **Switch Charges:**

i) **General Premise:** *The Large and Small Railroads agree that, subject to (iii) and (iv) below, existing (or future) intermediate and reciprocal switching charges*

***between Large and Small carriers shall be comparable to existing (or future) charges between Large Railroads in similar circumstances and conditions.***

ii) Any intermediate (switching between carriers) or reciprocal (switching between customer and carrier) switch charges existing between Large and Small Railroads on or after the effective date of this agreement shall be comparable to existing charges between Large Railroads in similar circumstances and conditions. See Exhibit D (Examples 8 – 12).

iii) This provision will not grant reciprocal switch Access for any carrier to any industry for which Access is not otherwise provided.

iv) This provision shall not apply with respect to any switch charges that are the subject of any administrative or judicial proceeding as of the date of this Agreement.

b) **Heavy Axle Loads:** With the growth of heavy axle load rolling stock (286,000 lbs. or greater), the Large Railroads agree to proportionately increase the Small Railroad share of the increase, if any, in overall revenue for handling heavy axle loads to reflect tonnage in situations where traffic is priced on a per-car basis for the Small Railroad.\*\*

c) **Certain Rates Policies:**

i) **General Premise:** *The Large and Small Railroads commit to provide market-based competitive pricing for their customers, regardless of whether located on a Class I or connecting Small Railroad, that is non-discriminatory under similar circumstances and conditions.*

ii) Recognizing that the establishment of rate and service levels are matters of individual rather than collective consideration, assessment of market conditions upon which joint line price levels are based will reflect consideration of capital and/or operating savings for the Large Railroads resulting from services provided by the Small Railroads in the route. See Exhibit E for the sole application of this subsection(c).

**V. APPLICATION**

All sections of this Agreement apply to Large Railroads (Class I) and Short Line Railroads (Class III) that indicate their participation by individual subscription to this Agreement. All sections of this Agreement except Section (IV)(3)—"Paper Barriers and New Routes" apply to Class II Railroads that indicate their participation by individual

\*\* Subsection IV(4)(b), Heavy Axle Loads, shall not apply to Montana Rail Link, Inc.; provided that this carve-out is without prejudice to the rights of Burlington Northern Santa Fe or Montana Rail Link, Inc. under their existing agreement.

subscription to this Agreement. All items provided for in this Agreement shall be binding upon all participating Railroads. Any relief available to any party under this Agreement shall be prospective only. To the extent that relief is granted by an arbitrator pursuant to the terms of this Agreement, such relief shall be limited solely to the period commencing on or, at the arbitrator's discretion, after the date that the subject arbitration proceeding was initiated.

#### **VI. ARBITRATION**

The participating Large and Small Railroads agree that if they have a dispute arising under Sections (IV)(3)—"Paper Barriers and New Routes" or Section (IV)(4) —"Switching, Heavy Axle Loads, and Certain Rate Policies" of this Agreement that cannot be resolved through discussion and negotiation between the parties involved, the parties will submit any unresolved issues to arbitration under the auspices of the STB (Ex Parte No. 560). Such arbitration will be based on the policies and principles of those sections of this Agreement, and to the extent applicable, the associated examples and exhibits, and will be binding on the parties.

#### **VII. SENIOR POLICY COMMITTEE**

A joint "Senior Policy Committee" shall be created to provide oversight, review, and, if applicable, non-binding recommendations on all matters relating to the relationship between Large Railroads and Small Railroads created by this Agreement and on all policy aspects and issues relating to the application and effects of this Agreement. This Senior Policy Committee shall be comprised of six members consisting of the Chief Executive Officers of the AAR, the ASLRRRA, two Large Railroads (to be designated by the Large Railroads) and two Small Railroads (to be designated by the Small Railroads). It shall meet semi-annually and, in addition, at any time upon the request of any member of the Committee or upon notification from a participant of its intent to withdraw from this Agreement.

#### **VIII. AMENDMENT AND TERM**

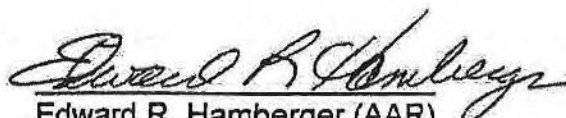
(a) The parties to this Agreement recognize that changes may occur which require modification of the terms of the Agreement. In the event of such changes, the parties agree that they will negotiate in good faith to modify appropriately the Agreement.

(b) The initial term of this Agreement shall be for a period of five years. After the initial term, this Agreement shall remain in effect for additional successive one-year terms; provided, however, that during any such additional term, any party to this Agreement may withdraw from participation in this Agreement, only if such party has first (i) presented the reason(s) for such withdrawal to the Senior Policy Committee and (ii) provided 90 days written notice to the AAR and the ASLRRRA.

successive one-year terms; provided, however, that during any such additional term, any party to this Agreement may withdraw from participation in this Agreement, only if such party has first (i) presented the reason(s) for such withdrawal to the Senior Policy Committee and (ii) provided 90 days written notice to the AAR and the ASLRRRA.

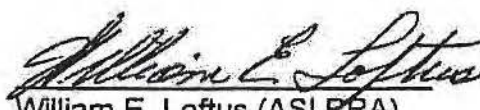
The parties agree to the policies, principles and procedures stated herein and to advise the Surface Transportation Board of this Railroad Industry Agreement. Individual Large and Small Railroads will indicate their acceptance of this Agreement by executing a separate document indicating their agreement to subscribe to and be bound by the terms and conditions of this Agreement.

For the Large Railroads:

  
Edward R. Hamberger (AAR)

Date: 9/10/98

For the Small Railroads:

  
William E. Loftus (ASLRRRA)

Date: 9/10/98

## LIST OF EXHIBITS

- Exhibit A: *Car Supply Protocol* (applies to all participating Class I, II, and III Railroads)
- Exhibit B: *Service Policy Protocol* (applies to all participating Class I, II and III Railroads)
- Exhibit C: *Guidelines for Paper Barriers and New Routes* (applies to all participating Class I and III Railroads)
- Exhibit D: *Guidelines for Intermediate and Reciprocal Switching* (applies to all participating Class I, II and III Railroads)
- Exhibit E: *Guidelines for Certain Rate Policies* (applies to all participating Class I, II and III Railroads)

## DEFINITIONS AND OTHER NOTES

"Access" means interchange, intermediate switching, or haulage (or trackage rights at grantor's option);

No new Access to industries, shippers or receivers not now served is granted or created; all Access is Railroad to Railroad;

Carrier providing interchange, switching, haulage, trackage rights, or other service will be entitled to fair compensation for use of its facilities and/or services;

"New Traffic" means traffic that (1) is not now moving by rail (except for reasons of seasonality or unusual disruptions of shipping patterns outside the control of the Large Railroad, such as plant shutdowns) and (2) does not unreasonably negatively impact the Large Railroad.

"Congestion Problem" means that Access to or through a terminal, or to or via a track segment, need not be granted because incremental traffic caused by the New Traffic cannot be handled without causing unreasonable interference with the owner's operations. If the interference can be reasonably remedied by additional facilities and/or services, the carrier seeking Access is entitled to such facilities and/or services, provided it pays fair compensation;

"Short Line" ("SL") is a Class III railroad;

"Small Railroad" ("SRR") is a Class II or III railroad;

"Large Railroad" ("LRR") is a Class I railroad;

"Non-Short Line" ("Non-SL") is a Class I or II railroad; and

"Railroad" ("RR") is a Class I, II or III railroad.

## CAR SUPPLY

(Applies to participating Class I, II and III Railroads)

Large and Small Railroads will explore opportunities where they can work together, consistent with the antitrust laws, to meet customers' car supply needs for existing and new business.

A joint committee of senior representatives of Large and Small carriers will identify car types for which existing fleets (Railroad, shipper, etc.) are projected to be inadequate for current and future demand. Further, the joint committee will examine the ability of Small Railroads to provide freight cars for their customers for the purpose of developing cooperative policies and programs to enhance the ability of the Small Railroads to have the use of more new and used freight cars. Return on investment will be a consideration.

The joint committee will report its recommendations quarterly to the appropriate representatives of the Large and Small Railroads.

