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February 21, 2020

BY E-FILING

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

Re: *Bessemer and Lake Erie Railroad Company – Acquisition and Operation – Certain Rail Lines of CSX Transportation, Inc. in Onondage, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, New York (Docket No. FD 36347)*

Dear Ms. Brown:

Finger Lakes Railway Corporation submits the enclosed Reply to Supplemental Information in accordance with the Board's February 7, 2020 Decision No. 3. Please let me know if there are any questions regarding this filing.

Sincerely,



Justin J. Marks
Counsel to Finger Lakes Railway Corp.

Enclosure

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

FINGER LAKES RAILWAY CORP.
REPLY TO SUPPLEMENTAL INFORMATION

(color images included)

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Counsel for Finger Lakes Railway Corp.

Dated: February 21, 2020

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

FINGER LAKES RAILWAY CORP.
REPLY TO SUPPLEMENTAL INFORMATION

Finger Lakes Railway Corp. (“FGLK”) submits this Reply to the supplemental information submitted by CSX Transportation, Inc. (“CSXT”) and by Bessemer and Lake Erie Railroad Company (“B&LE”) in accordance with the modified procedural schedule issued by the Board on February 7, 2020 in Decision No. 3. The inclusion of section 5.14(b) in the Purchase and Sale Agreement (“PSA”) prohibiting B&LE from seeking access to FGLK is a new competitive harm to FGLK shippers because it adds an additional carrier to the route between FGLK at Solvay and points on the Massena Lines all the way to eastern Canada¹, and provides CSXT with the power to block an alternative competitive route to eastern Canada. FGLK respectfully requests that the Board impose conditions on the B&LE/CSXT transaction to maintain single carrier access to the Massena Lines and an alternative competitive route to eastern Canada over the Massena Lines. FGLK is already handling traffic that could use the alternative route, and therefore, the relief sought is for the benefit of FGLK’s shippers and not for FGLK’s direct commercial benefit.

¹ For the purposes of this filing, “eastern Canada” means origins or destinations in the Provinces of Nova Scotia, New Brunswick, Ontario and Quebec.

I. PROCEDURAL HISTORY

On October 10, 2019, the B&LE filed an application for a minor transaction to acquire the Massena Lines from CSXT (“B&LE Application”). The parties included in their PSA a provision that expressly prohibits B&LE from directly accessing FGLK. Section 5.14(b) of the PSA states:

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 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.

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

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.

B&LE Application at Exhibit. 2, PSA, Section 5.14(b).

On December 9, 2019, FGLK filed comments taking no position on whether the transaction should be approved but requesting conditions to address the anticompetitive effects that Section 5.14(b) will have on FGLK and its shippers. FGLK asked the Board to condition approval of the Application on removal of Section 5.14(b) and to grant trackage rights to permit B&LE to interchange directly with FGLK. *See* FGLK Comments and Request for Conditions (“FGLK Comment”) at 16-17.

In Decision No. 3, the Board requested B&LE and CSXT to provide supplemental information concerning the potential anticompetitive effects of the provision that restricts B&LE

from seeking access to FGLK. The Board stated that such a prohibition on interchange merits further review as to any potential anticompetitive effect. The Board also invited other interested parties to address anticompetitive effects on shippers served by FGLK. Additionally, the Board requested comment as to whether FGLK's requested conditions would adequately address the competitive harms or whether modifications of FGLK's requests would be appropriate.

Decision No. 3 at 4.

FGLK filed Supplemental Information further explaining the anti-competitive effects of Section 5.14(b) including the addition of another carrier to routes to and from points on, and routes to eastern Canada over, the Massena Lines to what had been CSXT single carrier service. Moreover, it would allow CSXT, through its continued participation in the ratemaking for such moves, to control the access to the competitive route to eastern Canada, despite CSXT only handling the traffic for the approximately 7.9 miles between Solvay and DeWitt Yard. FGLK Supplemental Information at 2-3.

