

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35654

**GENESEE & WYOMING INC.
– CONTROL –
RAILAMERICA, INC.**

APPLICANTS' REPLY TO COMMENTS

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I. INTRODUCTION

The Board should act promptly to approve Genesee & Wyoming Inc.'s ("GWI") control of RailAmerica, Inc. ("RailAmerica"). No commenting party has asked the Board to block GWI's proposed control of the RailAmerica railroads.¹ Nor has any commenting party contested the evidence submitted by Applicants in the Application and the accompanying verified statements of Kevin Neels and William Rennie attached to the Application regarding the lack of any competitive impact of the Transaction. Based on the evidence presented in the Application and the attachments thereto, the Board preliminarily determined that "the Transaction clearly will not have any anticompetitive effects." Sept. 5, 2012 Decision at 1. No party has contested that determination or the evidence on which it was based. The acquisition of control of RailAmerica by GWI will combine control of a number of shortlines, all but one of which are Class III railroads, that operate largely independently of one another in distinct geographic regions. There will be no reduction in service alternatives from 2 to 1 resulting from

¹ As the Board is aware, the transaction was closed on October 1, 2012 and RailAmerica's common stock was simultaneously placed into a voting trust pending a final decision in this proceeding on GWI's authority to control RailAmerica. Applicants will hereafter refer to the proposed acquisition of control at issue here as the "Transaction."

the Transaction. Because the Transaction will not result in a “substantial lessening of competition, creation of monopoly, or restraint of trade,” the Board is instructed by statute that it must approve the Transaction. 49 U.S.C. §11324(d)(1).

Moreover, there is strong, widespread and unequivocal support for the Transaction. There is substantial support for the Transaction among Federal, state and local government agencies and officials. Hundreds of shippers and shipper associations have urged the Board to approve the Transaction. Based on these statements of support, it is obvious that there is broad recognition among shippers and government officials that GWI’s control of RailAmerica will bring strong and immediate benefits to the rail community.

Strong support for the Transaction exists because GWI is widely recognized as a customer-oriented company that is committed to the long-term viability of rail transportation in the communities in which it operates. As noted in the Application, a 2011 survey conducted by the leading customer-satisfaction research firm, J.D. Power and Associates, showed that GWI outscores the trucking and rail freight industries in customer satisfaction. *See* Application at 16; Aug. 6, 2012 Hellmann V.S. at 3. Surveys done by J.D. Power in 2007 and 2009 produced the same results.

There are several reasons for customers’ high level of satisfaction with GWI. First, GWI’s commitment to safety, as evidenced by its exemplary safety record, is unparalleled in the railroad industry. Second, GWI is well-known for its ability to offer local, flexible and responsive operations with outstanding customer service. In addition, GWI’s locally-based management teams approach new business development opportunities as would a local entrepreneur, seeking the best possible outcome for the customer, the community and the

railroad. Finally, GWI is a long-term owner of railroads that seeks to grow rail shipments and promote economic development in the communities it serves.

However, a limited number of commenting parties have used this Transaction to air complaints they have with the pre-Transaction management of a few RailAmerica railroads. These complaints are irrelevant to the Board's review of the Transaction because the concerns raised by these commenting parties all relate to commercial disputes with RailAmerica that predate the Transaction and therefore do not arise as a consequence of the Transaction.

Although it is clear that these complaints address pre-existing commercial disputes, these parties still ask the Board to impose conditions on its approval of the Transaction. A few commenting parties seek assurances that GWI will continue to act in ways that the commenting parties support. As discussed in more detail below, these conditions and assurances are completely unwarranted and there is no reason for the Board to address them in this proceeding.

In short, the record is clear that the Transaction should be approved. There is no reason for a lengthy review of the record and no need for further briefing or oral argument. Applicants urge the Board to complete its review of the record and issue a decision with sufficient time to allow the Transaction to be completed by December 31, 2012.

Since the Transaction was announced on July 23, 2012, RailAmerica has experienced a significant increase in the number of employees injured on its railroads. Since July 23rd, RailAmerica has reported ten injuries to the FRA, with two injuries in October. Prior to the announcement of the Transaction, RailAmerica had nine reportable injuries in 2012, meaning that the number of employees hurt on its railroads has more than doubled in just 95 days. Current year-to-date FRA reportable injuries per 200,000 man-hours is 0.49 at GWI and 1.98 at RailAmerica. While the increase in the number of injuries is significant, RailAmerica's injury

ratio is still lower than the overall Class III railroad average of 3.0 (through June). However this recent injury performance is inconsistent with GWI's and RailAmerica's goal of zero injuries. Prompt approval of the Transaction will allow GWI to roll out its industry leading safety program as soon as possible, providing more focus and attention on safe operating practices, with the goal of reversing this serious trend of increased injury activity.

Further, prompt approval of the Transaction will also allow GWI to deploy its locally-based, customer-oriented service to the RailAmerica railroads, and will remove the uncertainty currently faced by RailAmerica's shippers and the employees of the combined company. Finally, allowing GWI control to become effective on December 31, which is the end of GWI's fiscal year, also will increase the transparency of GWI's financial results and relieve GWI of burdensome and complicated financial reporting for the period that the common stock of the RailAmerica railroads is being held in trust.

Prompt approval of the Transaction will also comport with the Rail Transportation Policy objective at 49 U.S.C. § 10101(15) "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part," as well as the Board's stated objective of providing "fair and timely decisions when regulation is required." STB FY 2010 Annual Report at 2.

II. LEGAL FRAMEWORK FOR BOARD ANALYSIS

The standards that the Board applies in deciding whether to approve a minor transaction are narrow and straightforward. Consistent with Congress' intent to allow private markets to function free from regulatory control to the maximum extent possible, *see, e.g.*, 49 U.S.C. §10101(2), the Board is instructed to approve a minor transaction unless it finds that the transaction is likely to result in substantial anticompetitive effects. As explained in the Application and discussed further below, there is no evidence that this Transaction will produce

any anticompetitive effects, let alone substantial anticompetitive effects. Moreover, none of the commenting parties allege anticompetitive effects that will result from the transaction. Although the Board has authority to impose conditions on the approval of a control transaction, the Board must use that authority narrowly only to address specific anticompetitive effects likely to be produced by a transaction and not to address pre-existing issues or to resolve disputes that are unrelated to the transaction. The applicable legal standards and precedent are discussed below.

A. The Board Must Approve the Transaction Unless There Are Likely to Be Substantial Anticompetitive Effects.

Minor transactions are governed by 49 U.S.C. § 11324(d), which states:

In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board *shall approve such an application unless* it finds that— (1) *as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade* in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.” (emphasis added).

Under the governing statute, the focus of the Board’s analysis in a minor transaction case is whether the transaction is likely to produce anticompetitive effects. *See, e.g., CSX Corp. and CSX Transp., Inc.—Control—Indiana R.R. Co.*, Docket No. FD 32892, slip op. at 5 (STB served Nov. 7, 1996) (“*CSX/Indiana*”) (“In transactions subject to 49 U.S.C. 11324(d), the primary focus is on the probable competitive effects.”). If the transaction is not likely to produce anticompetitive effects, the Board’s analysis is complete and the transaction must be approved. *See Illinois v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982) (“[I]f the Commission finds no substantial anticompetitive effect flowing from the proposed [minor] transaction, its analysis is at an end. At that point, [it] must approve the transaction . . .”).

Issues other than the competitive impact of a proposed transaction become relevant to the Board's review *only if* the Board concludes that there is a likelihood that the transaction will produce substantial anticompetitive effects. See *Adrian & Blissfield R.R. Co.—Continuance in Control—Charlotte Southern R.R. Co., et al.*, Docket No. FD 35498, slip op. at 4 (STB served Aug. 19, 2011) (“In assessing transactions subject to § 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the transportation benefits or could be mitigated through conditions.”) (“*Adrian & Blissfield/Charlotte Southern*”); *CSX/Indiana*, slip op. at 5 (“In transactions subject to 49 U.S.C. 11324(d), . . . [w]e consider the public interest factors only if significant anticompetitive effects are found.”); *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1338-39 (D.C. Cir. 1991) (holding that the ICC need not consider issues unrelated to competition in exempting a minor transaction from review because the statute limited the ICC's disapproval authority to such issues); *Kansas City S.—Control—Kansas City S. Ry. Co., Gateway E. Ry. Co., & Tex. Mexican Ry. Co.*, 7 S.T.B. 933, 955 (2004) (“*KCS/TM*”) (in a minor transaction, “the application must be evaluated under the presumptive grant standard of § 11324(d), not under the broader public interest standard of § 11324(c), which applies only to ‘major’ transactions (involving two or more Class I railroads)”²).

When determining whether competitive harms would be caused by a transaction, the Board has repeatedly stated that the proper inquiry is whether the transaction would give the combined entity the power to increase the prices paid for transportation service or to reduce

² In light of these Board precedents and 49 U.S.C. § 11324(d), there is no basis for the suggestion by Central California Rail Shippers & Receivers Association (“CCRSRA”) that the Board must engage in a broad public interest inquiry under 49 U.S.C. § 11324(c) in approving this minor transaction. See CCRSRA Comments at 8-9. Similarly, there is no legal basis for CCRSRA's argument that approval of this minor transaction should be “guided” by the Board's policies for evaluating the mergers of Class I railroads. See *id.* at 10 n.4.

service, the two indicators of market power. As the ICC explained: “Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels.” *Burlington N. Inc. & Burlington N. R.R. Co.—Control & Merger—Santa Fe Pac. Corp. & Atchison, Topeka & Santa Fe Ry. Co.*, Finance Docket No. 32549, 1995 WL 528184, at *47 (ICC served Aug. 23, 1995). *See also KCS/TM*, 7 S.T.B. at 948 (“Competitive harm would result from a merger to the extent that the merging parties would gain sufficient market power to profit by raising rates and/or reducing service.”); *Canadian Nat’l Ry. Co. & Grand Trunk Corp.—Control—Duluth, Missabe & Iron Range Ry. Co.*, 7 S.T.B. 526, 538 (2004) (“Competitive harm can result from a merger to the extent that the merging parties gain sufficient market power to profit by raising rates and/or reducing service.”) (“*Canadian Nat’l/Duluth*”); *CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp.*, 3 STB 196, 246 (1998) (“Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both).”). Accordingly, where, as here, a proposed transaction is not likely to give the new company the power to raise rates or reduce service that it previously did not have, *see Neels Reply V.S.* at 7-9, the Board is required to approve the transaction.

B. Since the Board’s Review Focuses on Anticompetitive Effects that Result From the Transaction, Issues Related to Pre-Existing Disputes Are Irrelevant to the Board’s Review.

As indicated above, the statute limits the Board’s consideration of competitive issues to those issues that are “a result of the transaction.” 49 U.S.C. § 11324(d). In recognition of this, the Board has consistently stated that it will only consider anticompetitive effects that will be directly caused by or exacerbated by the transaction and not issues that pre-date the transaction. *See, e.g., Canadian Nat’l/Duluth*, 7 S.T.B. at 538 (“[H]arms 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).”).