Policies and programs to be considered to determine if they are feasible and mutually beneficial include, but are not limited to:

TTX ownership and operation of general service cars

Regional pools for specific car types operated by interested Railroads

Joint ownership of equipment by Large and Small carriers

Underwriting of Small Railroad ownership by a larger carrier

Continued review of rate arrangements

Refurbishment of older cars

Improvement of transit and turnaround times

Opportunity for Small Railroads to buy surplus cars from Large Railroads on a mutually beneficial basis

Longer term bilateral agreements to facilitate equipment financing

Private agreement to establish car hire rates

## SERVICE POLICY

(Applies to participating Class I, II and III Railroads)

Most Small Railroads are dependent upon and serve merchandise traffic that moves in non-unit manifest or local trains. Therefore, frequency and reliability of both interchange and manifest train schedules are of critical importance to the ability of Small Railroads, as well as Large Railroads, to serve their customers and to grow traffic and revenue.

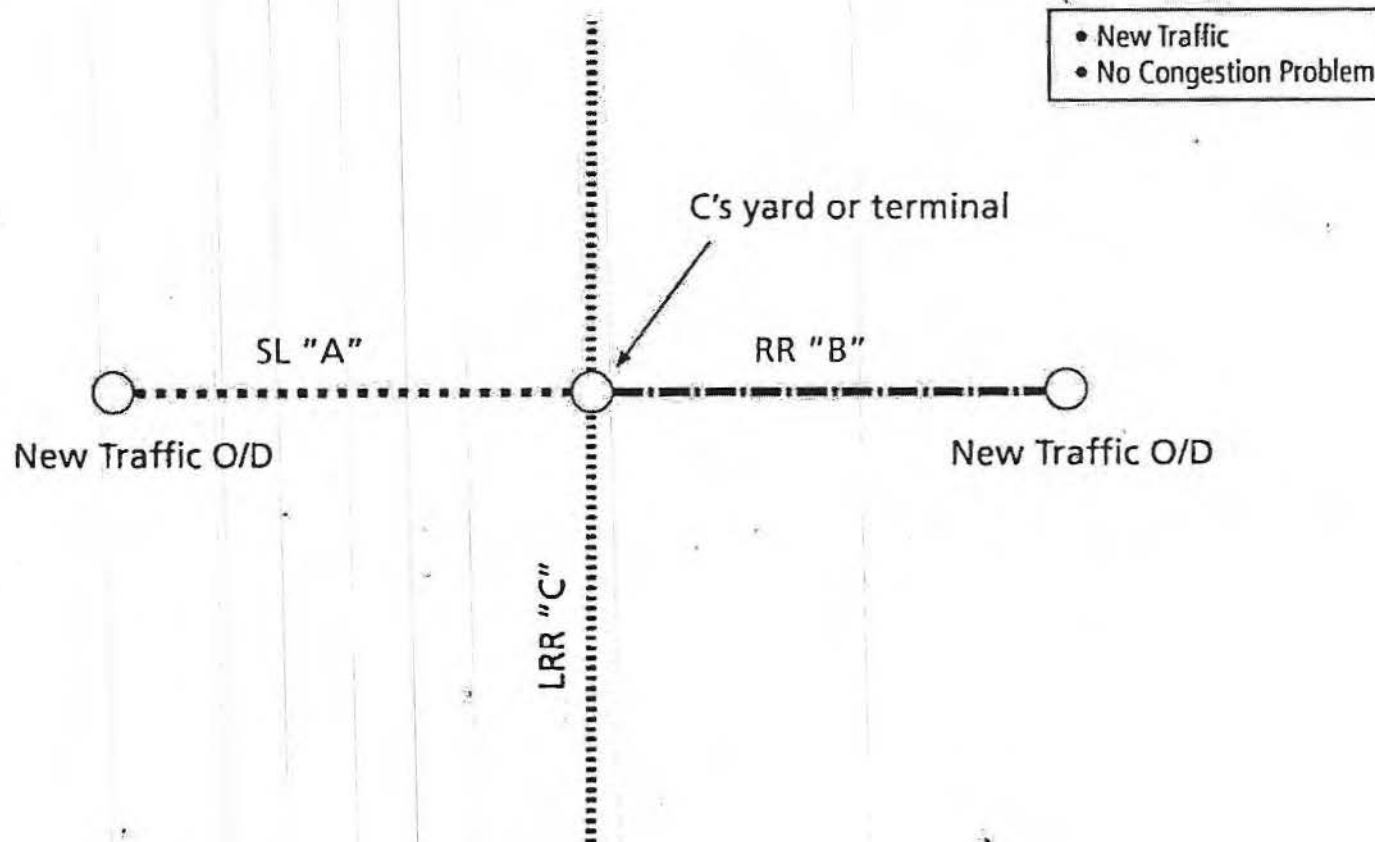
To maintain a higher level of service, Large and Small Railroads agree to establish procedures for Small Railroad corporate and/or operating personnel and Large Railroad senior corporate and/or operating officers (all of whom having authority within their respective companies to effect a resolution of service issues) to meet on a regular basis in order to review, among other items, train service and interchange priorities.

Each Large Railroad and each Small Railroad connecting with a Large Railroad will develop and implement Interchange Service Agreements ('ISA's') with each other. These ISA's will include agreement on terms and standards to govern service and common procedures to measure interchange performance, manifest and/or local train performance, and car cycle time for the purpose of providing Small Railroad customers with the equivalent level of service provided to similarly situated Large Railroad customers taking into account factors such as volumes, commodities transported and locations.

## Paper Barriers

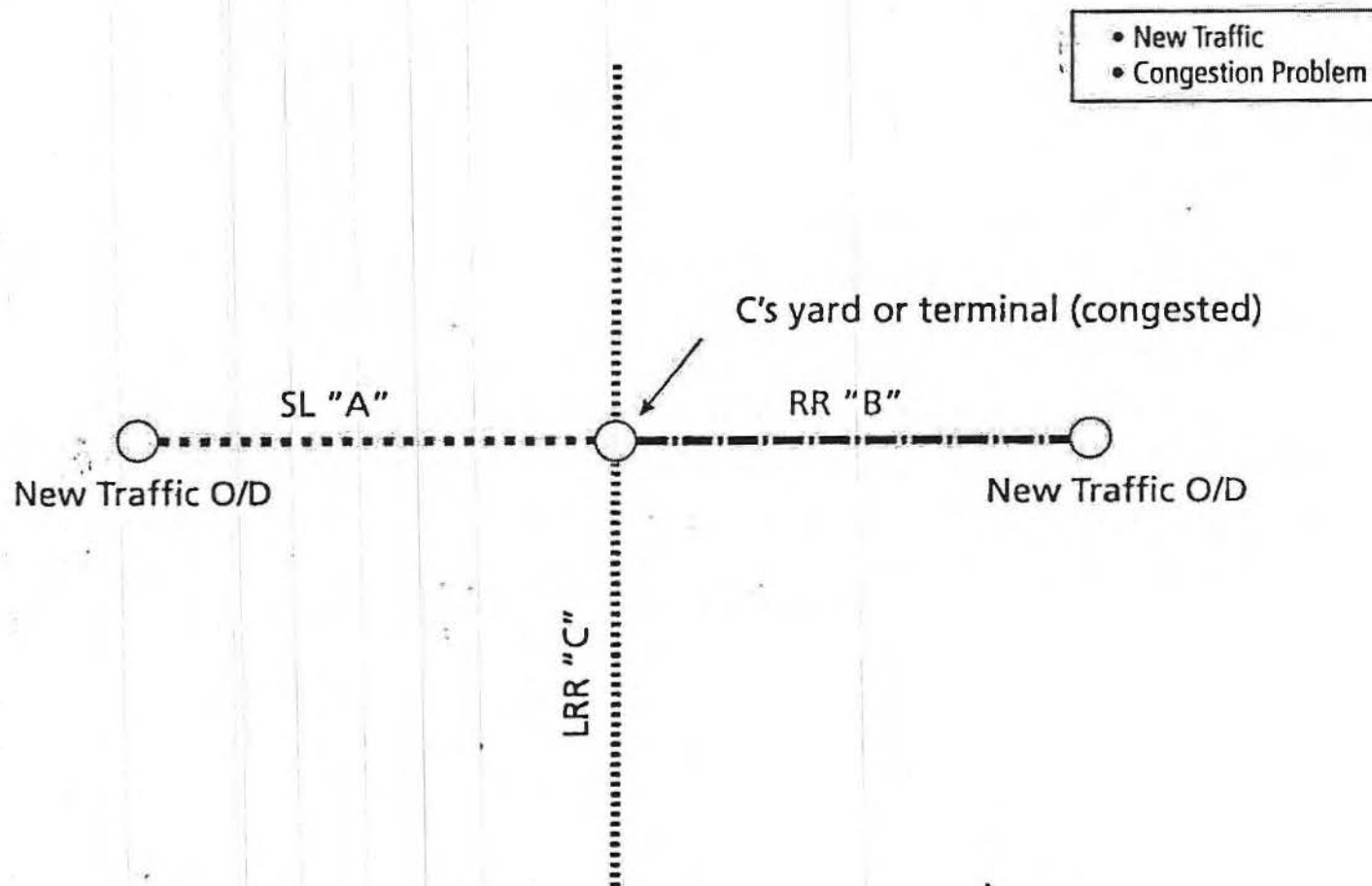
Short Line "A" (SL "A") and Railroad "B" (RR "B") both connect with Large Railroad "C" (LRR "C") either in a common yard or terminal area. There is an opportunity for New Traffic that would originate on "A" and terminate on "B", or vice versa. There is no Congestion Problem. **"C" must grant Access** by either allowing "A" and "B" to connect directly or by handling the traffic between "A" and "B" within the yard or terminal.

