

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36064

GENESEE & WYOMING INC.
- ACQUISITION OF CONTROL EXEMPTION -
PROVIDENCE AND WORCESTER RAILROAD COMPANY

COMMENTS OF BOSTON SURFACE RAILROAD COMPANY, INC.

INTRODUCTION

Boston Surface Railroad Company, Inc. (“BSRC”) is a privately funded and closely held company, established to address the growing demand for quality alternatives to driving for commuters between tightly coupled metropolitan markets. BSRC has selected Worcester, Massachusetts, and Providence, Rhode Island, as the first city pair for its pilot passenger rail program, with plans to initiate scheduled service between the two cities in late 2017-early 2018.

BSRC has already acquired property, a station located in Woonsocket, Rhode Island, and is currently in the process of acquiring equipment, including locomotives and passenger cars suitable for an intercity (and interstate) railroad passenger service and which meet the operating requirements of AMTRAK.

*THE RELATIONSHIP BETWEEN BSRC AND PROVIDENCE AND WORCESTER
RAILROAD COMPANY*

BSRC has been in negotiations with Providence and Worcester Railroad Company (“P&W”) to host BSRC’s proposed service.

P&W is a publicly traded Class III freight railroad that also operates seasonal passenger excursions including “the Polar Express.” Pending negotiation and final agreement of a definitive operating agreement, the P&W will host and operate BSRC equipment on a 44-mile route from Worcester, Massachusetts, to Providence, Rhode Island, the majority of which is on the P&W main line. Service is planned to commence in late 2017 or early 2018.

P&W and BSRC have entered into a memorandum of understanding dated May 26, 2016 (the “Agreement”) that contemplates the parties exchanging information leading to a definitive agreement as to the operation by BSRC of intercity passenger services over P&W’s right of way between Worcester, Massachusetts, and Providence, Rhode Island. BSRC and P&W have had

substantive verbal discussions, between both executive management and operations staff, and have both expressed publicly and privately the willingness to begin the service contemplated by the Agreement.

In reliance on (and in furtherance of) the Agreement, BSRC has already begun its due diligence, spending approximately \$1MM for surveys and analyses, consulting fees, engineering and planning fees, architect fees, and legal fees (which included BSRC's Petition before this Board). The Agreement contemplates that BSRC will complete its due diligence on or before December 31, 2016, unless such deadline is extended by mutual agreement, and grants BSRC a license to enter upon P&W's property for purposes of performing such due diligence. The Agreement sets forth preliminary expectations and understandings between P&W and BSRC and contemplates a further agreement between the parties.

Most importantly, for present purposes, the Agreement does not contemplate or address in any fashion the acquisition, merger or other change of control events of P&W and the impact that any change of control event would have on P&W's preliminary agreement with BSRC and/or its further negotiations with BSRC.

BSRC'S PETITION BEFORE THE BOARD

On June 22, 2016, BSRC filed with this Board a Petition for Exemption Pursuant to 49 U.S.C. § 10502, seeking an exemption from certain provisions of Subtitle IV of Title 49 of the United States Code ("BSRC's Petition"). More specifically, BSRC's Petition sought authorization to commence operation of a passenger rail service on P&W's existing interstate/intercity route between Worcester, Massachusetts, and Providence, Rhode Island.

On September 15, 2016, the Board issued its decision granting BSRC's request for exemption from Subtitle IV for its operations. The Board's exemption gives BSRC the right to provide its passenger service on any rail line where the host carrier – P&W – will allow BSRC's service.

The Board further stated that the exemption shall also apply to any future passenger rail operations and services BSRC may undertake, so long as the operations and services are of the same nature and scope as those described by BSRC in its initial Petition.

For present purposes, it is important to highlight that the Board has granted BSRC authority to conduct its proposed services on P&W's main line.

THE GENESEE & WYOMING INC. PETITION BEFORE THE BOARD

Following the Board's Decision, Genesee & Wyoming Inc. ("GWI"), a noncarrier holding company controlling two Class II carrier and 106 Class III carrier in the United States, filed a petition under 49 U.S.C. § 10502 and 49 C.F.R. § 1121 for exemption from the provisions of 49 U.S.C §§ 11323-11324 to allow GWI to acquire control of P&W (the "GWI Petition"). In

the GWI Petition, GWI has requested expedited consideration of its Petition. Multiple parties, including BSRC, have filed Notices of Intent to Participate in the GWI proceeding.¹

BSRC will be directly impacted if GWI acquires P&W and refuses or fails to host BSRC's proposed service as set forth in BSRC's Petition. In its decision on BSRC's Petition, the Board granted BSRC authority to conduct its proposed service on P&W's 44-mile route. BSRC does not have authority to operate its service otherwise. GWI should clearly explain its intentions relative to P&W's passenger service following the contemplated acquisition and clarify its application so as to specify if and how it plans to proceed with BSRC. In light of the significant time and financial expenditure BSRC has output already in reliance upon its negotiations with P&W, and the fact that this Board's allowance of BSRC's Petition was dependent upon its ability to operate its services with P&W, it is imperative that GWI clarify its position with respect to BSRC and confirm continued negotiation with BSRC so as to reach a mutually acceptable final agreement.