The Board has also indicated that it is unwilling to use merger proceedings to insert itself into potential disputes regarding service or fees or to allow shippers to use merger proceedings to put themselves in a better position than they were prior to the transaction. *See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, Finance Docket No. 35081, slip op. at 12, 15, 15 n. 25 (STB served Sept. 30, 2008) (“*Canadian Pac./Dakota*”) (“To enforce either agreement beyond its current expiration date would certainly benefit KCS by protecting its economic interests for longer than it has otherwise bargained for, but that is not our charge under 49 U.S.C. 11324. We do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation”), *aff’d*, *Commuter Rail Div. of the Reg’l Transp. Auth. v. STB*, 608 F.3d 24 (D.C. Cir. 2010).³

Further, the Board has found that merger proceedings are not the appropriate forum to deal with allegations regarding the legality of practices or actions or conduct engaged in by applicants where such claims can be or have been addressed in other forums. *See Norfolk Southern Ry. Co., Pan Am Ry., Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern LLC*, Finance Docket No. 35147, slip op. at 9 (STB served March 10, 2009) (“*Norfolk Southern/Pan Am Southern*”) (“The enforcement of any prior promises or obligations

³ Moreover, the Board does not consider complaints about the existence of market power that pre-date a proposed transaction. *See Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp.*, 3 S.T.B. 1030, 1032 (1998) (“Because the railroad industry is not an open access industry, and because some shippers may pay more than others under the law that we administer, merger proceedings are not used as vehicles to equalize the competitive positions of shippers generally.”). The Board’s concern is limited to market power that is created by the proposed transaction.

that Springfield Terminal may have made or undertaken concerning branch line service may be pursued in a different proceeding or forum, but such promises or obligations are not an appropriate subject for conditions in this proceeding”); *Adrian & Blissfield/Charlotte Southern*, slip op. at 5 (“The concerns regarding ADBF’s reporting of injuries and accidents are primarily within the purview of the FRA. The allegations concerning Dobronski’s professional conduct are not relevant to whether ADBF’s continuing control of the 3 railroads is anticompetitive, but rather raise issues of state and local law that the record shows have been litigated in Michigan and Arizona courts.”).

C. The Board Does Not Use Its Conditioning Authority to Address Pre-Existing Circumstances or Disputes.

The Board has authority to impose conditions on the approval of a proposed control transaction, but it exercises that authority under narrow circumstances, namely to address any anticompetitive effects that the Board concludes are likely to be produced by the transaction.⁴ As the Board has explained, “even if there will be likely substantial and anticompetitive impacts, the Board may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions” *Canadian Nat’l/Duluth*, 7 S.T.B. at 538. The Board does not use its conditioning authority as an opportunity to expand its regulation of the parties seeking approval of a control transaction but rather as a narrow remedy for any specific anticompetitive concerns raised by the transaction.

⁴ The Board also has authority to establish labor and environmental conditions, but labor conditions and environmental conditions are not at issue here. The Applicants have already confirmed that Board approval will be made subject to the labor protection requirements of 49 U.S.C. § 11326(b) and *Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad*, Docket No. FD 33116 (STB served Apr. 17, 1997). See Application at 23. No party has requested other labor conditions. The Transaction clearly has no environmental impact because it will result in no operational changes and no party has requested environmental conditions.

Moreover, when the Board concludes that conditions are warranted, the Board requires that the conditions be “feasible” and that they “ameliorate significant competitive harm that is caused by a merger.” *KCS/TM*, 7 S.T.B. at 948. Thus, “[t]here must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy.” *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233, 461 (1996) (“*UP/SP*”). The mere fact that “a requested condition pertains to . . . one of the applicants” or “would benefit the party seeking it does not justify its imposition.” *Id.*

The Board has consistently rejected requests for conditions that do not relate to competitive effects caused by a transaction. For example, the Board has rejected requests for conditions “to remedy perceived pre-existing problems, such as service failures, lack of investment, failure to pay bills, and failure to establish interchanges with other carriers or to route enough traffic through the interchanges that already exist.” *Norfolk Southern/Pan Am Southern*, slip op. at 5-6. The Board declined to impose conditions to remedy such pre-existing problems “because none [of the conditions] are based on a competitive effect of the transaction or would even address any kind of effect caused by the transaction.” *Id.* at 6. Similarly, the Board does not “use its conditioning authority to freeze in place the contractual terms, such as rate and revenue divisions, which have been voluntarily bargained for independent of the transaction.” *CSX Transport., Inc. & Delaware & Hudson Ry. Co., Inc.—Joint Use Agreement*, Docket No. FD 35348, slip op. at 8 (STB served Oct. 22, 2010). Also, the Board “do[es] not impose conditions designed to put the proponent in a better position than it occupied before the consolidation.” *Canadian Pac./Dakota*, slip op. at 12.

As discussed below, the application of these well-established legal principles should result in a prompt approval of the Transaction with no conditions imposed.

III. REPLIES TO INDIVIDUAL COMMENTS

Combined, the GWI and RailAmerica railroads serve approximately 2,000 customers. Yet only ten comments were filed in response to the Application. Three of the commenting parties—New York State Department of Transportation, Pan Am Southern LLC and Springfield Terminal Railway Company—support the Transaction. Four of the commenting parties—Kansas City Southern Railway Company, Southwestern Electric Power Company, United Transportation Union–New York State Legislative Board, and Vermont Agency of Transportation—seek assurances that existing conditions or relationships will be preserved. Three comments—Central California Rail Shippers & Receivers Association, Railroad Salvage & Restoration, Inc./G.F. Wiedeman International Inc., and Winamac Southern Railway Company/U.S. Rail Corporation—complain about certain pre-existing commercial practices of a small number of RailAmerica railroads and ask for conditions to be imposed on the Transaction to address their complaints.

Applicants address below the comments of commenting parties other than those that support the Transaction unequivocally. For the reasons discussed below, the Board should approve the control by GWI of RailAmerica and its railroads with no conditions.

A. Central California Rail Shippers & Receivers Association

The most extensive comments on the Transaction were filed by Central California Rail Shippers & Receivers Association (“CCRSRA”). CCRSRA members are served by RailAmerica’s San Joaquin Valley Railroad (“SJVR”) in California’s Central Valley. The SJVR interchanges with both BNSF and UP, but it does not interconnect with a GWI railroad, as GWI

does not own any railroads in California.⁵ Thus, it is beyond debate that the Transaction will have no operational, and therefore no competitive, impact on these shippers in terms of the interchange of freight between GWI and RailAmerica railroads. In fact, the CCRSRA comments are notable for the absence of any allegation that the Transaction will have any anticompetitive impact, and thus fail to state any basis on which any type of condition might be warranted.

The CCRSRA comments include a narrative argument and three verified statements from representatives of CCRSRA members which use the SJVR. In addition, CCRSRA submitted a verified statement by an economist, John Hoegemeier. Although the comments run to nearly 300 pages, they almost completely ignore the Transaction, underscoring that CCRSRA is concerned with non-Transaction related commercial matters. In fact, CCRSRA's economist devotes only three pages of his verified statement to the Transaction. The verified statements of CCRSRA members contain even less discussion of the Transaction.

The complaints made in the CCRSRA filing relate primarily to non-freight charges established by SJVR prior to the announcement of the Transaction. For example, CCRSRA witness Richard Dreo, president of Superior Soil Supplements, states that the purpose of his verified statement is "to address the practices of the San Joaquin Valley Railroad . . . and its parent holding company, RailAmerica Inc. . . . of assessing line surcharges on customers receiving rail freight on SJVR lines." Dreo V.S. at 1. Mr. Dreo complains about surcharges that have been assessed on his traffic since 2011 (none have yet been paid), details negotiations with SJVR over the surcharges, contends that his company was lured to locate on the SJVR without notice that there might be surcharges in the future, expresses doubt that the surcharges can be

⁵ GWI's Rail Link subsidiary conducts contract switching operations in French Camp, California at Union Pacific's Lathrop Intermodal Terminal, but these switching operations do not interchange with SJVR.

justified by required track maintenance, and appears to opine that there are other users of the SJVR line who should bear the cost of maintenance instead of his company.

Mr. Dreo refers in passing to the Transaction only twice. *See* Dreo V.S. at 1, 10-11. First, he states without any support or explanation that SJVR's "surcharge practices are impacted by the proposed acquisition." *Id.* at 1. Second, he states that he is "very concerned about how G&W will handle the current surcharge situation going forward." *Id.* at 10. His only explanation for his concern is that "a large holding company will become much larger" and that "there will be a need to continue to ramp up revenues to pay for the substantial transaction costs and new debt." *Id.* at 11. Mr. Dreo makes no allegation regarding the competitive effects of the Transaction.

Similarly, the verified statement of Mark Del Papa, a vice president of San Joaquin Refining Co., complains about the existing practices of the SJVR. Mr. Del Papa's discussion of the Transaction is limited to two paragraphs. The gist of Mr. Del Papa's discussion is that he does not know whether GWI will leave SJVR's switching and demurrage charges in place after the Transaction. *See* Del Papa V.S. at 11-12. Once again, there is no discussion whatsoever of the potential competitive impact of the Transaction. The remainder of Mr. Del Papa's statement contains a list of Mr. Del Papa's commercial complaints, including his objection to paying for demurrage, to paying when his company requests delivery of specific railcars by number to its plant, and to a separate "constructive placement" fee that his company has never been required to pay.⁶ Mr. Del Papa makes clear that the charges he finds objectionable were established long

⁶ Mr. Del Papa explains that "SJVR did inform us that the Switch from Constructive Placement fee would be waived for one year, but we were told that we may be subject to this new charge beginning in the Spring of 2013." Del Papa V.S. at 7.

before the Transaction was announced, thereby conceding they are in no way related to the Transaction.

The verified statement of Charles Littlefield, COO of Richard Best Transfer Inc. has a similar theme. Curiously, Mr. Littlefield also provided a July 27, 2012 letter on behalf of his company *supporting* the Transaction, a copy of which was included in the Application. In that July 27 letter, he lauds GWI as “an outstanding organization” that “believes in developing strong customer partnerships.” In his CCRSRA submission, however, Mr. Littlefield complains about fees and tariffs imposed by SJVR under RailAmerica management. Mr. Littlefield also complains about SJVR abandonments, some of which occurred prior to RailAmerica’s ownership, details a 2009 meeting with SJVR and RailAmerica officials arranged by the STB’s Office of Public Assistance, Governmental Affairs, and Compliance to discuss providing 20-days’ notice of new tariffs, and objects to credit and security deposit requirements that “RailAmerica applies across-the-board on almost all of its railroads.” Littlefield V.S. at 11. Mr. Littlefield’s discussion of the Transaction is limited to a description of the “good things” GWI said it would do in the Application, a statement that CCRSRA members have heard such promises from other railroads in the past and have subsequently been disappointed, and a summary of the points made in Mr. Hoegemeier’s statement. Once again, there is no discussion of possible competitive effects of the Transaction or any effort to attribute his complaints about RailAmerica to the Transaction.

