



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

Writer's Direct Dial Number
(757) 629-2831
(757) 533-4872 (Fax)
john.scheib@nscorp.com

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Office of Proceedings
October 26, 2012
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John M. Scheib
General Counsel

October 26, 2012

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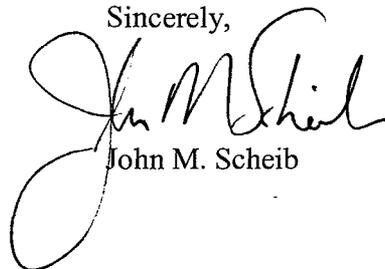
Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

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 Norfolk Southern Railway Company. If there are any questions concerning this filing, please contact me by telephone at (757) 629-2831 or by e-mail at John.Scheib@nscorp.com.

Sincerely,



John M. Scheib

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35654

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

REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

**James A. Hixon
John M. Scheib
Greg E. Summy
Maquiling B. Parkerson**

**Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510 -9241
Telephone: (757) 629-2831
Facsimile: (757) 533-4872**

Dated: October 26, 2012

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STB DOCKET NO. FD 35654

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

REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

Overview

Norfolk Southern Railway Company (“NSR”) hereby responds to the opening comments filed earlier in this proceeding. NSR takes no position concerning the merits of the proposed short line control transaction, but it wishes to respond to a request for the Board to order trackage rights over certain lines controlled by the Applicants¹ and over a rail line owned by NSR. Specifically, among those responding to the proposed transaction currently awaiting Board approval were Winamac Southern Railway Company (“WSRY”) and US Rail Corporation (“USRP”) – collectively, “WSRY/USRP” – which jointly requested that the Board use its conditioning authority to grant WSRY/USRP trackage rights over some 50 miles of railroad operated by two RAI-controlled short lines, and over approximately 2.5 miles of an NSR-owned rail line. For a number of reasons discussed herein, WSRY/USRP’s request for conditions – especially to the extent that they affect NSR - should be denied.

¹ Genesee & Wyoming Inc. (“GWI”) and RailAmerica, Inc. (“RAI”), the principal parties to the short line control transaction encompassed by STB Docket No. FD 35654, will be referred to herein as the “Applicants.”

WSRY/USRP's trackage rights request addresses a pre-existing situation, lacks a basis in any transaction-triggering anticompetitive impact, and, in any event, is an unnecessary remedy in light of available private sector solutions.

WSRY/USRP's request for conditions arises from existing circumstances, evidently stemming from long-standing grievances between WSRY/USRP and RAI. As such, the requested conditions will not remedy transaction-related harm, and should therefore be denied.² WSRY/USRP points to a series of simmering rate and service disputes with current RAI subsidiaries Toledo, Peoria and Western Railroad Corporation ("TPW") and Central Railroad Company of Indianapolis ("CERA") that WSRY/USRP alleges will or could worsen once GWI acquires control of TPW and CERA. Yet WSPR/USRP introduces no evidence to support its allegations. Accordingly, WSRY/USRP's unsubstantiated dual contentions that GWI's acquisition of control of TPW and CERA would exacerbate the existing issues that have prompted WSRY/USRP to participate in this proceeding, and that TPW or CERA will accumulate undue market power, and abuse it, as a result of the proposed transaction are both unpersuasive.

Similarly, WSRY/USRP's conditions request must be denied because the conditions are not designed to address anticompetitive impacts flowing from the proposed transaction. In recent decisions such as in the aforementioned Pan Am Southern case, the Board has set forth the

² See, e.g., Norfolk Southern Railway Company, Pan Am Railways, Inc. et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, STB Docket No. FD 35147 (STB served Mar. 10, 2009) ("Pan Am Southern"), slip op. at 5-6 (the Board will not impose conditions to address pre-existing situations, because the conditions sought would not address an anticompetitive impact triggered by the transaction); Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., STB Docket No. FD 35081 (Decision No. 11) (STB served Sept. 30, 2008), slip op. at 47 (wherein the Board describes its policy only to impose "conditions on its approval of a proposed transaction in order to address harms or conditions that are caused by the transaction, not to address pre-existing conditions that are unrelated to the transaction" as one of the "foundational principles regarding rail mergers").

standard for approval of, and the imposition of conditions to mitigate the impacts in, non-major rail consolidation transactions subject to approval under 49 U.S.C. §§ 11323-24 as follows:

In assessing [minor] transactions subject to section 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.

