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October 26, 2012

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## VIA E-FILING

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

ENTERED  
Office of Proceedings  
October 26, 2012  
Part of  
Public Record

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

Dear Ms. Brown:

In accordance with the procedures set forth in the Board's September 5, 2012 decision in the above-referenced proceeding, enclosed are the Reply Comments of The Kansas City Southern Railway Company. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

Enclosure

cc: Parties of Record  
W. James Wochner

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. FD 35654**

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

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**REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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**Attorneys for The Kansas City Southern  
Railway Company**

**Dated: October 26, 2012**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. FD 35654**

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

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**REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

The Kansas City Southern Railway Company (“KCS”) hereby tenders its response to the opening comments filed earlier this month in the above-captioned proceeding. The opening comments, particularly those filed by Southwestern Electric Power Company (“SWEPCO”), bring to light a concern about the applicants’ competitive analysis – namely that paper barriers that may be triggered by the transaction and might impact carrier-to-carrier competition at specific locations are undisclosed and unanalyzed.<sup>1</sup> In particular, SWEPCO is concerned whether the proposed transaction would trigger agreements or other arrangements among one or more of the applicants and a third party railroad that would preclude SWEPCO from pursuing currently-available avenues for securing competitive rail service via KCS and a connecting RailAmerica Inc.-controlled short line – the Kiamichi Railroad Company (“KRR”).

SWEPCO’s concern is valid. The applicants should address whether there are any existing paper barriers or similar restrictions on carrier-to-carrier competition that could be impacted by the transaction and whether the transaction will create any new paper barriers. The public interest would be served by disclosure to the Board and to the public of paper barriers and

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<sup>1</sup> See SWEPCO Comments (filed October 9, 2012) at 4. The most common restrictions of concern to KCS and SWEPCO would be interchange commitments (also known as “paper barriers”) between short line railroads and connecting line-haul carriers.

similar arrangements, especially where interested shippers, like SWEPCO, have expressed concern about the potential post-transaction impacts.

KCS, like SWEPCO, is concerned that the proposed transaction could impede or block altogether KRR's ability to work with other carriers to provide a competitive alternative to Union Pacific Railroad Company's ("UP") line-haul service for Powder River Basin-originated coal destined to SWEPCO's "Turk Plant" in Hempstead County, Arkansas. In its opening comments, KCS explained that it had forged a constructive working relationship with KRR with the objective of competing for and securing Turk Plant coal traffic, including a plan to undertake certain track improvements necessary to handle coal trains.<sup>2</sup> Because applicants have not yet filed reply comments addressing the concerns of SWEPCO and KCS nor have they provided any discussion or analysis of any paper barriers, the applicants have not yet shown that the transaction will not result in the "substantial lessening of competition, creation of a monopoly, or restraint of trade" as required by 49 U.S.C. § 11324(d)(1).

If applicants' reply comments do not adequately address the concerns identified in KCS's and SWEPCO's opening comments, the Board should require the applicants to supplement the application by disclosing all existing or any new paper barriers (or other restrictive agreements). Then, the Board should provide a means for all interested parties to review that disclosure and provide comment. Applicants would then be given an opportunity to respond.

Requiring disclosure of any paper barriers is a matter of good agency policy and is fully consistent with Board practice in comparable circumstances. Indeed, as KCS and SWEPCO

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<sup>2</sup> The applicants may yet resolve this issue through their reply comments, thereby satisfying SWEPCO, KCS and the Board that the transaction would not trigger any competition-restricting provisions. However, because the procedural schedule does not specifically provide for rebuttal comments, KCS submits these reply comments now rather than waiting for applicants' reply comments and then filing a response that could be deemed untimely.

previously pointed out, if G&W were acquiring KRR's assets as a single, stand-alone transaction, the applicable class exemption procedures at 49 CFR part 1150, subpart D or E would require disclosure of interchange restrictions or paper barriers. Similarly, were the subject transaction a major transaction under the Board's rules, then the applicants would also have to disclose the triggering of any new restrictions on rail-to-rail competition (and their impacts on shippers) and offer appropriate mitigation pursuant to 49 C.F.R. § 1180.6(b)(10). It would be inconsistent with these policies and the statute for the Board to require disclosure of paper barriers in a short line transaction of much smaller scope than the current transaction or in a major consolidation, but to permit the applicants to forego such disclosure here simply because this is a minor transaction.

KCS remains hopeful that the proposed transaction will preserve and not reverse the substantial progress that has already been made between KRR and KCS to develop a competing rail service plan for SWEPCO. Yet, at this time, it cannot be determined from the public record if the transaction could impede competition due to existing or newly-emerging paper barriers. The control application is simply devoid of any such discussion. Accordingly, unless applicants' reply comments adequately address the concerns identified in KCS's and SWEPCO's opening comments, the Board should require the disclosure of any potential competition-restricting impacts so as to provide the Board and the public with a full opportunity to review and comment on any such restrictive impacts. The Board can then take appropriate steps to address any concerns, including taking any steps necessary to preserve SWEPCO's existing competitive rail options.

Respectfully submitted,

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October 26, 2012

Attorneys for The Kansas City Southern  
Railway Company

**CERTIFICATE OF SERVICE**

I have this day served a copy of the foregoing Reply Comments of The Kansas City Southern Railway Company upon all parties of record by U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.



Robert A. Wimbish  
Attorney for The Kansas City Southern  
Railway Company

Dated: October 26, 2012