Thus, the bulk of the CCRSRA comments consists of a recounting of complaints about SJVR service and practices, mostly with respect to what CCRSRA terms “non-freight revenues,”

including demurrage, switching, and accessorial charges.⁷ CCRSRA takes the position that many of these charges are improper and that, in any case, the charges are excessive. While the CCRSRA comments reveal dissatisfaction with its members' historical dealings with SJVR under RailAmerica ownership, they provide nothing that is pertinent to the competitive analysis the Board is called upon to make in evaluating the Transaction.

Further, CCRSRA's claim that these charges are so high that they are driving shippers off the SJVR makes little sense. A shortline railroad cannot survive by driving customers off its rail line. In addition, the dissatisfaction expressed by these commenters is not shared by other users of the SJVR. A number of SJVR users, including Richard Best Transfer, Inc., filed letters in support of the Transaction. *See* Application, Appx. D (support letters from Heck Cellars, Inc.; Los Gatos Tomato Products, Inc.; and Quality Grain Company, Inc.).

Despite the volume of its comments, CCRSRA does not contend that the Transaction should be blocked. Indeed, replacement of the existing RailAmerica management and management policies appears to be the primary objective of the CCRSRA commenting parties. It is therefore not surprising that CCRSRA does not oppose the Transaction, since the direct consequence of the Transaction will be the replacement of RailAmerica senior management with GWI senior management. As noted above, and as acknowledged by CCRSRA witness Littlefield in his July 27 letter, GWI has an outstanding customer service record, one that has been recognized repeatedly in customer satisfaction surveys.

CCRSRA nonetheless seeks to impose a series of intrusive and unprecedented conditions on matters related to alleged conduct by SJVR that predates the Transaction by many years.

⁷ When CCRSRA complains that RailAmerica is making too much revenue from non-freight revenue it includes the revenue from certain sources, such as real estate lease and license revenue, and other charges that are not generally imposed on shippers. *See* Hoegemeier V.S. at 9.

CCRSRA recognizes that conditions are permissible under Board precedent only where there is a “nexus between the merger and the alleged harm for which the proposed condition would act as a remedy.” *See* CCRSRA Comments at 9, *quoting* *UP/SP*, 1 S.T.B. at 461. CCRSRA nevertheless fails to establish any link between the SJVR practices of which it complains and the Transaction.

The comments allege that the practices complained of have been going on for years and that they began with the acquisition of RailAmerica by Fortress Investment Group. Clearly the practices do not stem from the Transaction. The Board should not consider rate or service issues that were not caused by the Transaction, nor should it examine the propriety of such preexisting rates and practices in a control proceeding. In such circumstances, the Board’s precedents clearly preclude imposing conditions. As the Board explained in the full passage from which CCRSRA quoted an excerpt:

The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.

UP/SP, 1 S.T.B. at 461. Having failed to establish any link between the practices and the Transaction, CCRSRA is not entitled to conditions of any kind in this proceeding. If CCRSRA members have a concern about the reasonableness of the practices they complain about in their comments, they can endeavor to pursue those concerns through existing Board complaint procedures, not in the context of this control proceeding.⁸

⁸ *See CSX/Indiana*, slip op. at 5-6 (rejecting request for conditions assuring that service would not be diminished and stating that “[s]hould allegations of unjustified service reductions subsequently arise, existing regulatory remedies are available to shippers that might be affected”).

CCRSRA attempts to make up for the absence of a link between its complaints and the Transaction by suggesting that the Transaction might somehow change the competitive situation with respect to non-freight charges. CCRSRA does not challenge the competitive analysis by Mr. Neels submitted with the Application, which demonstrated that the Transaction is not anticompetitive.⁹ Instead, CCRSRA dismisses the Neels analysis as “traditional,” and asserts that “a different type of competitive analysis” is called for. *See* CCRSRA Comments at 3. In fact, however, the CCRSRA comments are devoid of meaningful analysis of how the Transaction would produce adverse competitive consequences for CCRSRA members.

CCRSRA’s purported competitive analysis consists of unsubstantiated assertions that the Transaction will lead to the assessment of additional non-freight charges for two reasons: the Transaction will produce a large holding company and the Transaction will increase GWI’s debt. Neither theory is persuasive, and both are dispelled by GWI’s witnesses Messrs. Neels and Rennie in their attached reply verified statements.

CCRSRA does not explain how increasing the size of a holding company creates or enhances any ability to recover non-freight revenues beyond what existed prior to the Transaction. CCRSRA’s economist, Mr. Hoegemeier, does not even address this issue. CCRSRA’s inability to support its theory is not surprising. As Mr. Neels explains in the reply verified statement that is attached to these Reply Comments, there is no reason to believe that increased holding company size would have the effect suggested by CCRSRA. Market power does not derive from company size, but from the absence of effective competition. *See* Neels Reply V.S. at 7-8. As Mr. Neels demonstrated in his initial verified statement, the Transaction does not eliminate the competition faced by any GWI or RailAmerica railroad today or increase

⁹ *See* Application, Appx. C, Neels V.S.

the market power of any such railroad. With respect to the SJVR in particular, it is difficult to imagine how the Transaction could increase SJVR's market power since the Transaction does nothing more than transfer ultimate ownership of SJVR. There are no GWI railroads in California or anywhere near the SJVR, so SJVR will face the same competitive landscape after the Transaction that existed before the Transaction.

The CCRSRA comments also make vague assertions about holding company operations that may be intended to imply that holding companies require special regulation. For example, CCRSRA complains that Fortress did not live up to promises it made when it acquired RailAmerica, which was already a holding company. *See* CCRSRA Comments at 11-12. CCRSRA's logic appears to be that if its members were disappointed by a holding company in the past, they will be more disappointed by a larger, different holding company in the future. CCRSRA also asserts that "all major strategic, operating, and non-operating decisions of [the railroads that will be commonly controlled after the Transaction] are clearly made at the holding company level." *Id.* at 4. The implication is that centralized decision-making effectively creates market power by permitting anticompetitive actions that could not have occurred prior to the Transaction.

These assertions demonstrate significant confusion both about who will be in control after the Transaction and the way that GWI operates. RailAmerica's railroads will be operated with more localized, less centralized management under GWI's organizational model than existed under Fortress and exists today under RailAmerica management. CCRSRA's concerns about what Fortress might or might not have done if it remained in control are therefore not pertinent to the Board's evaluation of the Transaction. CCRSRA's unsupported assertions about how decisions are made at GWI are simply incorrect. The separate letter *supporting* the

Transaction filed by CCRSRA's witness, Mr. Littlefield, directly contradicts the claim.

According to Mr. Littlefield:

[W]e find GWI to be an outstanding organization that has a strong de-centralized management approach that places decision-making at the local level where we believe it needs to be for prompt customer support and action. Furthermore, we find GWI to be a customer-based/responsive organization that believes in developing strong customer partnerships for growth and development opportunities through strategic supply chain alignments.

Application, Appx. D (support letter submitted by C. Littlefield on behalf of Richard Best Transfer Inc.). Mr. Littlefield's observations are entirely consistent with GWI's description of its de-centralized management approach in the Application. *See* Application at 16-17. GWI focuses on local customer service, and its decentralized operations are directed to serving individual customers and local communities. Locally-based management teams seek the best possible outcomes for the customer, the community, and the railroad. GWI's corporate management acts as a complement to, not a replacement for, local management. Given the clear dissatisfaction of CCRSRA's members with the current management of the SJVR, they should welcome GWI's assumption of control.¹⁰

CCRSRA's members appear to be concerned that the existence of a larger holding company post-Transaction will lead to more widespread adoption of SJVR's non-freight revenue practices across the railroads that will be controlled following the Transaction. At the same time, CCRSRA faults RailAmerica for failing to adopt tariffs similar to those employed by GWI railroads. *See* CCRSRA Comments at 25. Even if there were some reason to believe that post-

¹⁰ Indeed, shippers have recognized strong and immediate benefits from other GWI rail acquisitions. *See* Appendix B to these Reply comments (shipper support letter stating that "Freeport-McMoran has seen a significant improvement in a number of areas since GWI's acquisition of AZER in September 2011.")

Transaction GWI management would desire to adopt measures to enhance non-freight revenues, there is nothing about the Transaction that would reduce local competition and/or increase market power at the local level to enable it to do so. The Transaction does not increase the market power of any railroad involved in the Transaction. To the extent that GWI would be able to establish new non-freight revenue practices after the Transaction, it would also have been able to do so before the Transaction. As the Board has previously noted:

Our analysis of the effect on competition appropriately examines not how many railroad holding companies there are, or how many miles they operate, but rather whether the combination would have an adverse effect on shippers and communities. We perform that analysis by looking at the individual serving rail carriers ... rather than just the holding companies.

Sept. 5, 2012 Decision at 5. Creation of a larger holding company through the Transaction has no bearing on the issue of pricing practices or market power.

CCRSRA's second theory, that the debt level of the post-Transaction holding company will lead to an expansion of non-freight revenue practices to which its members object, is not even relevant to the competitive effects analysis that the Board undertakes in the review of a control transaction. *See Neels Reply V.S.* at 8-9. In any event, it is also unfounded. The CCRSRA comments assert, again without support, that the post-Transaction debt load will force GWI to seek additional non-freight revenues from its customers. CCRSRA's economist purports to find support for this notion in the pro forma financial statements filed by GWI with the U.S. Securities and Exchange Commission ("SEC") in connection with GWI's recent public equity offerings. He argues that RailAmerica non-freight revenues are "built into the GWI pro-forma financial statements, and thus the existing level of RA cash flow from non-freight revenue can be expected to continue post-transaction." *Hoegemeier V.S.* at 13.

There are a number of problems with Mr. Hoegemeier's conclusion. First, the inclusion of existing RailAmerica revenues is required by U.S. generally accepted accounting principles, and is not to be construed as an indication of prospective intentions. Second, Mr. Hoegemeier assumes that because these revenues are in the pro forma financial statements they are also necessarily included in GWI's projections going forward. He has no basis for making this assumption. Lastly, the fact that these non-freight revenues are included in the pro forma financial statements, which are based on RailAmerica's and GWI's historical financial statements, proves the point that these are existing charges and do not arise as a result of the Transaction and, therefore, are not relevant to the Board's consideration of the Transaction.