Impacts of the Proposed GWI Transaction Upon Adequacy of Transportation Service to the Public

In a prior proceeding before this Board concerning the separate and distinct GWI acquisition of Rail America (Docket No. FD 35654), GWI represented that the transaction for which it sought approval would have no impact on passenger rail service. In its decision, dated September 5, 2012, the Board (Commissioner Mulvey, dissenting) noted: "...the Board's review of minor and significant mergers is not limited to just competitive issues, [the Board] should not so severely limit the analysis [it] employ[s] to determine a merger's significance." *Citing Village of Barrington, et al. v. Surface Transportation Board*, 636 F.3d 650 (D.C. Cir. 2011); 49 CFR § 1180.6 (requiring minor and significant merger applicants to submit information regarding, *inter alia*, impacts on commuter/ passenger rail transportation). It is clear that this Board's authority is not merely limited to consideration and evaluation of the economic impacts of GWI's proposed transaction, but also extends far broader.

Under 49 CFR § 1180.6, GWI is required to discuss in its application to the Board "[t]he effect of the proposed transaction upon the adequacy of transportation service to the public, as measured by the continuation of essential transportation service by applicants and *other carriers*." [emphasis added]. The Board has the authority to direct GWI so as to limit impacts to passenger rail service in the context of other carriers. The Board's authority is clear in this regard. Here, if GWI continues to refuse, neglect or fail to consummate the negotiations between P&W and BSRC, BSRC will have no means by which it can operate its contemplated service for which it has already sought and received this Board's permission. Such an outcome will undoubtedly affect passenger service and BSRC's business.

Furthermore, BSRC believes its concern in this respect is valid, as GWI has neither acknowledged any of P&W's current passenger services, nor P&W's extensive negotiations with BSRC in its pending application. Since GWI's application, BSRC and P&W's negotiations have been suspended without any definitive date upon which they will resume. What is more concerning is that negotiations have ceased despite the fact that GWI has not yet acquired P&W

¹ BSRC filed its Notice of Intent to Participate on September 23, 2016.

and is not legally able to exert control over it until the acquisition is complete. It is not appropriate for GWI to suspend - or to direct P&W to suspend – P&W’s negotiations with BSRC.

Accordingly, in rendering a decision on GWI’s Petition, this Board should require GWI to comply with 49 CFR § 1180.6 and acknowledge and disclose the full breadth of the proposed transaction’s impact on service to the public, specifically with respect to the service contemplated by BSRC in conjunction with P&W. In order to do so, GWI should be required to clarify its intentions with respect to the operation of P&W following the proposed transaction.

CONCLUSION

In light of the fact that the Agreement between P&W and BSRC does not address the continuation of negotiations in the event of a change of control event for either party; that GWI has failed to disclose the extent of P&W’s current services and its negotiations with BSRC; and the fact that this Board has conditioned BSRC’s exemption and authorization on its operation upon P&W’s line, BSRC requests that the Board condition its approval of the GWI Petition on (a) GWI’s clarification of its intentions relative to P&W’s operation with respect to passenger service, in general, and more specifically, BSRC’s operation, following the proposed transaction; (b) GWI’s continued good faith negotiations with BSRC during and following its acquisition of P&W; (c) GWI’s continued adherence to the terms and conditions set forth in the Agreement; and (d) allowing BSRC to operate in the manner it outlined in BSRC’s Petition, specifically with P&W (as acquired by GWI) hosting and operating BSRC equipment on a 44-mile route from Worcester, Massachusetts, to Providence, Rhode Island.

For the reasons set forth above, BSRC respectfully requests that the Board condition its approval of the GWI proposed acquisition of P&W on the following conditions:

- (a) GWI clarifies its intentions relative to P&W’s operation with respect to passenger service, in general, and more specifically, BSRC’s operation, following the proposed transaction;
- (b) GWI’s continued good faith negotiations with BSRC during and following its acquisition of P&W;
- (c) GWI’s continued adherence to the terms and conditions set forth in the Agreement; and
- (d) GWI agrees to permit BSRC to operate in the manner it outlined in the BSRC Petition, specifically with P&W (as acquired by GWI) hosting and operating BSRC equipment on a 44-mile route from Worcester, Massachusetts, to Providence, Rhode Island.

Respectfully submitted,

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Dated: October 11, 2016

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon the following parties of record in this proceeding by first-class:

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