II. LEGAL STANDARD FOR REVIEWING THE ANTICOMPETITIVE EFFECTS OF THE PSA AND OF THE TRANSACTION

A. The Board Has Authority to Grant FGLK's Requested Conditions

The Board has authority to mitigate the anticompetitive effects of Section 5.14(b) of the PSA, and it should do so by granting FGLK's request to remove Section 5.14(b) and granting B&LE rights to directly access FGLK. In Decision 1 of this proceeding, the Board found the proposed transaction to be a minor transaction under 49 C.F.R. § 1180.2(c), but stated that the Board would "carefully review the proposed Transaction to make certain that it does not substantially lessen competition, create a monopoly, or restrain trade and that any anticompetitive effects are outweighed by the public interest." Decision 1 at 6. Further, the Board stated that it "may impose conditions to mitigate or eliminate any anticompetitive impacts

of the transaction.” *Id.* In Decision 3, the Board identified Section 5.14(b) as a restriction on interchange that “warrants further review as to the potential for any anticompetitive effect.” *Id.*

The Board has imposed conditions on minor transactions under 49 C.F.R. § 1180.2(c) to mitigate the anticompetitive impacts of rail line transactions. In its Supplemental Information, CSXT states that “the case law makes clear that the Board should only use conditions of *any type* to ameliorate a *reduction* in competition.” CSXT Supplemental Information at 13. Similarly, B&LE asserts that “[t]here is no basis for the Board to impose a competition-preserving condition on a minor transaction unless such ‘substantial’ anticompetitive effects exist.” B&LE Supplemental Information at 5.

However, the Board has imposed conditions when it is concerned that a provision in an agreement has the potential to be used in an anticompetitive fashion. *See Massachusetts Coastal Railroad, LLC – Acquisition – CSX Transp., Inc.* STB Finance Docket No. 35314, slip op at 6-7 (served Mar. 29, 2010) (“*Mass. Coastal*”). In *Mass. Coastal*, the Massachusetts Coastal Railroad, LLC acquired a freight easement from CSXT that contained a restriction potentially constraining competition. Concerned that the restriction could have even the potential for harming competition, the Board conditioned its approval on the parties adding language to the transaction documents to alleviate the Board’s concerns. Further, the Board reserved the post-approval right to require the parties to amend the transaction documents “to address any anticompetitive issues the Board might identify.” *Id.*

Section 5.14(b), unlike the offending provision in *Mass. Coastal*, is anticompetitive on its face. It does not have the potential to be anticompetitive, it is clearly anticompetitive because it precludes FGLK from having a direct connection with B&LE. Therefore, the Board should grant FGLK its requested conditions to remove the anticompetitive Section 5.14(b) and to grant

trackage rights to maintain an alternative competitive route to eastern Canada over the Massena Lines and single carrier access to points on the Massena Lines.

B. The Board Is Correct to Equate the Section 5.14(b) Access Restriction to an Interchange Commitment

In Decision No. 3, the Board correctly equated Section 5.14(b) to an interchange restriction. The Board has identified a variety of factors for considering whether an interchange commitment is in the public interest but considers any interchange commitment on a case-by-case basis. *Middletown & New Jersey Railroad, LLC – Lease and Operation Exemption – Norfolk Southern Railway Company*, STB Docket No. FD 35412, slip op. at 6 (served Sept. 23, 2011). These factors include:

- whether the interchange agreement is part of a lease or a sale of a line,
- the duration of the restriction,
- whether the interchange commitment discourages interchange with other carriers and the degree to which interchange is effectively foreclosed.

Id. at 7. The Board states that “[p]arties should expect a higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity.” *Id.* Here, Section 5.14(b) meets each of the factors that the Board considers when analyzing whether an interchange restriction is in the public interest. Section 5.14(b) is part of a line sale, it is permanent, and it certainly discourages interchange with FGLK to the extent that it totally prohibits B&LE from seeking access to FGLK. Considering the totality of the factors established by the Board, the Board is warranted in its concern about the restriction, and would be justified in imposing conditions on the B&LE/CSXT transaction to alleviate the anti-competitive effects of the PSA.