Moreover, Mr. Hoegemeier's concerns about post-Transaction debt levels are exaggerated. As explained in the Application, the Transaction will actually decrease total fixed charges for the combined operation of GWI and RailAmerica railroads. In September after filing the Application, as part of the capital raising process for the Transaction, GWI filed pro forma financial statements for the combined company with the SEC.¹¹ As indicated in these updated pro-forma financial statements, GWI estimates net interest expense of \$83.5 million in the first year of combined operations. This amount represents a decrease in net interest expense of \$23.8 million compared to the \$107.3 million of actual net interest expense reported by GWI and RailAmerica on a stand-alone basis in 2011. For the first six months of 2012, GWI estimates net interest expense would have been \$38 million for the combined company, whereas the stand-alone entities reported net interest expense of \$39.1 million. In addition to the overall lower interest expense anticipated to be recognized following the Transaction, GWI expects the Transaction will create \$36 million of annual cost savings going forward, further enhancing the

¹¹ See Genesee & Wyoming Inc., Prospectus, filed Sept. 17, 2012, <http://gwrr.com> (follow "Investors" hyperlink, then follow "SEC Filings" hyperlink).

ability of the combined business to service its debt (which as discussed above is reduced compared to the stand-alone companies). Lastly, GWI has also publicly stated and noted in its Application that the combined company is expected to generate significant free cash flow (inclusive of the payment of dividends on outstanding preferred stock), which is expected to facilitate approximately \$225 million of debt to be repaid in the first year of operations after control is authorized. *See also* Rennie Reply V.S. at 3-6 (concluding that GWI will have ample resources to service its post-transaction debt).

Given the fact that the relief CCRSRA seeks is unrelated to any legitimate Transaction-related competitive concern, little need be said about the specific conditions sought by CCRSRA. Each is objectionable not only for the reasons discussed above, but also because each is overly intrusive and entirely unnecessary. There is no need for the public reporting condition that CCRSRA seeks because the fees and charges about which CCRSRA complains are set forth in tariffs, about which customers must be notified before the charges can be assessed. Further, if there are continuing problems with specific charges or types of charges, there are procedures at the Board for customers to seek relief where the charges and their reasonableness can properly be examined.

In addition, conditions requiring Board review of all non-freight revenue “programs,” reporting to the Board concerning existing and planned non-freight revenue programs, and imposing specific requirements for interactions with customers, would result in Board micromanagement of the relationships of all of the individual railroads with their respective customers, the manner in which these individual railroads will establish rates and charges, and how these railroads will choose to fulfill their common carrier obligations. These conditions, if imposed, would represent an unprecedented and unwarranted intrusion into routine interactions

with customers as well as into economic and operating decisions that are entrusted to a carrier's discretion in the largely deregulated environment following the enactment of the Interstate Commerce Commission Termination Act of 1995.

In addition, CCRSRA seeks to impose burdensome, open-ended periodic reports concerning non-freight revenue programs and three years of "oversight" reporting concerning many aspects of GWI's operations. No legitimate purpose would be served by these detailed, costly and burdensome reporting requirements.

Finally, CCRSRA seeks to hold GWI to "representations" made during the course of this proceeding. While GWI, of course, expects to be held to representations it has made and has no objection to being held to its word, the open-ended condition proposed by CCRSRA would do much more. CCRSRA asks the Board to actively regulate GWI's compliance with general statements of intent. For example, CCRSRA wants the Board to determine whether customers are receiving "better and more reliable service" after the Transaction and whether GWI has engaged in "meaningful dialogue with stakeholders to foster local economic development." CCRSRA Comments at 37. Such conditions have no established criteria for measurement, are inherently unenforceable and would inappropriately involve the Board in GWI's routine interactions with its customers.

In sum, CCRSRA's clear objective is to have the Board inject itself to an unprecedented extent into GWI's commercial practices. The conditions CCRSRA seeks go far beyond conditions of the sort that have imposed in the context of a minor transaction. Indeed, even in a large Class I transaction, we submit that the Board would not consider the type of intrusive reregulation that CCRSRA seeks here, particularly given the absence of any nexus between the conditions sought and the Transaction.

B. Kansas City Southern Railway Co. and Southwestern Electric Power Co.

The comments of Kansas City Southern Railway Company (“KCS”) and Southwestern Electric Power Company (“SWEPCO”) both relate to the SWEPCO Turk Plant. The Turk Plant has been constructed in Arkansas on a rail line that is operated exclusively by Union Pacific Railroad Company (“UP”). *See* KCS Comments at 2. SWEPCO has apparently awarded UP the contract to supply the Turk Plant with Powder River Basin coal. *See* KCS Comments at 3; SWEPCO Comments at 2.

Neither KCS nor SWEPCO opposes the Transaction. *See* KCS Comments at 4; SWEPCO Comments at 3. Rather, despite the fact that SWEPCO built the Turk Plant on a UP line, and awarded the contract for coal transportation to UP, it, along with KCS, seeks “conditions” to, as they describe it, preserve competitive rail alternatives for the Turk Plant. However, no such competitive options exist today, and the Transaction would not change that situation. Today, SWEPCO can only receive service from a single carrier, which is not involved in the Transaction. KCS could only provide competitive service to the Turk Plant over the Kiamichi Railroad Company (“KRR”), a RailAmerica railroad. In order for KCS and KRR to provide service, an approximately 24-mile segment of the KRR rail line between Ashdown, Arkansas, and the vicinity of the Turk Plant would need substantial upgrading to handle unit coal trains, and KRR would need authority to construct a track of between ½- and 1-mile in length (KCS and SWEPCO give different estimates) from the KRR line to the Turk Plant. KCS argues that such a build-in would create a routing alternative to the UP single line-movement. *See* KCS Comments at 3. Further, although KCS describes a competing KCS/KRR route, such a route would also necessarily include BNSF, as the origin carrier at the Powder River Basin.

The Transaction will not change the current situation in any way. There will be no change or reduction in the number of competitive alternatives post-Transaction that SWEPCO has today.

Further, the possibility of a competitive rail alternative for the SWEPCO plant is speculative. The contract to supply the Turk Plant has already been awarded by SWEPCO to UP. And there is no assurance that any Board authority that might be needed for the necessary track construction would be obtained or how long it might take. In addition, KCS acknowledges that it did not reach a final agreement with KRR. *See* KCS Comments at 3. There is no suggestion that rate agreements have been reached with BNSF, or among any of the parties. And there are no current negotiations between KRR and either KCS or SWEPCO regarding the possible build-in; those negotiations terminated before GWI filed to control KRR.

GWI does not understand the basis for KCS's expressed concern that it will not be able to work with KRR in the future. KCS and SWEPCO suggest that a secret settlement agreement or interchange commitment might bar KRR from working with KCS to provide service to SWEPCO's Turk Plant. However, this is not the case. GWI confirms that it has not entered into any agreements that would affect or limit KRR's right to handle any traffic with KCS to or from SWEPCO, or any other customers. Additionally, although not a required disclosure in a control proceeding under 49 U.S.C. § 11323 and 49 C.F.R. § 1180, GWI and RailAmerica confirm that KRR is not subject to any interchange commitments that would affect rail service to the Turk Plant.

There is no basis for KCS or SWEPCO to ask for any commitment of capital from KRR or GWI at this time. However, GWI confirms that the Transaction will not result in any new capital restrictions on KRR or limit its ability to participate in infrastructure upgrades. GWI and

KRR would of course consider the economics of any logical proposal, as it would any proposal involving new business, based upon a complete analysis of the operations, risks, potential revenues, costs and return on invested capital, consistent with its fiduciary duties owed to its stockholders.

The simple fact is that SWEPCO chose to site its Turk Plant on UP's rail line, and to give UP the exclusive coal transportation contract. The Board does not impose conditions to put the proponent in a better position than before a transaction. *See, e.g., Canadian Pac./Dakota*, slip op. at 12. The Transaction will not change or reduce existing competitive alternatives for SWEPCO in any way, and neither KCS nor SWEPCO has presented any basis for imposing any condition on the Transaction.

C. Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc.

Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc. ("RSR/GFW") are commonly controlled corporations that receive salvaged rail and other track materials at a yard in Joplin, Missouri that is leased from UP. The yard is served by Missouri & Northern Arkansas Railroad Company, Inc. ("MNA"), a RailAmerica railroad. *See RSR/GFW Comments at 1-2.* RSR/GFW clearly are customers unhappy with the level of demurrage charges and interest that they incur, and what they perceive as a decline in service and customer relations, but they fail to make any credible allegation linking their concerns to the Transaction.

The disputes between RSR/GFW and MNA over demurrage billing practices and deposit requirements are well known to the Board.¹² The demurrage claims of approximately \$400,000,

¹² *See Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. NOR 42102, and *G.F. Wiedeman International, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. 42103 (joint decision served July 20, 2010) (collectively "*RSR/GFW Reasonableness of Demurrage Charges*"); and *Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc.—Petition for Investigation and for Emergency Relief under 49*

plus interest, that were the subject of the Board's reasonableness determination on referral from the U.S. District Court for the Western District of Missouri, Southwest Division, and the Circuit Court of Jasper County, Missouri, remain in active litigation in both courts. Clearly, these are long-standing problems between these shippers and the single carrier that serves them that were in no way caused by, nor is there any supported allegation that they will be exacerbated by, the Transaction.

Further, as RSR/GFW recognize in the verified statement of Gaylon W. Jackson attached to their comments, a control proceeding is not the proper forum to challenge rates or practices. *See Jackson V.S.* at 5. RSR/GFW are well aware of the proper procedures for doing so, and in fact have been using them. Unreasonable-practice claims, including challenges to MNA's interest charges, were, on referral from the courts, denied by the Board. *See RSR/GFW Reasonableness of Demurrage Charges*. The Board also refused to enjoin the MNA's current deposit requirements. *See RSR/GFW Investigation of Security Deposit*. As noted above, the initial demurrage and interest claims are still being disputed in the courts on other grounds. However, RSR/GFW have been complying with the deposit requirements resulting in demurrage charges being paid on a current basis without the accrual of interest charges. They have not filed any new complaints at the Board alleging that the current charges are unreasonable or that the service they are receiving is a violation of MNA's common carrier service obligations.

RSR/GFW do not ask the Board to deny approval of the control proceeding. In fact, if the Board were to deny approval, RSR/GFW would be left in their current unwelcome

U.S.C. 721(B)(4)—Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42107, and *Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc.—Petition for Investigation and for Emergency Relief under 49 U.S.C. 721(B)(4)—Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc. (Revised Item 1010)*, STB Docket No. 42109 (joint decision served July 25, 2008) (collectively "*RSR/GFW Investigation of Security Deposit*").

relationship with MNA under current RailAmerica senior management and control. RSR/GFW ask for a condition that they not be subjected to the same “non-freight” practices of MNA, *see* RSR/GFW Comments at 4, despite findings of the Board that these practices were reasonable, and the fact that they have not challenged the current practices. RSR/GFW have made no showing that they will suffer any adverse effects as a result of the Transaction, and accordingly have not established the need for any conditions to approval of the Transaction.

To the extent RSR/GFW reference and incorporate the comments of Central California Shippers and Receivers Association, see the response set forth above.

D. United Transportation Union-New York State Legislative Board

The United Transportation Union-New York State Legislative Board (“UTU-NY”) does not oppose GWI’s control of RailAmerica and its railroads. UTU-NY simply points out that GWI has rail operations in Canada, Australia, the Netherlands, and Belgium, and UTU-NY asks the Board to ensure that the economic benefits flowing from the Transaction are applied to GWI’s U.S. rail network.