Pan Am Southern, FD 35147 at 4-5. The GWI-RAI transaction will not result in the loss of competitive rail service options via TPW and CERA now available to WSRY/USRP customers. Notably, WSRY/USRP does not even attempt to show a loss of competition would result from the transaction. There is therefore no harm to be mitigated through a condition.

Nevertheless, WSRY/USRP seeks a highly intrusive trackage rights remedy³ that is not supported by compelling evidence of market dominance or similar such anticompetitive impacts that are alleged to result from the GWI-RAI transaction. Surprising to NSR, is WSRY/USRP's request for STB-mandated trackage rights over roughly 2.5 miles of NSR rail line in the vicinity of Marion, Indiana. Although WSRY/USRP does not specifically describe the need for such trackage rights over NSR in its comments, the map submitted as an exhibit to the request clearly depicts trackage rights over NSR-owned track between Michaelsville and Marion, Indiana. NSR is not a party to the transaction proposed in the Application and is disappointed that WSRY/USRP did not consult with it before seeking the requested trackage rights relief.⁴ In the

³ See Shenango Inc. v. Pitts., Chartiers & Yough. Ry. Co., 5 I.C.C.2d 995,1002 (1989) (“Shenango”) (as an ameliorative condition, “[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient”); cf. Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., STB Docket No. NOR 41987, et al. (STB served Jul. 28, 1997) (“Western Fuels”), slip op. at 7 (“As we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient”) (citations omitted).

⁴ NSR only learned of WSRY/USRP's trackage rights plans after it was served with a copy of the request for conditions.

past, the Board has expressed extreme reluctance to grant such relief where, as here, the condition-seeking party has other paths available to achieve its overarching objectives, and can negotiate a mutually beneficial arrangement with the target(s) of the trackage rights request without Board intervention.⁵ Here is another path.

Prior to the Application, NSR and WSRY/USRP had substantially completed negotiations to lease a currently out-of-service, 10.8-mile rail line owned by NSR extending from Kokomo to Tipton, Indiana (the “Tipton Line”), which connects with WSRY/USRP’s Van Junction-Kokomo line at Kokomo and NSR’s Lafayette-Muncie (Indiana) main line at Tipton. Pursuant to that lease, the Tipton Line would be leased to WSRY/USRP, and returned to service. If completed, the lease transaction would establish a new, direct point of WSRY/USRP-NSR interchange at Tipton, and the requested trackage rights over CERA and NSR would be unnecessary.

The Tipton Line proposal would benefit all concerned – WSRY/USRP, the communities currently served by WSRY/USRP and those that would receive service from WSRY/USRP following lease consummation, and NSR. Indeed, the Tipton Line lease transaction has garnered considerable public attention, and it has received favorable coverage from the local press which has identified a key shipper at Kokomo (Kokomo Grain) as a driving force behind the initiative.⁶ More importantly, the substantially complete negotiations that occurred prior to the filing of this Application and the availability of that option demonstrates that (1) the potential harm WSRY/USRP allegedly seeks to remedy through its request for a condition pre-existed the

⁵ See *id.* (the applicants’ terminal trackage rights request was denied because, although the agency had the authority and the discretion to impose terminal trackage rights remedies on appropriate showing, the Board perceived that there were adequate, existing paths to achieve the applicants’ objective that did not require forced terminal trackage rights over a non-applicant).

⁶ See articles attached hereto as Exhibit A.

transaction and is not caused by the transaction and (2) WSRV/USRP has an adequate exiting option other than the 22 miles of trackage rights over CERA and the additional 2.5 miles of trackage rights over NSR.

In addition, NSR has learned that the Applicants are endeavoring to reach out to WSRV/USRP to address the underlying areas of conflict and to resolve privately the rate and service disputes discussed in WSRV/USRP's conditions request. A private settlement that resolves festering rates and divisions issues and that does not require any further Board intervention would be consistent with the Board's oft-repeated preference for privately-negotiated dispute resolution.⁷ NSR fully expects that the Applicants will abide by their representations made in communications with NSR personnel to confer with WSRV/USRP in good faith, which, in the absence of the Tipton Line lease transaction, may also yield an amicable and long-standing resolution of the matter.⁸

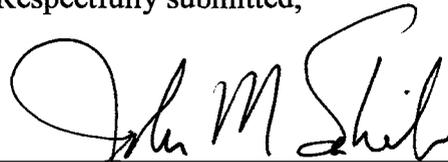
⁷ See, e.g., Assessment of Mediation and Arbitration Procedures, STB Docket No. EP 699 (STB served Aug. 20, 2010), slip op. at 1 ("The Board favors private sector resolutions of disputes as an alternative to its formal processes where possible").