If existing movements between "A" and "B" are provided for by a reasonable intermediate switch charge published by "C", "A" and "B" are already deemed to have Access.



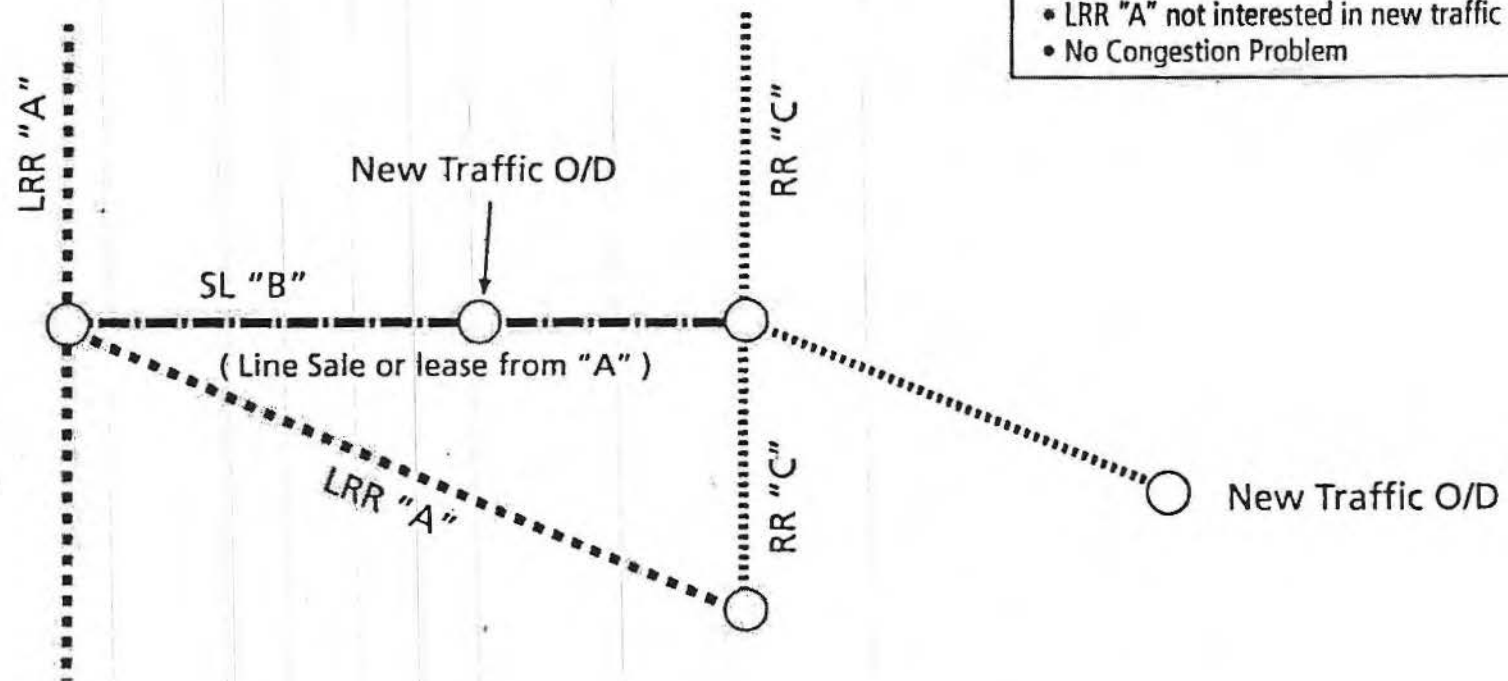
## Paper Barriers

Same facts as Example 1, except there is a Congestion Problem. Large Railroad "C" may deny Access.



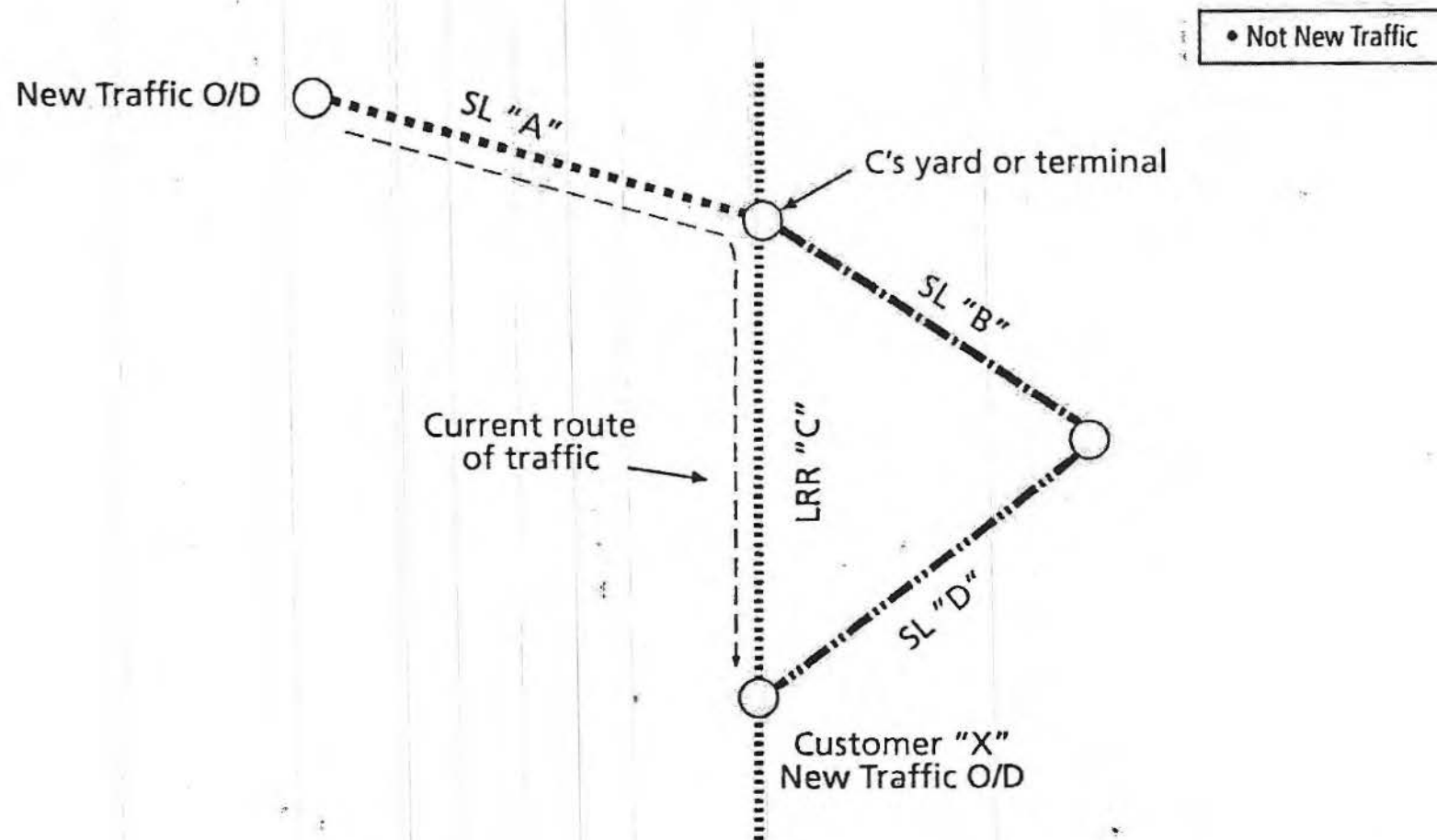
## Paper Barriers

A legitimate paper barrier [see Section (III)(6)] resulting from a line sale or lease by Large Railroad "A" to Short Line "B" which restricts "B" from interchanging with Railroad "C" will be suspended to allow "B" to interchange New Traffic with "C" without penalty if, after request by "B", "A" does not establish a competitive package (rates, service and car supply) and "C" does.