There is no reason for the Board to address this issue in this proceeding. UTU-NY provides no reason to believe that the mere ownership of railroads outside the United States has any impact on GWI’s commitment to railroad operations in the United States. GWI has a long and clear record of capital investment in U.S. rail infrastructure. There is no reason to believe that the Transaction will weaken GWI’s commitment to U.S. rail operations. One of GWI’s objectives for entering into the Transaction is to strengthen its U.S. rail operations, and the Transaction results in an approximate doubling of U.S.-based revenues. Moreover, another of

the stated objectives of the Transaction is to increase rail business on GWI's U.S. footprint.¹³ Further, GWI has made no statements or public filings that contemplate any distribution of cash from the U.S. to fund existing international operations and therefore the purported concern of UTU-NY has no factual basis. As discussed in the reply verified statement of William Rennie, GWI's operations in Australia (its largest international operation) are completely viable on a stand-alone basis and generate significant free cash flow.

E. Vermont Agency of Transportation

The Vermont Agency of Transportation ("VTrans") seeks to ensure that New England Central Railroad, Inc. ("NECR") will continue to collaborate with VTrans on projects to improve rail service and will continue to honor existing agreements following NECR's acquisition by GWI. Specifically, VTrans requests that the approval of the Transaction be conditioned on the following: (1) continued participation by NECR and affiliated companies in joint and coordinated high-speed and intercity passenger rail planning; (2) continued participation by NECR and affiliated companies in the FRA's High Speed and Intercity Passenger Rail Program; and (3) continued adherence by NECR and affiliated companies to existing agreements for federally funded passenger rail projects.

GWI and NECR intend to continue collaboration with VTrans following the Transaction, and have no intention of breaching any existing written agreements following the Transaction. Accordingly, there is no need for the Board to entertain the specific conditions requested by VTrans and no reason for the Board to do so. The conditions requested by VTrans do not

¹³ See Press Release, Genesee & Wyoming Inc. Enters Into Agreement to Acquire RailAmerica, Inc.; Announces Mandatorily Convertible Preferred Stock Investment by The Carlyle Group (July 23, 2012), <http://www.gwrr.com> (follow "Press Releases" hyperlink).

address Transaction-related competitive harms and are therefore not appropriate in the context of a minor transaction subject to section 11324(d) for the reasons discussed above.

After any STB approval of the Transaction, GWI and NECR intend to work with VTrans officials in planning for future developments of the railroad network in Vermont and to promote safe and efficient realization of current and future freight and passenger transportation opportunities. This will be a continuation of the existing positive relationship between GWI and VTrans, as demonstrated by the operations of the GWI subsidiary St. Lawrence & Atlantic Railroad Company in Vermont today. Further, GWI and NECR intend to participate in future discussions of new passenger rail efforts with VTrans and federal officials concerning services that can be undertaken in a safe manner, do not compromise current or future freight services on NECR lines, provide an adequate reimbursement for expenses and address possible liabilities associated with such new services. Although the St. Lawrence & Atlantic Railroad Company does not currently operate passenger service, other GWI subsidiaries have significant experience with passenger operations. GWI's Portland & Western Railroad has a long-standing relationship with the Washington County Commuter Line ("WES"), and operates a commuter rail service over a 14.7-mile corridor from Beaverton, Oregon to Wilsonville, Oregon on behalf of WES. Ridership averages 1,700 passengers per day and on time performance was better than 98% in 2011.

There is no reason for the Board to address rail passenger issues in Vermont in connection with the Board's approval of GWI's control of RailAmerica and its railroads. There is a solid history of cooperation between GWI and VTrans and federal officials and no reason to believe that the existing positive relationship will change.

GWI and NECR will continue to honor all existing written contracts in place for passenger services on NECR lines and will carry out in good faith all existing written contracts for federally funded rail passenger projects. If for some reason VTrans believes GWI and NECR are not honoring existing written contracts, there are other forums to address any such dispute. *See Canadian Pac./Dakota*, slip op. at 15 n. 25 (STB served Sept. 30, 2008) (“[A]ny contractual disputes between Metra and CPRC can be litigated by them in an appropriate court.”).

F. Winamac Southern Railway Company / U S Rail Corporation

Winamac Southern Railway Company (“WSRY”) and U S Rail Corporation (“USRP”) ask that the Board require as a condition to approval of the Transaction that two railroads owned by RailAmerica—Toledo, Peoria and Western Railroad Corporation (“TPW”) and Central Railroad Company of Indianapolis (“CERA”)—grant trackage rights to WSRY and USRP over three discrete rail segments in Indiana. The rail segments at issue are identified in an attachment to WSRY/USRP’s comments. The purported grounds for the requested trackage rights conditions are set out in a statement submitted by the President of USRP, who describes several long-running commercial disputes that WSRY/USRP have had with TPW and CERA regarding rates, service and trackage rights.

The proposed conditions are unwarranted. The trackage rights are presented as a supposed means of addressing commercial disputes between WSRY/USRP and two railroads owned by RailAmerica that long predate the Transaction. As alleged by USRP’s President, Gabriel Hall, the disputes began in 2008 in connection with a “transition from CERA to USRP as operator of the WSRY-KGC rail lines.” *See Hall V.S.* at 2. According to Mr. Hall, TPW and CERA took several measures beginning in 2009 as “retaliation for losing the operating lease.” *Hall V.S.* at 1. The alleged retaliation included termination of trackage rights, changes in the

rates on traffic to or from points on the USPR, and changes in service offered by TPW and CERA.

The allegation that TPW and CERA have retaliated against WSRY and USRP for CERA's loss of an operating lease on WSRY lines is unfounded and incorrect. Most of the commercial practices that WSRY/USRP identify as evidence of supposed retaliation are part of company-wide changes that RailAmerica implemented, including practices relating to the transportation of hazardous materials. In any event, it is clear from the face of Mr. Hall's statement that the supposed "retaliation" has nothing to do with the Transaction. Even if Mr. Hall's allegations were correct, and they are not, the actions complained of were supposedly a response to issues that arose in 2008-2009, long before the Transaction was announced.

As explained above, the Board does not use its conditioning authority to address pre-existing disputes. Moreover, the Board imposes conditions such as trackage rights only to remedy anticompetitive effects that result from a transaction. Here, however, there is no GWI railroad in the vicinity of the lines in Indiana discussed by WSRY and USRP and the Transaction therefore would produce no change whatsoever in the competitive situation. WSRY/USRP vaguely claim that "[a] consolidated GWI-RA would be able to exert huge market power vis-a-vis smaller Class III rail carrier connections." Hall V.S. at 4. But as explained by Mr. Neels, the number of independent railroads held by a holding company has no bearing on the market power that any particular railroad can exercise. There is no reason to believe that the existence or extent of any market power by TPW or CERA would be affected in the least by the Transaction.

In addition, the trackage rights conditions sought by WSRY/USRP are clearly inappropriate. One of the trackage rights conditions that WSRY/USRP seeks involves a three-mile segment of TPW's track near Logansport, Indiana, that has been the subject of litigation in

federal court and before the Board.¹⁴ By seeking a grant of trackage rights over that rail line, WSRY/USRP are improperly trying to obtain through the “back door” of this control proceeding what they have not been able to obtain from the courts and the Board. As to the other two trackage rights conditions sought by WSRY/USRP, WSRY/USRP have never had any operating rights over those lines and a grant of trackage rights could have severe financial consequences for TPW/CERA that would be detrimental to their ability to provide rail service.

In essence, WSRY/USRP’s complaint is with the way RailAmerica management previously has handled the commercial relationship between TPW/CERA and WSRY/USRP. But the Transaction will result in the replacement of RailAmerica senior management with a different management team and organizational structure. WSRY/USRP’s prior relationship with RailAmerica’s senior management is an issue that has no relevance to the Board’s approval of the Transaction.

IV. CONCLUSION

Applicants urge the Board to act promptly to allow the Transaction to be completed before the end of 2012. There is overwhelming public support for the Transaction. None of the conditions sought by the few parties that have commented adversely on the Transaction is warranted. Substantial benefits will be created by GWI’s acquisition of control of RailAmerica

¹⁴ See *Winamac S. Ry. Co. v. Toledo, Peoria & W. Corp.*, No. 3:09-CV-86, slip op. (N.D. Ind. July 9, 2012) (partially granting TPW’s summary judgment motion and noting that “the dispute centers around whether the trackage rights agreement (‘TRA’) between Winamac and Toledo allows Winamac to assign its rights under the TRA and whether the TRA has been terminated due to Winamac’s assignment”); *U S Rail Corp.—Lease & Operation Exemption—Winamac S. Ry. Co.*, Docket No. FD 35205 (STB served Jan. 15, 2009) (partially staying effectiveness of USRP’s notice of exemption because of dispute as to whether WSRY has assignable trackage rights over three miles of track owned by TPW); *Winamac S. Ry. Co.—Trackage Rights Exemption—A. & R. Line, Inc.*, Docket No. FD 35208 (STB served Jan. 9, 2009) (rejecting WSRY’s notice of exemption because of dispute between WSRY and TPW regarding trackage rights).

and its railroads, and the Board should act promptly to ensure that those benefits will be realized as soon as possible and the voting trust dissolved.

Due to the demonstrated lack of anticompetitive effects from the Transaction, the record is clear that the Transaction should be approved without any conditions. There is no reason for a lengthy review of the record and no need for further briefing or oral argument. The Board should grant Applicants' request for an expedited procedural schedule under which the Board would serve its final decision by December 10, 2012 (a full 45 days after the date of this filing), with an effective date of December 20, 2012. *See* Applicants' Aug. 6, 2012 Motion to Establish Procedural Schedule. This schedule would allow the Transaction to be completed by December 31, 2012, which will minimize uncertainty and will allow shippers and the Applicants to take advantage of the benefits of the Transaction as soon as possible, and remove the uncertainties that result from the RailAmerica common stock remaining in control of a trustee. As previously explained by Applicants, an expedited schedule will allow the timely renegotiation of expiring leases and operating agreements. Also, GWI is eager to begin extending its highly successful safety program and customer-oriented service to the RailAmerica railroads. Finally, allowing the Transaction to be completed on December 31, 2012 will minimize the burden of complicated financial reporting for interim periods that would be placed on GWI if the Transaction were to occur other than in conjunction with its fiscal year end, which is also December 31.

For all of the reasons set forth in the Application and in this Reply to Comments, the Board should approve GWI's control of RailAmerica and its railroads under the expedited schedule requested by Applicants.



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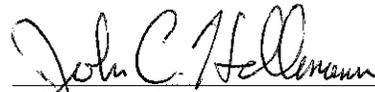
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October 26, 2012

VERIFICATION AND SIGNATURE

I, John C. Hellmann, being duly sworn, state that I am the President and Chief Executive Officer of Genesee & Wyoming Inc., and that I am an officer duly designated to execute, verify, and file these Reply Comments. I have knowledge of the matters contained herein as they pertain to Genesee & Wyoming Inc., and the factual statements made herein regarding Genesee & Wyoming Inc. are true and correct to the best of my knowledge, information, and belief.