III. THE BOARD SHOULD GRANT TRACKAGE RIGHTS IN THIS PROCEEDING TO AMELIORATE THE ANTI-COMPETITIVE EFFECTS OF THE PSA AND OF THE TRANSACTION

A. The Board Has the Authority to Grant B&LE Trackage Rights To FGLK

B&LE and CSXT assert that the Board cannot impose, trackage rights in this transaction because trackage rights are a form of affirmative relief not permitted in minor transactions. CSXT Reply at 21-22; CSXT Supplemental Information at 13; B&LE Supplemental Information at 6. CSXT cites for support, *Norfolk Southern Railway Co. – Acquisition and Operation Exemption – Certain Rail Lines of the Delaware and Hudson Railway Co., Inc.*, STB Finance Docket FD 35873, slip op. at 25 (served May 15, 2015) (“*NSR/D&H*”).

In *NSR/D&H*, the Board rejected the requested condition for trackage rights because the complainant sought trackage rights in an unrelated proceeding: “East of Hudson asks the Board to assign NSR trackage rights that are related to the Conrail acquisition, not this proceeding, and its request in no way relates to a competitive harm alleged to be cause by this proposed transaction.” *NSR/D&H* at 25. However, where the Board did find competitive harm in the *NSR/D&H* case, it did grant trackage rights. *Id.* at 34. Thus, the Board’s prohibition on the right to grant trackage rights is not as broad as CSXT and B&LE assert.²

B. B&LE and CSXT Overstate the Operational Impacts of Granting Trackage Rights

Both B&LE and CSXT assert that granting a trackage rights condition would interfere with efficient operations resulting in substantial costs in connection with requiring and

² See also *Canadian National Ry Co, Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisc. Central Transp. Corp., Wisc. Central LTD., Fox Valley & Western LTD., Sault STE. Marie Bridge Co., and Wisc. Chicago Link LTD*, STB Finance Docket No. 34000, slip op. at 2 (served June 15, 2001) (allowing for trackage rights or another remedy that would ordinarily be sought by a responsive application if an interested party can demonstrate harms that would be caused by an unconditioned approval of a minor transaction.).

accommodating a new train to cross the CSXT mainline, referred to as the Water Level Route. B&LE Supplemental Information at 14; CSXT Supplemental Information at 12. B&LE and CSXT overstate the operational impact that a trackage rights condition would cause because any additional FGLK traffic could be accommodated in a similar manner as other existing trains that already cross the Water Level Route in the vicinity of Solvay, New York.

Currently, three times per week (totaling 6 trips bidirectionally), the New York, Susquehanna & Western Railway (“NYSW”) crosses over from the Solvay (on the south) side of the Water Level Route through multiple crossovers to drop off and pick up traffic between NYSW and CSXT at Belle Isle yard (on the north side). The NYSW train then crosses back from north to south to return to NYSW trackage. *See Exhibit 1.*³ As noted previously, B&LE when it operates to and from Belle Isle Yard will be in close proximity to FGLK’s Solvay Yard. *See the overhead photograph attached as Exhibit 2.*⁴

In addition, seven times a week, CSXT runs a DeWitt Yard to Solvay Yard local train, serving FGLK, NYSW, and local shippers, that leaves DeWitt Yard and interchanges with FGLK at Solvay Yard. Depending on which track of the Water Level Route is being used (both tracks are operated bi-directionally), some of these trains also cross over from the north side of the Water Level Route to the south side.

An example of how B&LE could access Solvay Yard is shown on Exhibit 3. Even if one additional train crossing over — from Solvay to Woodard by FGLK or by B&LE, or by B&LE

³ FGLK is not suggesting that it would interchange traffic with B&LE in CSXT’s Belle Isle Yard, or that it would be handling either the Fulton Branch unit trains or the military traffic. Rather, these movements suggest that it would not be operationally difficult for B&LE to cross the Water Level Route to access FGLK’s Solvay Yard.