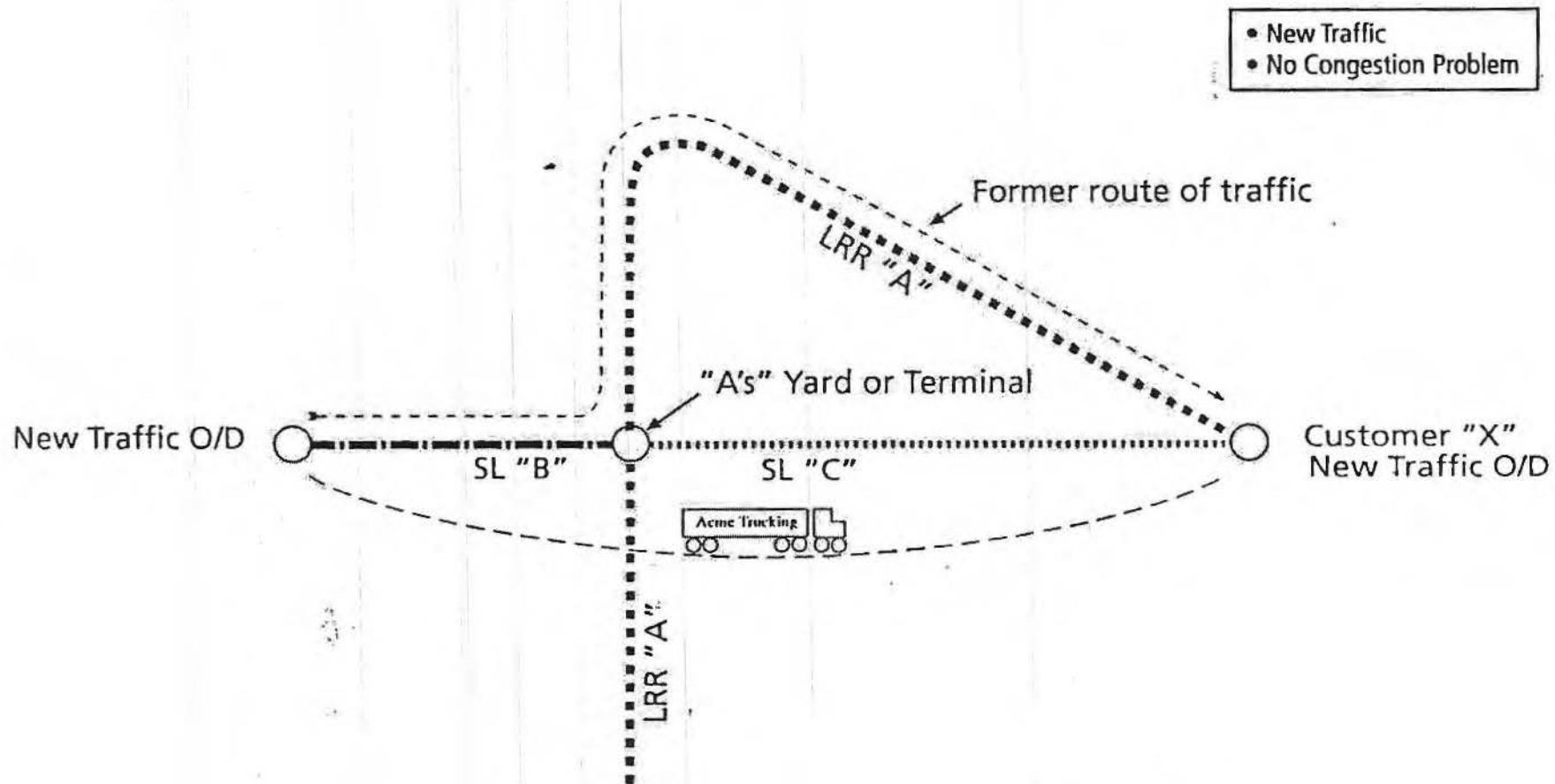
## Paper Barriers

Short Line "A" can physically connect with Short Line "B" via Large Railroad "C's" yard or terminal but a paper barrier restricts "A" from interchanging with "B". "B" connects with Short Line "D" and "D" serves Customer "X" also directly served by "C". "A" and "D" wish to develop business with Customer "X" that is not New Traffic. "C" may deny Access.



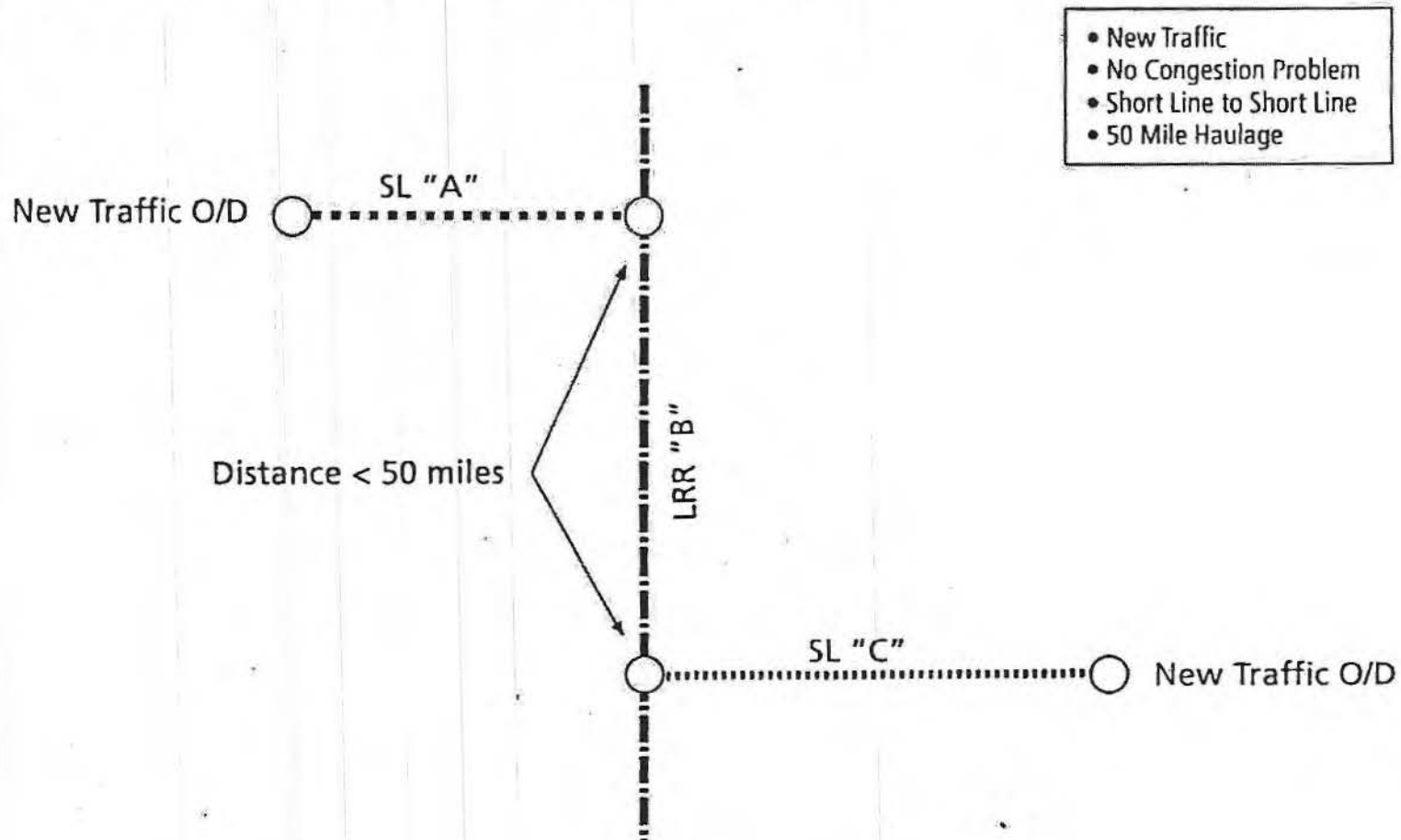
## Paper Barriers

Large Railroad "A"/Short Line "B" traffic for Customer "X" has been lost to truck. "B" and "C" had no role in causing the truck diversion to happen. "A" must grant Access to "B" and Short Line "C" through "A's" terminal or yard to redirect traffic to rail from truck (New Traffic). There is no Congestion Problem.