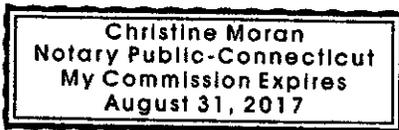


John C. Hellmann
President and Chief Executive Officer

Subscribed and sworn to before me
this 25 day of October, 2012

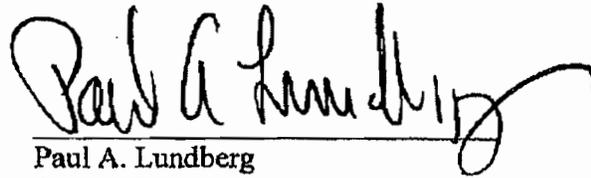


Notary Public



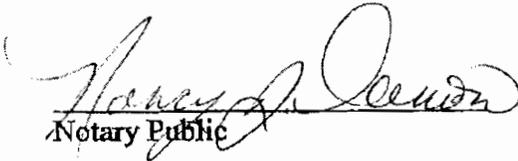
VERIFICATION AND SIGNATURE

I, Paul A. Lundberg, being duly sworn, state that I am a Senior Vice President and the Chief Operations Officer of RailAmerica, Inc., and that I am an officer duly designated to execute, verify, and file these Reply Comments. I have knowledge of the matters contained herein as they pertain to RailAmerica, Inc., and the factual statements made herein regarding RailAmerica, Inc. are true and correct to the best of my knowledge, information, and belief.

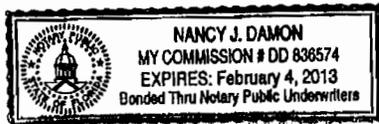


Paul A. Lundberg
Senior Vice President &
Chief Operations Officer

Subscribed and sworn to before me
this 24th day of October, 2012



Nancy J. Damon
Notary Public



APPENDIX A

REPLY VERIFIED STATEMENTS

KEVIN NEELS

**REPLY VERIFIED STATEMENT
OF
KEVIN NEELS**

I submitted a Verified Statement in connection with the August 6, 2012, Application of Genesee & Wyoming Inc. (GWI) to acquire control of RailAmerica, Inc. (RailAmerica). In that Verified Statement I evaluated the potential competitive impacts of the proposed acquisition. I concluded that the proposed acquisition would not have any adverse competitive impact. My qualifications are set forth in my prior Verified Statement.

In this Reply Verified Statement, I address the relevance of issues raised by the limited number of parties who submitted comments on the Application relating to potential competitive impacts of the acquisition.

I. Summary of Complaints Voiced in Adverse Comments

A few commenters voice complaints about longstanding disputes between themselves and particular short lines currently owned or operated by RailAmerica. The Central California Rail Shippers & Receivers Association (CCRSRA) has filed a statement detailing various complaints relating to the San Joaquin Valley Railroad (SJVR). The Winamac Southern Railway Company and US Rail Corporation have filed a statement detailing complaints relating to the Toledo, Peoria and Western Railroad Corporation (TPW) and the Central Railroad Company of Indianapolis (CERA). Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc. have filed a statement relating to the Missouri & Northern Arkansas Railroad Company, Inc. (MNA). All of these railroads were controlled by RailAmerica prior to the proposed transaction.

The complaints raised in these comments relate to various aspects of the behavior of the RailAmerica railroads with which they do business. The statement filed by CCRSRA – the lengthiest and most detailed of these filings – focuses on “non-freight revenues.” These consist

of a variety of different charges, including demurrage and storage charges, line surcharges, track lease fees, “order in” fees, “switch from constructive placement” fees, “switch maintenance fees,” and other charges levied by SJVR.¹ CCRSRA also complains of abandonments that took place both before and after RailAmerica assumed control over SJVR.²

The statement filed by Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc. focuses on the application of demurrage charges and interest on overdue invoices imposed by MNA. This statement argues that these increases were motivated in part by debt taken on by RailAmerica in connection with its acquisition by Fortress Investment Group LLC.

The statement filed jointly by the Winamac Southern Railway Company and US Rail Corporation (Winamac/US Rail) complains of a number of actions taken by RailAmerica subsidiaries TPW and CERA after US Rail Corporation replaced CERA as the operator of the Winamac Southern Railway Company and the Kokomo Grain Co. rail lines. This statement argues that in retaliation for losing the operating lease to these rail lines, TPW and CERA have taken a number of actions aimed at reducing the amount of traffic carried on them. These actions include raising rates, imposing switching charges, refusing to allow US Rail to operate over tracks controlled by TPW and CERA and reducing frequency of service.³

II. Complaints Raised by Commenters Pre-Date the Transaction, Have No Relationship to the Transaction, and Are Not Affected by the Transaction

The complaints voiced by these parties share a number of important characteristics.

¹ Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, pages 13-14.

² Verified Statement of Charles L. Littlefield, pages 4-5.

³ Verified Statement of Gabriel D. Hall, September 28, 2012.

First, all of the complaints relate to decisions and events that predate the GWI/RailAmerica transaction, often by many years. For example, CCRSRA expresses concern over abandonments and attempted abandonments, the most recent of which appears to have occurred in 2008.⁴ The accessorial charges that seem to be the primary focus of concern for CCRSRA shippers and that appear, in fact, to have been one of the major factors leading to the formation of their organization were the subject of a letter delivered to RailAmerica in May of 2009.⁵ The transfer of operating authority over the Winamac Southern Railway Company and the Kokomo Grain Co. lines from CERA to US Rail Corporation, which plays a central role in the statement filed by Winamac/US Rail, occurred in 2009, three years prior to the GWI/RailAmerica transaction.⁶ The statement of Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc. explicitly ties initiation of the practices of which they complain to the acquisition of RailAmerica by Fortress Investment Group LLC, an event that took place in February 2007,⁷ nearly five and a half years before the GWI/RailAmerica transaction. As outlined in the statements themselves, all of the practices that these parties complain of began before the GWI/RailAmerica transaction, and therefore, the issues raised are clearly not caused by the transaction.

Second, none of the complained of behaviors in any way involve lines controlled by GWI prior to the transaction. Neither SJVR nor MNA connects with or is located anywhere near a line controlled by GWI. And while TPW does connect with the GWI-owned Tazewell & Peoria

⁴ Verified Statement of Charles L. Littlefield, pages 5-6.

⁵ Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, Attachment 5.

⁶ Verified Statement of Gabriel D. Hall, September 28, 2012, page 1.

⁷ Comments and Request for Conditions of Railroad Salvage & Restoration, Inc. and G.F. Wiedeman International, Inc., page 2.

Railroad, that connection is located near Peoria, Illinois, far from the portion of the TPW relevant to the concerns of Winamac/US Rail.

Third, and in view of the foregoing not surprisingly, to the extent that the disputes involve allegations of the exercise of market power by the serving short line, the proposed transaction would in no way enhance the ability of the involved short lines to exercise any such alleged market power. The fact that none of the actions of which these parties complain involves or is geographically proximate to any pre-acquisition GWI subsidiary means that there is no possibility for post-acquisition coordinated behavior to worsen the behavior. And as I explain in more detail below, the mere fact that the acquisition will create a larger company is similarly irrelevant.

Given these characteristics, these disputes have no bearing on whether the proposed transaction will have anticompetitive effects. Indeed, as I demonstrated in my prior Verified Statement, the GWI/RailAmerica transaction will not have any adverse impact on competition. None of the commenting parties disputes this fact.

III. Increased Holding Company Size Does Not Create Additional Market Power

Although these complainants fail to identify any specific possibility for coordinated or anticompetitive behavior created by this transaction, they nonetheless seem to argue that the overall size of the new holding company created by the transaction will somehow by itself endow that company with enhanced market power. Their submissions are littered with statements about the size of the entity to be created as a result of the transaction. CCRSRA focuses on the number of short lines that will be controlled by GWI following the transaction, the aggregate revenues those short lines will generate, and the overall size of the resulting

holding company.⁸ Winamac/US Rail make the unsupported contention that the transaction will create “a powerful conglomerate” and that the Board’s analysis should focus on “the significantly increased market power and economic strength that the consolidated GWI-RA will be able to exert on the smaller Class III rail carriers with whom they connect.”⁹

These statements imply or state that bigger total revenues equate to greater degrees of market power, regardless of how those revenues are distributed across economically relevant product or geographic markets. Such an assertion flatly contradicts what has been learned through years of economic research and antitrust enforcement. The GWI/RailAmerica transaction is from a competitive standpoint analogous to a conglomerate merger in the sense that it would combine under common management and control a large number of subsidiaries providing diverse rail services¹⁰ in geographically and economically distinct markets to generally non-overlapping sets of customers.

Long experience with such transactions has led antitrust authorities to definite conclusions regarding the likely competitive effects of a merger of this nature:

In the 1960s the United States experienced a wave of conglomerate mergers, driven in part by overly restrictive antitrust policies toward horizontal and vertical mergers. In response, the U.S. antitrust agencies and courts developed a number of theories of competitive harm with colorful names like deep pockets, reciprocal dealing, and entrenchment...After fifteen years of painful experience with these now long-abandoned theories, the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. We simply could not identify any conditions under which a conglomerate merger, unlike

⁸ Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, pages 2-3; Verified Statement of Mark Del Papa, page 11.

⁹ Joint Request for Conditions, Winamac Southern Railway Company and US Rail Corporation, Argument, page 2.

¹⁰ RailAmerica and GWI subsidiaries provide terminal railroad services, pickup and delivery services provided in conjunction with Class I railroads, and carry some amount of traffic that is local to their systems.

a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output. We recognized, conversely, that conglomerate mergers have the potential as a class to generate significant efficiencies. These potential benefits include providing infusions of capital, improving management efficiency either through replacement of mediocre executives or reinforcement of good ones with superior financial control and management information systems, transfer of technical and marketing know-how and best practices across traditional industry lines; meshing of research and distribution; increasing ability to ride out economic fluctuations through diversification; and providing owners-managers a market for selling the enterprises they created, thus encouraging entrepreneurship and risk-taking.¹¹

In a merger of this nature, where the subsidiary businesses sell into distinct geographic markets, rather than distinct product markets, the absence of worrisome competitive concerns is coupled with an even greater possibility of efficiency gains due to the greater likelihood that the improved management practices, financial controls, information systems, and technical and marketing know-how referred to above will be broadly applicable across those subsidiary businesses.

CCRSRA criticizes the competitive analysis contained in my original submission in this proceeding for focusing on the possible effects of the proposed transaction on the competitive alternatives available to individual shippers.¹² CCRSRA appears to believe that there is some other type of analysis that would be more relevant to this transaction, but it fails to state what this analysis might be. The correct way to assess the possible competitive impacts of this transaction is precisely to consider its effects on the competitive alternatives facing individual shippers.

