

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35654

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

233371
ENTERED
Office of Proceedings
November 19, 2012
Part of
Public Record

**APPLICANTS' REPLY TO CCRSRA PETITION
FOR LEAVE TO FILE RESPONSE**

Scott Williams
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street
Jacksonville, FL 32256
(904) 538-6100

Counsel for RailAmerica, Inc.

Allison M. Fergus
General Counsel and Secretary
Genesee & Wyoming Inc.
66 Field Point Road
Greenwich, CT 06830
(203) 629-3722

David H. Coburn
Anthony J. LaRocca
Timothy M. Walsh
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Eric M. Hocky
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500

Counsel for Genesee & Wyoming Inc.

November 19, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35654

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

**APPLICANTS' REPLY TO CCRSRA PETITION
FOR LEAVE TO FILE RESPONSE**

Applicants Genesee & Wyoming Inc. ("GWI") and RailAmerica, Inc. ("RailAmerica") hereby file this Reply in opposition to the Petition of the Central California Rail Shippers & Receivers Association ("CCRSRA") for Leave to File Response filed with the Board on November 15, 2012. While CCRSRA argues that its proposed Response addresses the "renewed request for expedited consideration," it clearly is an attempt by CCRSRA to rehash the arguments it has previously made and to have the "last bite at the apple." CCRSRA's proposed response is not permitted under the schedule adopted by the Board (or the Board's regulations) and adds no new evidence or arguments to the proceeding. Further, since consideration by the Board would delay the proceedings unnecessarily, the Board should deny the Petition and should not consider the Response.

In support of their Reply, Applicants state as follows:

At the time the Applicants filed their Application on August 6, 2012, they also filed a motion requesting that the Board establish an expedited procedural schedule. In Decision No. 2

served on September 5, 2012, the Board issued a decision that accepted the Application as a minor transaction, and set forth the following procedural deadlines:

September 19, 2012	Notices of intent to participate in this proceeding due.
October 5, 2012	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings of DOJ and DOT, due.
October 26, 2012	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the application due.

Although the Board reserved the right to set the rest of the procedural schedule after reviewing the comments and requested conditions, and the Applicants' reply thereto, the deadlines set forth make clear that the Board did not contemplate further replies to the Motion to Establish Procedural Schedule, or replies to the Applicants' Reply Comments. *See also* 49 C.F.R. §1104.13(c) (a reply to a reply is not permitted).

It is disingenuous at best for CCRSRA to argue that it is seeking to respond to a new request for an expedited decision when the request for an expedited schedule was made over three months ago at the time the Application was filed. Rather, it is clear that CCRSRA is instead merely seeking to respond to the Applicants' Reply to Comments and delay a decision in an apparent attempt to gain some sort of leverage over Applicants. As noted by CCRSRA in its Petition, the Board will at times permit a reply to a reply, but only in circumstances where it is necessary to provide a complete record, to clarify arguments and where the proceeding will not be delayed. Petition at 2-3. On the other hand, the Board has made clear that it will not accept a reply to a reply that is just a rehash of what has or could have been set forth previously. *E.g.*, STB Docket No. FD 35304, *San Francisco Bay R.R.-Mare Island—Operation Exemption—Cal. N. R.R.*, slip op. at 3 (served Dec. 6, 2010) (rejecting reply to a reply where “[t]he pleading

introduces no new evidence and adds nothing necessary for us to adjudicate LMI's petition"); STB Docket AB 409 (Sub No. 5X), *Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—In Los Angeles County, CA*, slip op. at 2 fn.4 (served July 17, 2008) (reply to reply rejected where it merely rehashed prior arguments and failed to add substance to the record); STB Docket No. AB-6 (Sub- No. 430X), *BNSF Ry. Co.—Abandonment Exemption—In Okla. County, OK*, slip op. at 2 (served Jan. 26, 2007) (striking reply to a reply where "the asserted factual misrepresentation of the record has been raised in petitioners' earlier pleadings, and thus is already before us"). CCRSRA's Response is clearly an impermissible rehash. Further, CCRSRA's attempt to disguise this procedural infirmity by re-arguing its case in lengthy footnotes underscores that CCRSRA is merely seeking to circumvent the rule against replies.