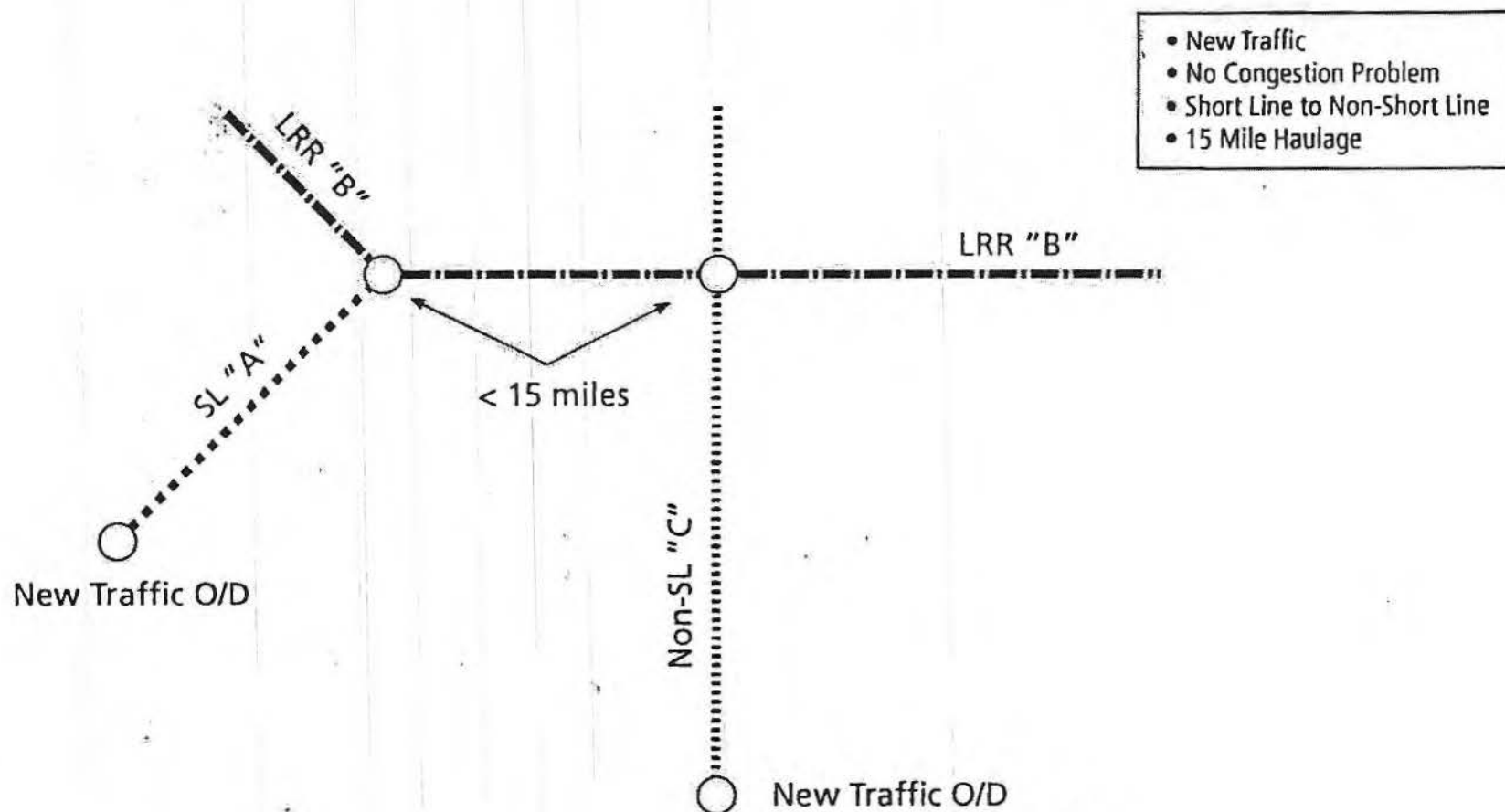
## New Routes

**Large Railroad "B" must grant Access via haulage** (or trackage rights at "B's" option) for New Traffic originating on Short Line "A" and terminating on Short Line "C", or vice versa, for distances up to fifty (50) miles along "B's" line of railroad connecting "A" and "C" as long as there is not a Congestion Problem. "B" is not obligated to provide equipment. Haulage (or trackage rights at "B's" option) may be for longer distance by mutual agreement. If "B" does provide equipment, "B" is entitled to participate as a line-haul carrier in the rate if it so chooses.



## New Routes

**Large Railroad "B" must grant Access via haulage** (or trackage rights at "B's" option) between Short Line "A" and Non-Short Line "C" to move New Traffic handled by "B" for distances up to fifteen (15) miles along "B's" line of railroad connecting "A" and "C" as long as there is not a Congestion Problem. "B" is not obligated to provide equipment. Haulage (or trackage rights at "B's" option) may be for longer distance by mutual agreement.