⁴ FGLK is not suggesting that proximity is a justification for the trackage rights, but rather demonstrates that the trackage rights would not substantially interfere with operations on the Water Level Route.

between Belle Isle Yard and Solvay — would add some operating challenge, it would not be as significant as CSXT asserts considering the number of trains that already cross the Water Level Route.⁵

IV. THE BOARD SHOULD REJECT B&LE AND CSXT ATTEMPTS TO MINIMIZE THE ANTICOMPETITIVE EFFECTS OF SECTION 5.14(b)

Section 5.14(b) prohibits B&LE from accessing or seeking to access FGLK and is anticompetitive on its face. As such, it places CSXT as the gatekeeper to the Massena Lines. B&LE and CSXT attempt to minimize the anticompetitive effect on FGLK shippers by stating that only a small amount of FGLK traffic ships over the Massena Lines. B&LE Supplemental Information at 7; CSXT Supplemental Information at 11. This argument ignores the fact that CSXT has control over FGLK routings to eastern Canada. Currently, FGLK shippers with freight originating or terminating in eastern Canada have one of two options on CSXT, either routing north over the Massena Lines or routing west through Buffalo. CSXT, for its own purposes, has chosen to route most of the traffic of FGLK shippers to eastern Canada through Buffalo (394 carloads in 2018 and 149 in 2019).⁶ Some of the FGLK Buffalo traffic could just as easily be routed over the Massena Lines if CSXT were to competitively price this route.

FGLK requests conditions to alleviate the competitive harms created by Section 5.14(b) of the PSA and the transaction as proposed because post transaction, CSXT will be able to use this interchange restriction to act as gatekeeper to continue pushing FGLK traffic through Buffalo and eliminating the Massena Lines as a competitive option for FGLK shippers.

⁵ Moreover, with the implementation of PSR, CSXT is or will be running fewer trains on the Water Level Route which should allow for additional windows.

⁶ B&LE acknowledges that some additional FGLK shipper traffic currently moves over the Massena Lines to eastern Canada. B&LE Supplemental Information at 3.

Conditions that place the Massena Lines on equal footing with CSXT's routing through Buffalo will mitigate the harm imposed by Section 5.14(b).

Direct access to B&LE and the Massena Lines would also eliminate the addition of CSXT as an additional intermediate carrier to the route. CSXT attempts to diminish this competitive harm by stating that "no demand exists today for rail transportation between points on FGLK and points on the Massena Lines." CSXT Supplemental Information at 8. While FGLK acknowledges that there is no current traffic moving between points on the Massena Lines and FGLK shippers, FGLK's experience is that demand for such moves does exist; however, CSXT has not been willing to quote truck-competitive rates. FGLK has requested pricing for potential shipments to/from the Fulton subdivision (where FGLK is a switching carrier), and to/from points on the Massena Lines for commodities including aluminum scrap, ingots, and dross, as well as soybeans, protein enriched animal feed, bagged salt, and liquid fertilizer. That traffic was not ultimately transported via rail. The likelihood of shippers being able to obtain competitive pricing to and from points on the Massena Lines will further diminish with the addition of another carrier into the route.

Moreover, the Board should reject the B&LE and CSXT attempts to minimize the anticompetitive impacts of Section 5.14(b) because regardless of the amount of traffic impacted, the provision harms shippers by blocking a competitive route over the Massena Lines. As the Board has recognized, even the small-volume traffic that short line railroads move benefits shippers because it allows short lines to "give specialized attention to the needs of shippers on their lines."⁷

⁷ *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, STB EP No. 575; *Disclosure of Rail Interchange Commitments*, STB EP No. 575

V. THE BOARD SHOULD IMPOSE CONDITIONS TO MITIGATE THE ANTICOMPETITIVE HARMS CAUSED BY THE PSA AND THE TRANSACTION

As discussed above, the Board should impose conditions upon the B&LE/CSXT transactions to mitigate the anticompetitive harms caused by Section 5.14(b) and the transaction as proposed. In Decision No. 3, the Board also requested comment as to whether FGLK's requested conditions would adequately address the anticompetitive harms or whether modifications of FGLK's requests would be appropriate. Decision No. 3 at 4. Neither B&LE nor CSXT address whether modifications of FGLK's requested conditions would be appropriate; instead they continue to ask the Board to deny any mitigating conditions claiming that FGLK is only pursuing personal commercial benefit from the transaction.