The proposed CCRSRA Response does not purport to supplement the record (it is not verified, and it does not include any additional verified statements), nor does it clarify any arguments previously made by CCRSRA. It merely repeats its complaints about existing RailAmerica policies and its unsupported claims that going forward GWI's debt load will cause it to expand those policies, and restates why it believes Applicants have not adequately addressed the concerns of its members. Despite CCRSRA's protestations to the contrary, Applicants in great detail discussed all of the concerns raised by CCRSRA, demonstrated that the "problems" it raised are not a result of the Transaction or any change in market power, and that GWI will be under no debt pressure to seek additional non-freight revenues. Applicants' Reply to Comments at 11-23.

Also of significance, CCRSRA continues to argue that the Board must ensure that the Transaction meets the public interest standards of 49 U.S.C. §11325(a) (CCRSRA proposed

Response at 2 fn.3, 3 fn.4), and that the Board needs more than the proposed expedited schedule to consider the public interest ramifications of the Transaction. CCRSRA's proposed Response at 6. While Applicants believe that they have sufficiently demonstrated that the Transaction will be in the public interest, this is *not* the standard the Board is to apply in evaluating a minor transaction, and CCRSRA's assertions are without merit. *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)”). *See also* STB Docket No. FD 32892, *CSX Corp. & CSX Transp., Inc.—Control—Indiana R.R. Co.*, slip op. at 5 (served Nov. 7, 1996) (“In transactions subject to 49 U.S.C. 11324(d), . . . [w]e consider the public interest factors only if significant anticompetitive effects are found.”).

The CCRSRA proposed Response also seems to seek an additional condition that was not requested previously. In response to Applicants' concerns that there has been a recent uptick in reportable injuries on RailAmerica Railroads, CCRSRA for the first time implies that a Safety Integration Plan (“SIP”) is required and that Applicants failed to submit one. CCRSRA proposed Response at 8, fn.12. However, this request ignores that a SIP is only required in

connection with a major transaction, 49 C.F.R. §1180.8(a)(1), and that Applicants have provided all of the operational data required for a minor transaction 49 C.F.R. 1180.8(c).¹

In summary, the whole purpose of CCRSRA's filing is to delay the proceeding and make it more difficult for the Board to meet the expedited schedule requested by Applicants, and meet the rail transportation policy goal "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. §10101(2).

¹ CCRSRA also chastises GWI for not explaining what they are doing to address the matter. CCRSRA proposed Response at 8. This ignores, of course, that GWI is prohibited from exercising any control over RailAmerica and the RailAmerica Railroads until after it acquires the approval of the Board. Allowing GWI to extend its safety programs to RailAmerica as soon as possible justifies an expedited decision, not the pointless delay that CCRSRA seeks. And contrary to CCRSRA's claim, GWI's CEO did not contradict what GWI has advised the Board about the comparative safety performance of the RailAmerica Railroads and GWI's railroad performance. The safety slide accompanying the earnings performance conference call cited by CCRSRA underscores the point. See <http://phoenix.corporate-ir.net/phoenix.zhtml?p=irol-eventDetails&c=64426&eventID=4854073> (slide number 3, showing RailAmerica with a 1.8 injury frequency ratio per 200,000 man hours versus a 0.5 ratio for GWI during the period January through September 2012).

CONCLUSION

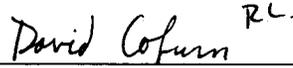
For the reasons set forth above, Applicants urge the Board to deny CCRSRA's Petition, and act promptly to set the remainder of the procedural schedule and to allow the Transaction to be completed before the end of 2012, as previously requested by Applicants.²

Respectfully submitted,

^{RL}

Scott Williams
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street
Jacksonville, FL 32256
(904) 538-6100

Counsel for RailAmerica, Inc.

^{RL}

Allison M. Fergus
General Counsel and Secretary
Genesee & Wyoming Inc.
66 Field Point Road
Greenwich, CT 06830
(203) 629-3722

David H. Coburn
Anthony J. LaRocca
Timothy M. Walsh
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Eric M. Hocky
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500

Counsel for Genesee & Wyoming Inc.

November 19, 2012

² If the Board were to grant the Petition or otherwise allow the Response, Applicants hereby advise the Board that Applicants will not be seeking leave to file a reply to the Response. They believe they have adequately addressed the issues raised by CCRSRA in their Reply to Comments filed on October 26, 2012. Applicants urge the Board to formally close the record in this proceeding and move forward with a decision by December 10, 2012 (effective December 20, 2012), the dates requested in their August 6, 2012 Motion to Establish a Procedural Schedule.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2012, I have caused a copy of the foregoing to be served by first class mail on each Party of Record in this proceeding.

David Coburn ^{R.L.}

David H. Coburn