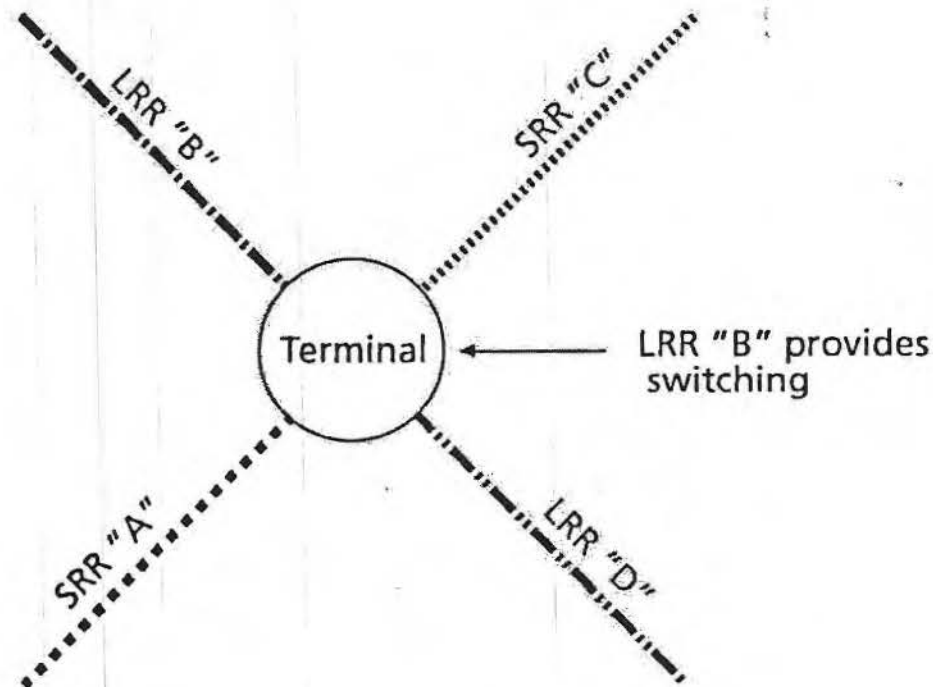
**GUIDELINES FOR  
INTERMEDIATE AND RECIPROCAL SWITCHING**

**(Examples 8 – 12)**

**(Applies to participating Class I, II and III Railroads)**

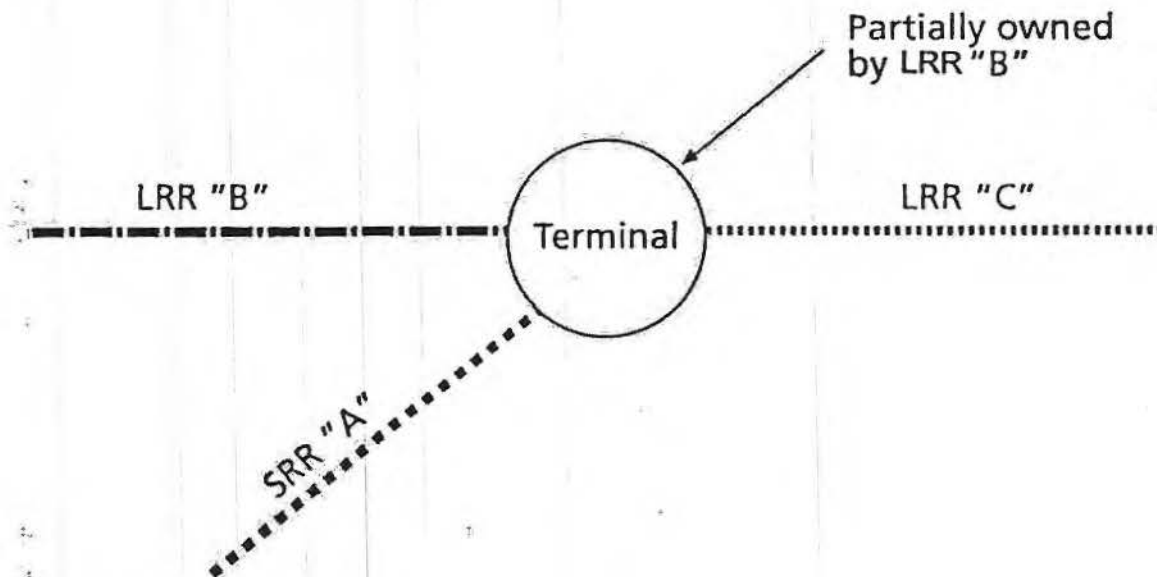
## Intermediate Switching Charges

Small Railroad "A" serves a terminal where Large Railroad "B" currently provides intermediate terminal switching between a number of carriers including Small Railroad "C". Small Railroad "C" serves the same terminal as does another Large Railroad. Assuming the operating conditions are similar, "A" and "C" should pay the same or similar charges as the other Large Railroad for receipt of similar services.



## Intermediate Switching Charges

Small Railroad "A" serves a terminal, as do Large Railroad "B" and Large Railroad "C". "B" owns a share of the terminal switching company and "A" and "C" own no share of the terminal switching company. "A" and "C" may pay a higher per car intermediate switch charge than "B", reflecting its ownership interest. Assuming the operating conditions are similar, "A" and "C" should pay the same or similar charges for receipt of similar services.



#### Example 10

#### Reciprocal Switching Charges

Large Railroads "A" and "B" and Small Railroad "C" serve a terminal. No other Large Railroads serve the terminal. "A" and "B" charge each other \$400 per loaded car for reciprocal switching within the terminal. "A" charges "C" \$500 per loaded car, and "B" charges "C" \$600 or more per loaded car. "A" and "B" must each charge "C" \$400 per loaded car, assuming similar circumstances and conditions.

#### Example 11

#### Reciprocal Switching Charges

Large Railroads "A" and "B" and Small Railroad "C" serve a terminal. No other Large Railroads serve the terminal. "A" and "B" have a system-wide reciprocal switching arrangement with each other that provides for a per-car charge less than or equal to \$250 per loaded car. The charge (assessed by "A" and/or "B" to "C") for switching in this particular terminal exceeds \$250 per loaded car. If 115% of the actual cost of performing the reciprocal switch service is greater than \$250, "A" and "B" shall each charge "C" no more than said 115% of actual cost. If 115% of actual cost is less than or equal to \$250, "A" and "B" shall not charge "C" more than \$250 per loaded car. Nothing in this example prohibits a lower switch charge to "C" if such is mutually agreed to by "A" and/or "B" and "C".

### **Reciprocal Switching Charges**

In terminals containing multiple Railroads (greater than three), the carrier, on which the particular customer to be Accessed by reciprocal switch is located, must not charge a Small Railroad a charge that is higher than the highest charge to a Large Railroad or \$250 per loaded car, whichever is greater. (The involved Large Railroads may be parties to one or more system-wide reciprocal switching agreements providing charges to each involved carrier of less than or equal to \$250 per loaded car.)

**Note:** Nothing in the provisions of Examples 10, 11 and 12 will grant reciprocal switch access for any carrier to any industry for which Access is not otherwise provided.

## GUIDELINES FOR CERTAIN RATE POLICIES

(Applies to participating Class I, II and III Railroads)

In the event that a Small Railroad has only one Class I connection or a Large Railroad has rate making authority on behalf of a Small Railroad, and the Small Railroad is trying to generate New Traffic or is threatened with the loss of existing traffic, and the Small Railroad believes that the Large Railroad is not adequately reflecting the Large Railroad costs or relevant market conditions in a rate charged to a shipper of a comparable commodity located on the Large Railroad in close proximity to a similar shipper located on the Small Railroad (similar circumstances and conditions), then the Small Railroad can request the Large Railroad, within ninety (90) days, to examine its costs and relevant market conditions and meet to discuss the matter. For purposes of this Agreement, a haulage agreement between a Large Railroad and a Small Railroad does not give the Large Railroad rate making authority on behalf of the Small Railroad.

The Large Railroad shall study its costs and the relevant market conditions, on an annual actual total cost basis, from the area requested by the Small Railroad to the first crew change location common for the similar Small Railroad and Large Railroad shipments in question. This study shall include all costs relevant to this segment of the Large Railroad (including any savings attributable to the then present Small Railroad operations as well as including any applicable handling charges paid by the Large Railroad to the Small railroad as part of the costs incurred by the Large Railroad) and shall consider the volume and seasonality of the traffic in question and capability of the Large Railroad, due to economies of scale, to reallocate assets and personnel during periods of slow demand.

After the requested cost study has been completed, the Railroads shall meet to discuss the results. Terms of confidential transportation contracts to which both Railroads are not a party will not be revealed. Acting on the results of the study, the Large Railroad may choose to adjust one or more rates and/or charges or may elect to retain the status quo.

The Small Railroad, if not satisfied with the result, may invoke arbitration under Section VI of this Agreement. Both parties and the arbitrator will treat all cost information involved in the arbitration as confidential. Particular rates charged to individual shippers or receivers in transportation contracts shall not be considered in arbitration under the terms of this Agreement. The arbitrator's decision can only deal with the rate complained of, that is, the joint Large Railroad/Small Railroad rate.

If the arbitrator determines that the rate charged by the Large Railroad to the Small Railroad shipper improperly favors the shipper on the Large Railroad, then the arbitrator may order a reduction of the rate, but only to the extent needed to eliminate such favoritism. The rights provided in this Exhibit E reflect unique circumstances and create no rights for any third parties.

AMENDMENT TO  
RAILROAD INDUSTRY AGREEMENT

The American Short Line and Regional Railroad Association ("ASLRRA"), on behalf of the Small Railroads, and the Association of American Railroads, on behalf of the Large Railroads, entered into the Railroad Industry Agreement ("Agreement") on September 10, 1998. The ASLRRA hereby further agree as follows:

1. The Agreement is hereby amended as follows:
  - a. The section of the Agreement entitled "Paper Barriers" on page 2 is amended by adding, at the end thereof, the following sentence:

"See Exhibit F for interpretation of this principle."
  - b. Section VII of the Agreement is stricken in its entirety and the following is inserted in its place:

**"VII. RAIL INDUSTRY WORKING GROUP**

(a) A joint "Rail Industry Working Group" ("RIWG") shall be created to address all policy aspects and issues relating to the application and effects of this Agreement. It shall also provide a forum for the discussion of opportunities and concerns relating to issues between the Large Railroads and Small Railroads and to assure that the expectations of this Agreement are attained by having the terms of this Agreement consistently interpreted and applied throughout the railroad industry. The RIWG shall be comprised of Large Railroad managers who are responsible for the development of business with the Small Railroads and of Small Railroad operators who have first-hand knowledge of relevant rail transportation problems, issues, and opportunities. It shall consist of 16 members. There shall be one member designated from each of the seven Large railroad subscribers to this Agreement, seven members from Small Railroads who are subscribers to this Agreement (to be designated by the ASLRRA), and one member each from the AAR and the ASLRRA. (The AAR and ASLRRA representatives shall be non-voting members.)