As previously stated, FGLK requests that the Board mitigate the competitive harm of this transaction by conditioning its approval on the removal of Section 5.14(b) from the PSA and granting trackage rights for either B&LE to access FGLK or FGLK to access B&LE. Imposing these conditions would mitigate the blatantly anticompetitive effects of the proposed transaction, would ensure that FGLK shippers have a direct competitive route to eastern Canada via the Massena Lines, and would ensure that FGLK shippers have single carrier access to points on the Massena Lines.

In the B&LE and CSXT Supplemental Information, both parties ignore the Board's request for suggestions on how FGLK's requested conditions might be modified. Although FGLK maintains its requested conditions are reasonable, FGLK believes there may be other adequate ways for the Board to mitigate the anticompetitive harm.

While, FGLK disagrees that granting it trackage rights to B&LE would interfere with efficient operations, the Board has other options that could alleviate B&LE's and CSXT's operational concerns. First, the Board could require CSXT to grant trackage rights to B&LE to FGLK's Solvay Yard instead of granting FGLK trackage rights to B&LE at Woodard. Only granting B&LE trackage rights will potentially simplify the movements since B&LE will already be operating over the Water Level Route near the Solvay Yard. The Board could also condition the transaction by requiring CSXT to provide haulage service on reasonable terms and conditions between FGLK's Solvay Yard and CSXT's DeWitt Yard - since CSXT already handles FGLK traffic between Solvay Yard and DeWitt Yard and will be physically interchanging traffic with B&LE in DeWitt Yard, this condition would alleviate any possible operational concerns while also mitigating the anticompetitive effects of Section 5.14(b) by providing direct commercial access between FGLK and B&LE. (Physical interchange with B&LE at DeWitt Yard and commercial interchange with B&LE at Woodard would mirror the interchange arrangements being established by B&LE and CSXT.)

Finally, regardless of whether the Board imposes any or all of the requested conditions, FGLK requests the Board to condition approval of the transaction on its continued oversight to ensure that FGLK and its shippers have a venue to hear complaints regarding competitive harms based on the behavior of the parties after the transaction.

VI. CONCLUSION

For the above stated reasons, FGLK respectfully requests that the Board condition its approval of the B&LE/CSXT transaction on conditions that mitigate the anticompetitive effects of Section 5.14(b) of the PSA and of the transaction. Any conditions imposed should ensure that FGLK shippers have access to the Massena Lines as a competitive option to routing traffic to eastern Canada through Buffalo via CSXT, and direct commercial access to points on the Massena Lines.