To illustrate that this is so, it may be useful to consider an example. Consider a situation in which a firm was somehow able to gain control of all of the gas stations in a metropolitan

¹¹Address by William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the George Mason University Symposium, Washington, DC, November 9, 2001, <http://www.justice.gov/atr/public/speeches/9536.htm>

¹² Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, page 3.

area. Such a transaction would clearly seem to raise competitive concerns, and to create, at a minimum, short term opportunities for the exercise of market power. Consider then an alternative transaction in which a single firm acquired control of an equal number of gas stations scattered across the country in such a way that the firm never controlled more than a single station in any single metropolitan area. Such a firm would be just as big as the first firm, but would be highly unlikely to possess any sort of market power. This simple example illustrates that it is not size per se that matters for purposes of assessing competitive impact, but rather the ability of a firm to exercise control over an individual market by reducing the number of independently controlled competitive alternatives. The second firm in this example more closely resembles the nature of the transaction at issue in this proceeding.

IV. To the Extent the Complaints Relate to Exercise of Market Power by Short Lines, that Market Power Existed Prior to the Acquisition and Is Not Enhanced by the Acquisition

The fact that none of the complaints voiced in these comments involves any allegations of coordinated behavior among multiple railroads necessarily implies that, to the extent there is any market power being exercised in any of these situations, it must inhere at the level of the individual short line. This observation has several implications for the competitive analysis of this transaction.

First, to the extent that market power exists, it has nothing whatsoever to do with the holding company structure to which such a short line might belong. Any such market power would not have been created by the holding company structure,¹³ would not be worsened by a change in the holding company structure,¹⁴ and would not be cured by a dissolution of the

¹³ The only possible exception to this statement would occur if a holding company combined two formerly competitive short line railroads – something that the transaction does not do.

¹⁴ Assuming, once again, that the change does not combine two formerly competitive short lines.

holding company structure. Any such market power is a result of the market dynamics between the individual rail carrier, the shippers it serves and the shippers' transportation alternatives.

Second, the complainants do not present an analysis demonstrating that the short line railroads featured in their complaints actually possess any undue degree of market power. For the most part the statements have merely documented the fact that the customers of these railroads are paying more than they did before, and more than they would prefer to pay. These are characteristics that they undoubtedly share with many, many other customers, of many, many other suppliers in a wide range of fully competitive markets.

Finally, the short line railroads featured in these complaints undoubtedly remain subject to some degree of truck competition. Many of the shippers on the SJVR have indicated that they could use truck transportation, but find rail to be less expensive.¹⁵ In addition, Winamac/US Rail has indicated in their statement that because of the rail cost increases they have diverted a significant amount of their traffic to truck.

Clearly, the transaction neither creates market power nor enhances the ability of these short lines to exercise market power.

V. Increased Debt Will Not Cause GWI to “Try Harder” to Raise Rates

Some of the parties claim that additional debt assumed in connection with this transaction will somehow make GWI and the various short lines that it will own or operate “try harder” to generate incremental non-freight revenues from shippers.¹⁶ This claim is incorrect. No doubt, the various short lines referenced in the filings were trying prior to the transaction to enhance

¹⁵ These include, for example, Holt Lumber Inc., International Paper, M.C. Truss and O'Neill Vintners & Distillers, among others. See Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, Attachment 2.

¹⁶ There is nothing in any of the comments that challenges the showing in the Application that the transaction will not give the combined short lines any control over freight rates.

profitability, just like the CCRSRA shippers. That is what businesses do. To the extent that market conditions prior to the transaction permitted these short lines to increase non-freight revenues, there would be no reason to expect them to refrain from doing so, regardless of their debt loads. There is no reason to expect that the presence of additional debt on GWI's balance sheet is suddenly going to create any such opportunities for, or pressure to, profitably raising non-freight revenues that did not exist before.

VI. None of the Information Presented by the Complainants Alters in Any Way My Original Conclusion that the Transaction Should Not Raise Competitive Concerns

It is well established that market power arises not from size per se, but rather from the absence of effective competition. To assess the competitive effects of the GWI/RailAmerica transaction one needs to consider not the overall size of the holding company, but rather the effect of the transaction on the competition facing the various individual railroads that the holding company owns or operates. As I explained in my original statement, there is no reason to expect the transaction to alter the competitive constraints facing any of the various short lines currently owned or operated by the two parties. The parties protesting about pre-existing conduct by certain RailAmerica railroads have failed to articulate any specific reason why this conclusion is incorrect, or why the problems of which they complain will worsen as a result of this transaction. There is no reason to believe that any individual railroad will have increased market power after the transaction simply because the number of railroads in the holding company has increased.

VERIFICATION

I, Kevin Neels, verify 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 October 25, 2012

A handwritten signature in cursive script that reads "Kevin Neels". The signature is written in black ink and is positioned above a horizontal line.

Kevin Neels

WILLIAM RENNICKE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 35654

GENESEE & WYOMING INC.

- CONTROL -

RAILAMERICA, INC., *et al.*

REPLY VERIFIED STATEMENT

OF

WILLIAM J. RENNICKE

PARTNER

OLIVER WYMAN, INC.

October 26, 2012

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I. Introduction and Summary

Statement of WILLIAM J. RENNICKE, of the City of Boston, Massachusetts.

I am a Partner with Oliver Wyman, Inc. Oliver Wyman is a leading global general management consulting firm. I am also a licensed representative of Oliver Wyman Transaction Services, a division of MMC Securities Corp., which is a US registered broker/dealer and member FINRA/SIPC. Oliver Wyman maintains one of the largest practices in the world dedicated to serving the transportation and logistics sectors. That practice provides a comprehensive set of services and capabilities to transportation carriers across all modes, and to the users and regulators of transportation services. Oliver Wyman's transportation clients include national and regional governments on six continents, as well as many of the world's largest users of rail services, railroads, motor carriers, leasing companies, and industrial and consumer manufacturing firms. I am familiar with railroad investments Genesee & Wyoming Inc. (GWI) has made in Australia, and during the past fifteen years I have worked on projects for all of the major Australian carriers and the largest iron ore railroads in that country. Descriptions of my experience and of Oliver Wyman's qualifications and experience are included in my Verified Statement of August 6, 2012 filed with the application.

II. Scope of Analysis

I have been asked by GWI to comment on (1) whether the acquisition by GWI of railroads owned and operated by RailAmerica, Inc. (RA) might cause the resulting company to become overleveraged, and (2) whether assets owned and operated by GWI in Australia might require diversion of capital from the company's operations in the United States.

To address the first question, concerning leverage, I examined the ratio of debt to EBITDA, GWI's past practice of reducing leverage following significant acquisitions and the response of financial markets to the proposed transaction.

To address the second question, concerning GWI's operations in Australia, I reviewed GWI's publicly available regulatory filings and statements that contain financial information related to those operations.

Based on my analysis, I conclude that there is no basis for concern either that GWI will become overleveraged as a result of its acquisition of railroads owned and operated by RA or that GWI's Australian operations will require diversion of capital from the company's operations in the United States.

III. Findings

1. Financial Leverage

In their comments to the Surface Transportation Board, certain parties to this proceeding expressed concern that GWI's acquisition of properties owned by RA might cause the combined company to take on excessive financial leverage. To examine this concern, I analyzed GWI's ratio of debt to EBITDA, reviewed the company's past practice of reducing leverage following significant acquisitions and examined the response of financial markets to the proposed transaction.

Debt to EBITDA. The ratio of debt to EBITDA¹ is a common metric used to assess a company's ability to service its debt. In general, the lower a company's ratio of debt to EBITDA, the stronger its ability to repay its debt. This metric is frequently employed by commercial banks and other lenders to assess overall leverage, since EBITDA is essentially a proxy for cash flow from operations that is available to cover debt service obligations. This is also the metric upon which the financial covenants for GWI were set in its new Senior Secured Credit Facility entered into in conjunction with the proposed transaction. In the new credit facility, GWI's debt to EBITDA financial covenant has a starting threshold level of 4.75x debt to EBITDA before a financial default would be triggered.² For reference we have calculated GWI's pro forma debt to EBITDA at approximately 3.7x,³ which provides approximately \$100 million of EBITDA cushion for the current business (and which equates to 20% of EBITDA) before GWI would approach a 4.75x debt to EBITDA level. I believe this is sufficient cushion to withstand significant economic

¹ EBITDA is defined as earnings before interest, taxes, depreciation and amortization.

² Genesee & Wyoming Inc. Form 8-K, filed October 3, 2012, Exhibit 10.1, p. 147.

³ Pro forma EBITDA for GWI is equal to total debt at closing of \$1,918 million divided by LTM (last twelve months) EBITDA of \$512 million. See Genesee & Wyoming Inc. Form 424B5 filed September 17, 2012, p. S-66 and Genesee & Wyoming Form 8-K, filed October 3, 2012, Exhibit 10.1, p. 17.

shocks, which leads me to conclude that there is little risk that GWI's debt burden will place management under financial pressure.

Consistent with past practice, I expect GWI's debt to EBITDA ratio to decline after it integrates the acquisition of RA. GWI has stated publicly that it expects its debt to EBITDA ratio to decline to approximately 3.0x by the end of 2013.⁴ In its announcement that it was rating GWI's debt facility, Standard & Poor's also noted that GWI's debt to EBITDA ratio is expected to decline, and recognized that based on the amortization in the proposed transaction structure, moderate debt reduction is expected over the next few years.⁵

GWI's past practice with respect to leverage. In his Verified Statement supporting Comments and Request for Conditions of Central California Rail Shippers & Receivers Association, Dr. John J. Hoegemeier opined that GWI's debt to equity ratio will increase after its acquisition of assets owned by RA.⁶ Debt to equity ratio is a measure of the portion of a company's capitalization that is debt.

In general, a company's debt to equity ratio says little about its ability to service its debt. Further, based on past practice, I anticipate that GWI will reduce its debt to equity ratio over the coming years. As shown in Exhibit 1 below, GWI has exhibited a pattern over the past decade of assuming leverage to make significant acquisitions and then reducing leverage in subsequent years. Dr. Hoegemeier acknowledges this pattern in his Verified Statement.⁷

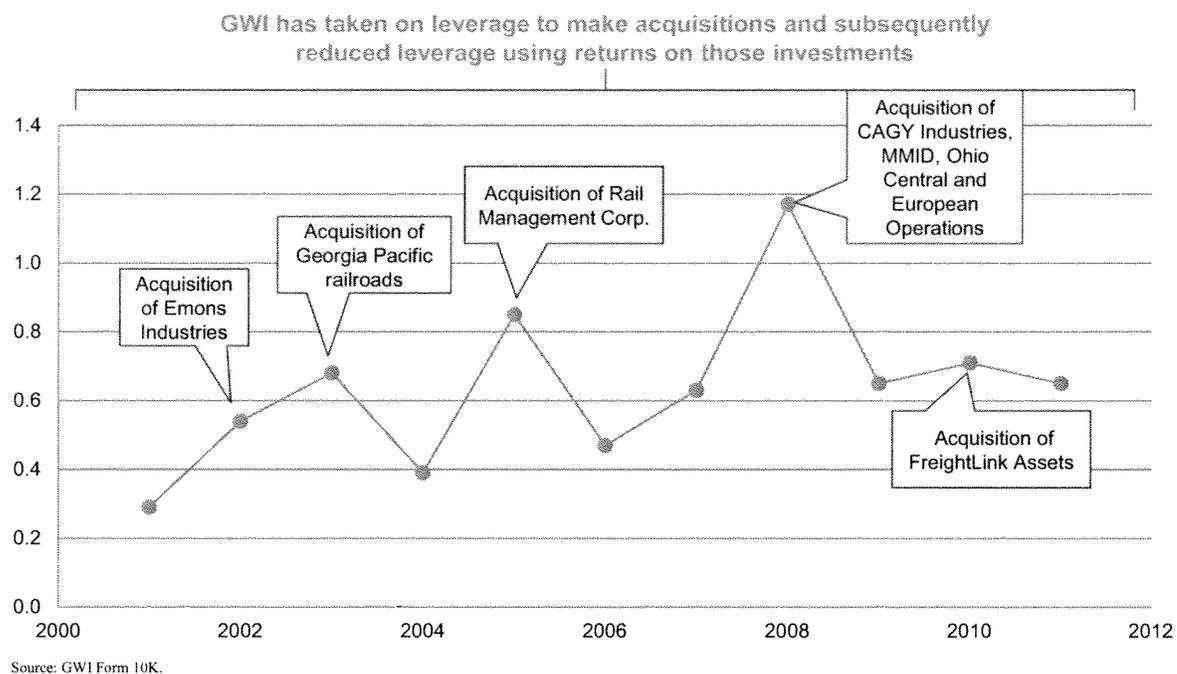
⁴ Genesee & Wyoming Inc. press release, July 23, 2012.