(b) The RIWG shall meet at least quarterly and, in addition, at any time upon the request of any member of the RIWG or upon notification from a party of its intent to withdraw from the Agreement pursuant to Section VIII(b). RIWG members may participate in meetings either in person or by conference call. Counsel from the AAR and/or the ASLRRA shall attend RIWG meetings. Unless an objection is raised by any member,

technical and other issue-specific experts and advisors may be invited to attend portions of RIWG meetings relevant to their respective interests.

(c) The RIWG may, from time to time, issue opinions or interpretations regarding the provisions of this Agreement. Any such opinion or interpretation must be in writing and by unanimous vote of the RIWG.

(d) The RIWG shall not, in any circumstance, have authority to set rates or charges or reach any agreement respecting rate-related matters."

c. Section VIII of the Agreement is amended by: (1) deleting the term "Senior Policy Committee" in subsection (b) and inserting, in its place, the term "RIWG"; and (2) adding a new subsection VIII(c) at the end thereof as follows:

"Opinions and interpretations adopted by the RIWG in accordance with the requirements of subsection VII(c) of this Agreement shall be delivered to each then current subscriber by the AAR (to the Large Railroads) and the ASLRRRA (to the Small Railroads). Each such opinion or interpretation shall be deemed to be a part of this Agreement and shall be binding upon all subscribers hereto; provided, however, that if, within 30 days of receipt of an opinion or interpretation, a subscriber gives notice pursuant to subsection VIII(b) of its intent to withdraw from this Agreement and withdraws from the Agreement 90 days thereafter, such subscriber shall not be bound by the interpretation or opinion."

d. Attachment 1 hereto is incorporated into the Agreement after Appendix E (page 25) as a new Appendix F (pages 26 and 27) and made a part of the Agreement.

e. The "LIST OF EXHIBITS" on page 8 of the Agreement is amended by inserting, at the end of thereof, the following:

"Exhibit F: *Interpretation Relating to Paper Barriers*  
(applies to all participating Class I and III Railroads)"

2. Individual Large and Small Railroads who are current subscribers to the Agreement shall indicate their acceptance of this Amendment by executing a separate document ("Acceptance Agreement") indicating their agreement to subscribe to and be bound by the terms and conditions of the Agreement, as amended by this Amendment.
3. Notwithstanding any provisions of Section VIII(b) of the Agreement to the contrary, the delivery by a subscriber of an Acceptance Agreement as described in Section 2 of this Amendment shall also be considered giving notice to the AAR, ASLRRRA, and the Senior Policy Committee, pursuant to Section VIII(b) of the current Agreement, of such subscriber's withdrawal from such original

unamended Agreement 90 days after such subscriber's delivery of the Acceptance Agreement.

4. Capitalized terms not otherwise defined in this Amendment shall be as defined in the Agreement.
5. Except as amended hereby, all other terms and conditions in the Agreement shall remain in full force and effect between and among the subscribers thereto.

For the Large Railroads:

For the Small Railroads:

\_\_\_\_\_  
Edward R. Hamberger (AAR)

\_\_\_\_\_  
Richard F. Timmons (ASLRRA)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## **EXHIBIT F**

### **INTERPRETATION RELATING TO PAPER BARRIERS**

(Applies to participating Class I and III Railroads)

The following situations shall be considered to meet the first element in the definition of "New Traffic" pursuant to the RIA:

1. Traffic to or from newly constructed customer facilities on the Short Line by a new customer to the Short Line. Expansions, relocations, or replacements of customer facilities from which traffic is currently or had been previously moving by any mode of transportation (whether or not such existing facilities were previously located on the Short Line) do not satisfy the first element of the definition of "New Traffic" under this paragraph.
2. Traffic to or from an existing facility located on the Short Line that has been shipped by any mode or modes of transport other than by rail for a period of twelve consecutive months immediately prior to a request made pursuant to the RIA.
3. Traffic to or from an existing facility located on the Short Line if that facility has not shipped for a period of twenty-four consecutive months immediately prior to a request made pursuant to the RIA.

For purposes of computing the time periods in paragraphs 2 and 3, periods during which there were unusual disruptions of shipping patterns outside the control of the Large Railroad and the Short Line, such as plant shutdowns, shall not be included.

This list is not intended to be exhaustive, and traffic not meeting these criteria may still be considered to meet the first element of the "New Traffic" definition as determined by individual facts and circumstances.

In all these cases, in order to be considered "New Traffic" the traffic in question must also meet the second element in the definition of "New Traffic" under the RIA, i.e., it must not have an unreasonable negative impact on the Large Railroad. Factors in assessing whether there is an "unreasonable negative impact" on a Large Railroad would include, but not be limited to, circumstances where the traffic at issue was diverted from an existing movement elsewhere on the Large Railroad.

In all instances the identification of "New Traffic" on a rail line shall not require the waiver of a "paper barrier" unless the Large Railroad that sold or leased the rail line in question, and has the contract with the Short Line, cannot offer a transportation package for the traffic which is competitive on a rate, service, and car supply basis with motor carrier alternatives.

**Before the**  
**SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36347

**BESSEMER AND LAKE ERIE RAILROAD COMPANY**  
**-ACQUISITION AND OPERATION-**  
**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA,**  
**OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, NY**

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**VERIFIED STATEMENT**  
**OF**  
**MICHAEL V. SMITH**

**Before the**  
**SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36347

**BESSEMER AND LAKE ERIE RAILROAD COMPANY**  
**-ACQUISITION AND OPERATION-**  
**CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA,**  
**OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, NY**

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**VERIFIED STATEMENT**  
**OF**  
**MICHAEL V. SMITH**

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My name is Michael V. Smith. I am President of the Finger Lakes Railway Corp. (FGLK). FGLK is a Class III short line railroad established in 1995 and headquartered in Geneva, New York. FGLK operates 167 miles of track in six counties in the Central and Finger Lakes regions of upstate New York as shown on the map attached hereto as Exhibit A. FGLK interchanges traffic with CSX Transportation, Inc. (CSXT), Norfolk Southern Railway and New York, Susquehanna & Western Railway.

In the first 10 months of 2019, FGLK has handled over 14,082 carloads of switch traffic. As relevant to the proposed transaction, FGLK currently interchanges Canadian freight with CSXT at Solvay, NY, for handling over the 230+ miles of lines that are the subject of this proceeding, for interchange with Canadian National (CN) in Canada. In the first 10 months of 2019, FGLK handled 291 carloads of pulpboard, corrugated cuttings/clippings, scrap paper, Canadian field dried peas, talc and liquified petroleum gas of Canadian traffic. After the transaction, CSXT would only be providing a short haul of approximately six miles between the Solvay interchange and Woodard where CSXT and B&LE/CN will be interchanging traffic.

(From their operating plan, I understand that the physical interchange will take place either at Belle Isle Yard which is less than 3 miles from Solvay, or Dewitt Yard which is approximately 7.9 miles from Solvay.)

FGLK also provides non-carrier switching services for Attis Fulton Ethanol, LLC (Attis) which is located on the Fulton Subdivision as shown on the map attached hereto as Exhibit B. As the switching provider, FGLK handles the receipt and unloading of the annual 35-40 inbound unit trains of corn (approximately 3600 carloads) delivered by CSXT, as well as the spotting and delivery to CSXT of approximately 2400 outbound carloads of DDGS (distilled dried grains with solubles), CO2 and corn oil. FGLK is in discussions with the Port of Oswego (the "Port"), another shipper on the Fulton Branch as shown on the map attached at Exhibit B, to become the Port's railroad operator (The Port currently handles its own internal railroad operations.)