Respectfully submitted,



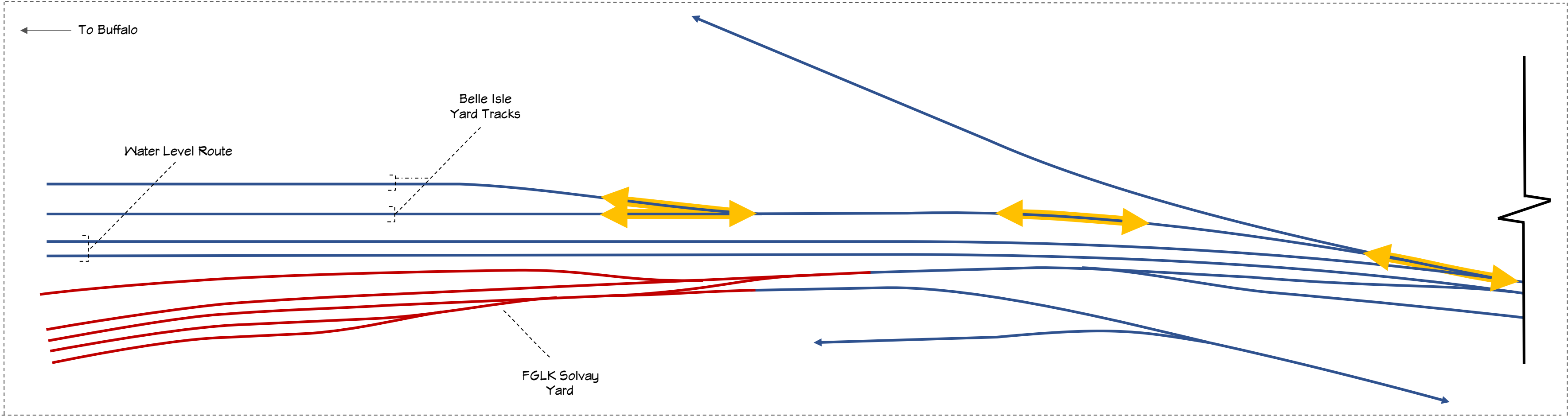
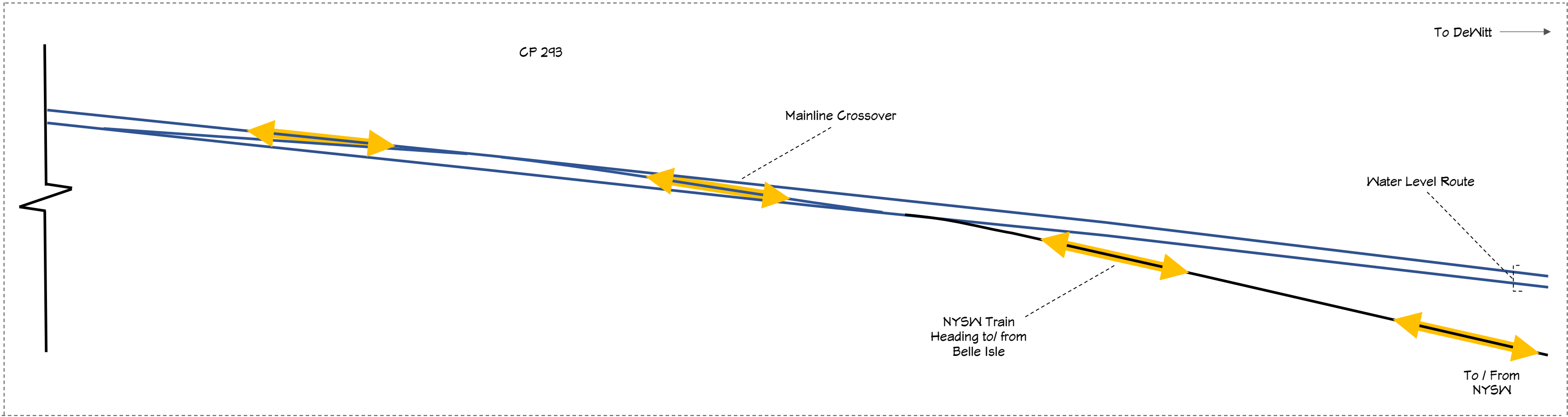
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Counsel for Finger Lakes Railway Corp.