⁵ Reuters, "S&P Rates Genesee & Wyoming Inc.," August 29, 2012.

⁶ Verified Statement of Hoegemeier, p. 14.

⁷ Verified Statement of Hoegemeier, p. 3.

Exhibit 1: GWI Debt to Equity Ratio



Based on its public statements and expected free cash flow, I expect the increased leverage as a result of the transaction to revert to more moderate levels in the near future, consistent with GWI's past practice.

Response of the Financial Markets. There also has been strong support for the acquisition in the financial markets, which is another indication that GWI is not excessively leveraged. For example, since GWI's announcement on July 23, 2012 that it would acquire the assets of RA, GWI has been able to raise substantial equity. On October 1, 2012, GWI sold \$350 million of mandatorily convertible preferred stock to The Carlyle Group⁸, and in September 2012 GWI raised net proceeds of \$457.5 million through the sale of 3,791,004 shares of Class A Common Stock at \$61.8363 (net of underwriting discounts) and 2,300,000 tangible equity units at \$97 (net of

⁸ Genesee & Wyoming, Inc. Form 8-K, filed October 3, 2012, pp. 5-6.

underwriting discounts).⁹ Finally, since July 20, 2012, the last trading day prior to the announcement of its transaction with RA on July 23, 2012, investors have shown confidence in the company and GWI's share price has increased by 27.7 percent, from \$55.98 to \$71.46 on October 19, 2012.¹⁰

In sum, there is no evidence that GWI is taking on more leverage than it can handle. The company's pro forma debt to EBITDA ratio, which is the best measure of its ability to service its debt, is 3.7. That is comfortably below the financial default trigger of 4.75x in its Senior Secured Credit Facility. GWI has exhibited a clear past pattern of increasing leverage to make significant acquisitions and then reducing leverage as the benefits of the acquisition are realized. Dr. Hoegemeier himself has acknowledged this pattern. Finally, since the acquisition, GWI has demonstrated ability to raise substantial equity and its share price has increased by more than 27 percent.

Based upon the foregoing, I do not find any support for the concern expressed by parties in this proceeding that GWI will be overleveraged as a result of the transaction.

2. Australian Operations

In comments to the Surface Transportation Board, one party expressed concern that GWI's operations in Australia might require diversion of capital from its operations in the United States.

GWI has been active in Australia since the 1997 privatization of the Australia Southern Railroad. Its presence increased significantly in December 2010, when GWI acquired the assets of FreightLink, the operator of the Darwin to Tarcoola railway. That acquisition increased GWI's operating income from its Australian operation nearly sixfold, from \$10.5 million in 2010 to \$62.1

⁹ Genesee & Wyoming Inc., Form 8-K, filed September 19, 2012, p. 2; Exhibit 1(a) p. 15; Exhibit 1(b) p. 15; Exhibit 5(a). Shares of Class A common stock sold are equal to 4,025,000 shares registered less 233,996 shares sold by the Selling Stockholder.

¹⁰ Genesee & Wyoming Inc. website <http://phx.corporate-ir.net/phoenix.zhtml?c=64426&p=irol-stockquote>.

million in 2011.¹¹ Today, GWI operates over 3,100 miles of railroad in Australia, including operations over its 1,400 mile concession between Darwin and Tarcoola. In 2011, six of GWI's ten largest customers were located in Australia.¹²

In April 2011, GWI's Australia Region announced an agreement with affiliates of Arrium, an Australian iron ore miner and steel manufacturer, to transport 3.3 million tons of iron ore per year.¹³ At the time, Deutsche Bank estimated that the contract would generate revenue of A\$50 million per year.¹⁴ In July 2012, GWI's Australia Region announced an agreement with affiliates of Arrium to transport an additional 2.7 million tons of iron ore, with a similar profile of revenue and profitability.

Exhibit 2 shows GWI's Australia EBITDA and capital expenditures for 2011, for the six months ending June 30, 2012 and estimated annualized amounts for 2012 based on the six month results.

Exhibit 2: Results of GWI's Australia Operations

| | 2011 | H1 2012 | 2012 (est.) ¹⁵ |
|--|--------------|--------------|---------------------------|
| Income from operations | \$62,133,000 | \$32,576,000 | \$65,152,000 |
| Depreciation and amortization | 19,263,000 | 11,108,000 | 22,216,000 |
| EBITDA | 81,396,000 | 43,684,000 | 87,368,000 |
| Total expenditures for additions to property and equipment, net of grants from third parties | 96,643,000 | 61,519,000 | 125,000,000 |
| Less new Australia equipment investments | (78,200,000) | (54,518,000) | (111,000,000) |
| Normalized capital expenditures | 18,443,000 | 7,001,000 | 14,000,000 |
| Surplus of EBITDA over normalized capital expenditures | 62,953,000 | 36,683,000 | 73,368,000 |

Source: From Genesee & Wyoming, Inc. Form 8-K, filed February 8, 2012; H1 2012 from Genesee & Wyoming Inc. Form 10Q for the quarter ended June 30, 2012, p. 16; Oliver Wyman calculations.

¹¹ Genesee & Wyoming Inc. Form 10-K, 2011, p. F-35.

¹² Genesee & Wyoming Inc. Form 10-K, 2011, p. 8.

¹³ Genesee & Wyoming Inc. press release, April 28, 2011.

¹⁴ Deutsche Bank Global Market Research, May 2, 2011.

¹⁵ H1 2012 annualized assuming full year performance similar to first half of year performance.

Exhibit 2 shows that GWI's Australian operations generate significant EBITDA. EBITDA less normalized capital expenditures (capital required to maintain plant and equipment) is a proxy for free cash flow commonly used in valuation. As Exhibit 2 demonstrates, GWI's Australian operations generate a significant surplus of EBITDA over normalized capital expenditures on a standalone basis. GWI finances its new Australia equipment investments, which are tied to equipment and facilities required in connection with contracts for new business, in Australian dollars through its global credit facility and is able to service those debts using its Australian EBITDA, which annualized amounts for 2012 are more than sufficient to sustain in-country operations. Further, once the six million tons of new iron ore traffic described above comes on line, GWI's Australian operations will generate EBITDA greatly in excess of the amount required to maintain plant and equipment.

Based on the foregoing, it is clear that GWI has a growing and profitable business in Australia that is generating EBITDA sufficient to fully fund normalized capital expenditures and to fully service the debt on investments related to new contracts. Therefore, I find no merit in the concern that GWI will be forced to divert capital from the United States to finance its Australian operations.

VERIFICATION

I, William J. Rennie, verify 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 October 26, 2012

A handwritten signature in black ink, appearing to read "William J. Rennie". The signature is written in a cursive style with a large, stylized initial "W".

William J. Rennie

APPENDIX B

SUPPORT LETTER



FREEPORT-McMoRAN
COPPER & GOLD

Global Supply Chain
333 North Central Avenue
Phoenix, AZ 85018

Eileen_Mitchell@fmi.com
Transportation & Logistics
602-366-8486

October 26, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: STB Docket No. FD 35654
Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al.

Dear Ms. Brown:

Freeport-McMoRan Corporation (“Freeport-McMoRan”), a subsidiary of Freeport-McMoRan Copper & Gold Inc., is the principal customer of Arizona Eastern Railroad Company (“AZER”), a wholly-owned subsidiary of Genesee & Wyoming Inc. (“GWI”). Freeport-McMoRan is writing to express its support of GWI’s acquisition of RailAmerica, Inc. and to share its experience with GWI since GWI’s acquisition of AZER from Iowa Pacific Holdings in September 2011.

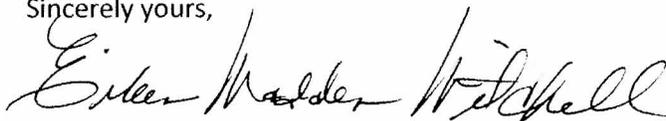
Freeport-McMoRan has seen a significant improvement in a number of areas since GWI’s acquisition of AZER in September 2011. First, GWI has made a number of substantial improvements and upgrades to AZER’s rail lines. Our understanding is that since September 2011 GWI has invested \$7.75 million in track / bridge infrastructure improvements and \$2.80 million in locomotive purchases. GWI’s financial resources have enabled it to make these capital improvements and upgrades, which were very much needed because AZER’s prior owner, Iowa Pacific Holdings, was not in the position to make such improvements and upgrades.

Second, GWI’s commitment to customer service has been outstanding and has resulted in vastly improved service. A safer, reliable, more efficient operation has been the result of a focused commitment to build a relationship of confidence that allows for continued growth by both companies.

Lastly, it should be noted that the above capital improvements and upgrades and service improvements have been implemented without the imposition of additional arbitrary non-freight charges. In our experience with GWI, it has been a true partner that seeks to work with the customer towards the goal of driving more freight to rail.

Freeport-McMoRan very much appreciates the Board’s consideration of this matter. If you have any questions, please feel free to contact the undersigned.

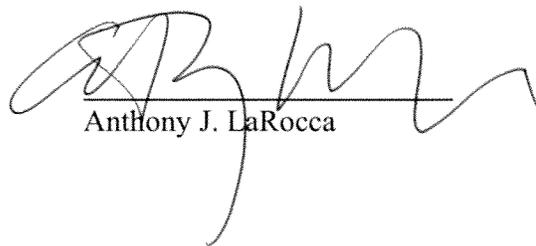
Sincerely yours,



Eileen Madden Mitchell
Director, Global Supply Chain
Logistics and Transportation

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2012, I have caused a copy of the foregoing to be served by first class mail on each Party of Record in this proceeding.



Anthony J. LaRocca