FGLK takes no position on whether the proposed purchase by Bessemer and Lake Erie Railroad Company (B&LE/CN) of CSXT's US Massena Lines. However, FGLK does have two concerns with the transaction that it believes should be remediated before the transaction is approved. First, the Purchase and Sale Agreement (PSA) expressly prohibits B&LE/CN from interchanging directly with FGLK. Second, FGLK and shippers located on the Fulton Subdivision are concerned that with the addition of B&LE/CN as an intermediate carrier between themselves and CSXT, that they will not receive the same level of seamless service and competitive rates as is currently provided by CSXT. In this way, the sale of the Fulton Subdivision is different from and should be analyzed separately from the Massena Line to Woodard – while the line to Woodard will see the elimination of CSXT as a bridge carrier and the benefits of single line B&LE/CN service, the Fulton Subdivision will see the opposite with the insertion of a bridge carrier and the inefficiencies and costs that result. The STB can resolve

these concerns by imposing FGLK's requested conditions.

FGLK should not be prohibited from directly interchanging with B&LE. As noted above, FGLK currently has a direct interchange with CSXT in Solvay, NY. FGLK's traffic to and from eastern Canada currently is handled by CSXT from Solvay over the Massena Lines between Solvay and CN. After the transaction, CSXT would only be handling the traffic between Solvay and Woodard, a distance of only six miles. As such, CSXT will no longer be a significant line haul participant, but if FGLK is not provided direct access to B&LE/CN, CSXT will remain as a gatekeeper between FGLK and the CN System, able to control FGLK's Canadian traffic opportunities.

FGLK requests the Board to condition any approval of the B&LE/CN acquisition on CSXT granting FGLK trackage rights to interchange directly with B&LE/CN at Woodard, or alternatively on CSXT allowing B&LE/CN to use the trackage rights already being granted to B&LE/CN for interchange at Belle Isle Yard and Dewitt Yard to be used to access FGLK's Solvay Yard. This request has the potential to improve efficiency by eliminating CSXT as a bridge carrier between FGLK and B&LE/CN. CSXT should not have the right to act as gatekeeper for FGLK's traffic when it will now be only a minor participant in the route. FGLK believes that there would be additional traffic opportunities if there were a direct connection between FGLK and the CN System, including opportunities to convince CN that FGLK's existing facilities could offer more efficient destinations / transloads rather than CN setting up new competing facilities off of the lines it is purchasing. This request also resolves a fundamentally unfair and anti-competitive provision of the PSA by permitting FGLK the right to interchange with B&LE/CN.

Attis and the Port have expressed concerns to FGLK about whether the level of service

they are currently receiving from CSXT will continue if the Fulton Subdivision were sold to B&LE/CN. As the switching contractor for Attis that must coordinate and handle the inbound unit trains and outbound carloads, FGLK is also concerned.

CSXT and CN have attempted to assure us and Attis that the only change resulting from the sale and change in operators on the Fulton Subdivision will be that a B&LE crew will be delivering trains and carloads to and from their plant rather than a CSXT crew. However, we and the shippers remain concerned that B&LE/CN will not provide equivalent service at equivalent pricing currently provided by CSXT. This transaction will result in an added interchange between B&LE/CN and CSXT, including for the inbound unit trains that were handed by CSXT in special train service. As B&LE/CN acknowledges in its Application, an intermediate carrier only introduces inefficiencies, raises costs and negatively impacts service.

Attis has requested that FGLK provide expanded switching service between Fulton and CSXT. FGLK is willing and able to provide such service which would streamline operations on the Fulton Subdivision by eliminating an interline carrier from the move. FGLK already has train crews and locomotives at both Fulton and Solvay to provide the service.

The Port, where FGLK is establishing a relationship to become the rail operator, faces a similar service predicament as Attis. The Port has also requested that FGLK provide expanded switching service to CSXT, FGLK confirms that it is willing and able to provide such service. As noted above, FGLK has locomotives and crews stationed nearby to be able to provide the service.

The Port has also requested trackage rights between the Port and Novelis in order to provide a shuttle service over the 4 miles between the two, and has asked FGLK to provide the service. FGLK confirms that it is willing and able to provide the service, and that it has the

experience to be able to do so. FGLK operates a similar 3-mile shuttle on its lines between a paper mill and a box plant, and has extensive experience with one man crews, and winter weather.

### VERIFICATION

I, Michael V. Smith, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 9, 2019.

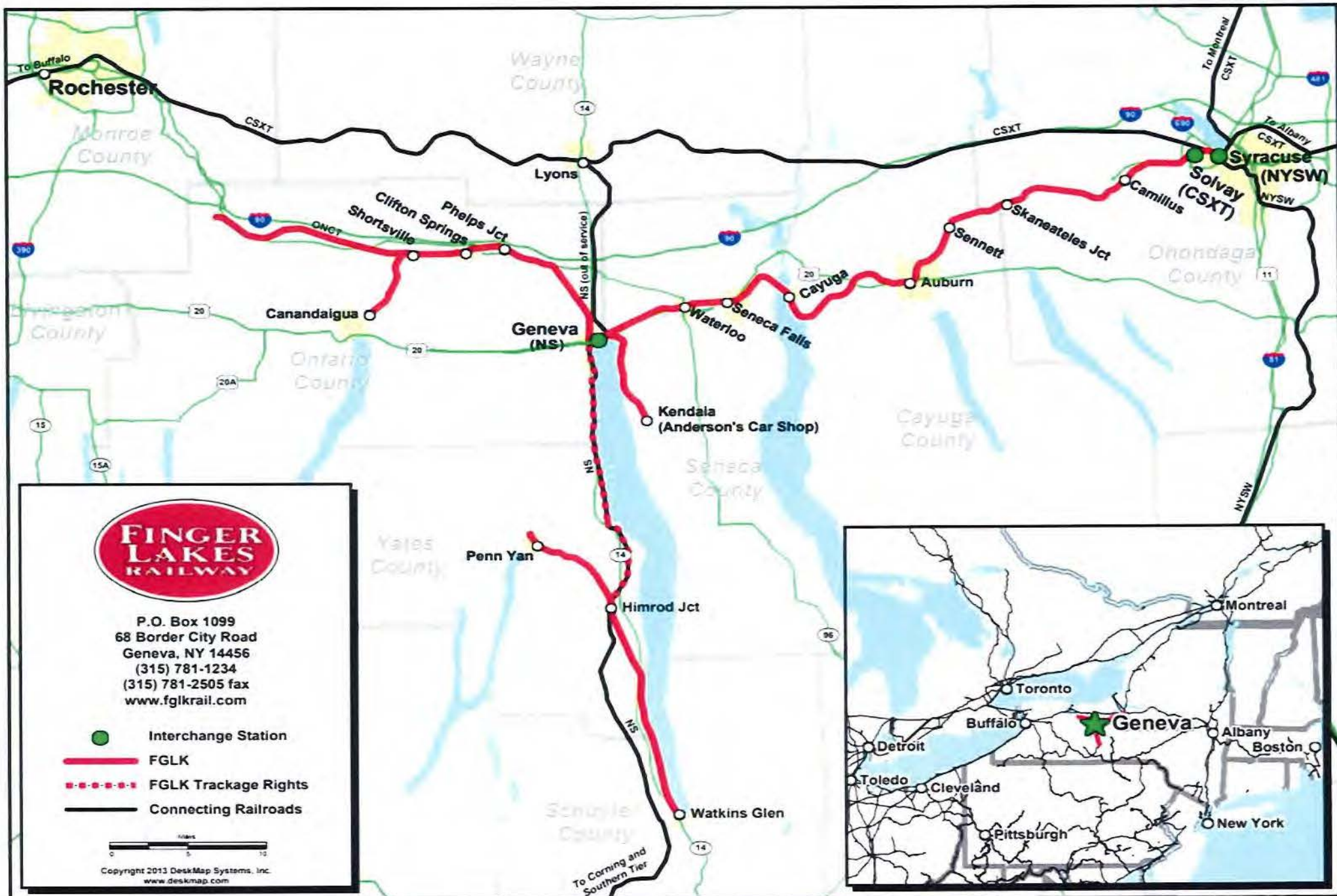


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Michael V. Smith  
President  
Finger Lakes Railway Corporation

## EXHIBIT A

# System Map



## EXHIBIT B