Dated: February 21, 2020

EXHIBIT 1



SCALE: NOT TO SCALE
DRAWN BY: JDK
DATE: 02/20/20

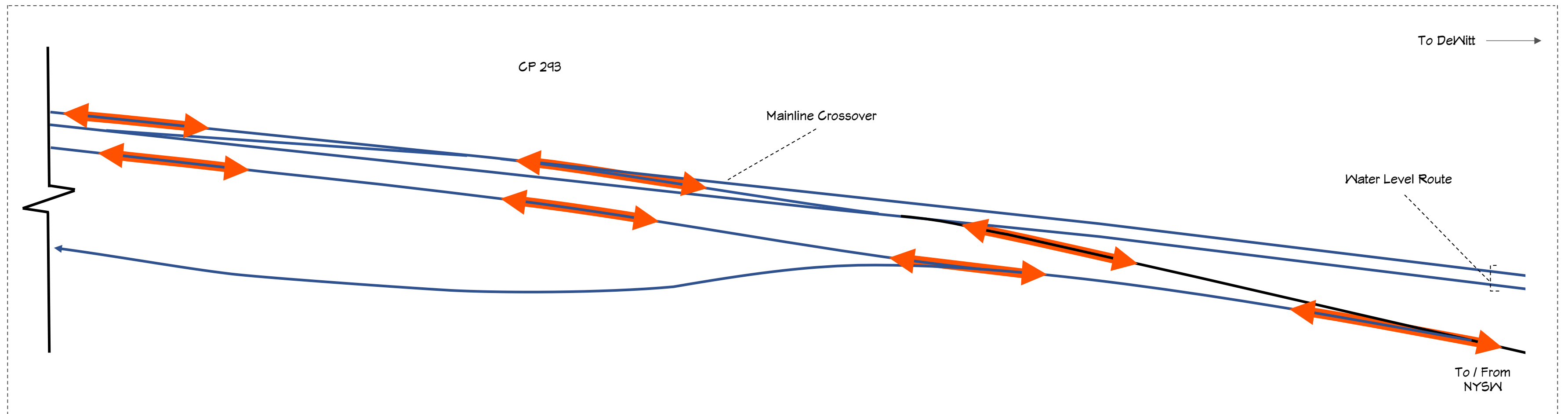
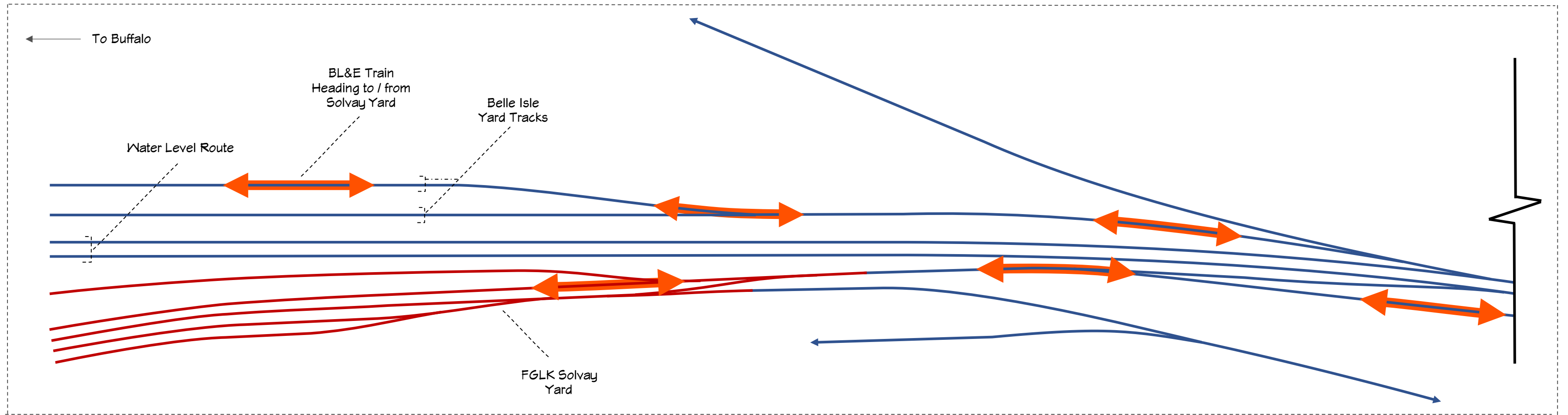
KEY	
CSXT TRACK	
FGLK TRACK	
NYSW TRACK	

EXHIBIT 2

Facing southeast in Solvay Yard toward Syracuse.



EXHIBIT 3



SCALE: NOT TO SCALE
 DRAWN BY: JDK
 DATE: 02/20/20

KEY	
CSXT TRACK	—
FGLK TRACK	—
NYSW TRACK	—

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 Verification.

Executed on February 21, 2020.

A handwritten signature in black ink, appearing to read "M.V. Smith", is written above a horizontal line.

Michael V. Smith
President
Finger Lakes Railway Corp.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2020, I served a copy of the foregoing

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

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