⁸ NSR expects that it would have an integral role in this process, insofar as possible solutions may involve traffic moving to and from the existing NSR-CERA interchange in Marion, Indiana.

Conclusion

As discussed above, WSRY/USRP's trackage rights conditions request came as a surprise to NSR, particularly because NSR had substantially completed negotiating a transaction with WSRY/USRP that would resolve WSRY/USRP's dispute with CERA. WSRY/USRP has now inserted into that process an unannounced, forced trackage rights demand that is unrelated to any harm from the proposed transaction. NSR's disappointment aside, WSRY/USRP's trackage rights conditions request is not supported by record evidence or agency precedent. Finally, as detailed herein, WSRY/USRP has options at its disposal that, if pursued to fruition, would render WSRY/USRP's intrusive trackage rights conditions unnecessary. For the foregoing reasons, WSRY/USRP's trackage rights conditions request is unwarranted and should be denied.

Respectfully submitted,



James A. Hixon
John M. Scheib
Greg E. Summy
Maquiling B. Parkerson

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510 -9241
Telephone: (757) 629-2831
Facsimile: (757) 533-4872

October 26, 2012

EXHIBIT A



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October 5, 2012 Friday 6:30 AM EST

LENGTH: 228 words

HEADLINE: United States : KOKOMO RAILROAD to undergo \$5.5 million rehabilitation

BODY:

By early 2014, twelve miles of inactive railroad running through the City of Kokomo to Tipton will be reopened to rail freight traffic.

The partnership of Kokomo Grain, US Rail (USR) and Norfolk Southern (NS) Railroads will work on a railroad rehabilitation project that will see \$5.5 million spent to restart a railway which has been inactive since 1997.

Kokomo Mayor Greg Goodnight said: Kokomo and central Indiana companies will benefit from this world-class transportation system. As an economic development tool, access to a rail system is again becoming more important to agricultural, construction and manufacturing industries.

The reopened railroad will reduce Kokomo Grain's transportation costs and provide them with faster and more efficient access to southern grain markets.

Scot Ortman, President/CEO Kokomo Grain said: This project is a great example of public/private coordination of efforts to attract investments to our community. I would like to commend the City of Kokomo for their forward looking stance in embracing this opportunity and working with us to make it happen.

Founded in Kokomo in 1950, Kokomo-based Kokomo Grain has over 75 employees and annual sales have exceeded \$400 million in the last few year.

LOAD-DATE: October 5, 2012



2 of 5 DOCUMENTS

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October 5, 2012 Friday

LENGTH: 206 words

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Ltd.

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3 of 5 DOCUMENTS

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Distributed by McClatchy-Tribune Business News

October 2, 2012 Tuesday

SECTION: STATE AND REGIONAL NEWS

ACC-NO: 20121002-KO-Rail-deal-to-reopen-12-miles-of-track-1002-20121002

LENGTH: 701 words

HEADLINE: Rail deal to reopen 12 miles of track

BYLINE: Scott Smith, Kokomo Tribune, Ind.

BODY:

Oct. 02--The railroads are making a comeback in Kokomo, where 12 miles of inactive railroad track are about to be returned to service.

Kokomo Grain, US Rail and Norfolk Southern Railroads are partnering on a \$5.5 million project to reroute much of the grain company's freight, sending it south toward Tipton instead of east toward Marion.

A dormant Norfolk Southern line, which runs southeast from Home Avenue, will be placed back into use, and portions of Kokomo which haven't seen train traffic since 1997 will again be seeing and hearing trains.

But the bottom line for the project is jobs, in the form of expanded business for local farmers, for Kokomo Grain and for the railroads.

Right now, cars full of grain are sent from Kokomo to Norfolk Southern in Tipton via Marion and Alexandria, a process that often takes up to three days.

US Rail President Gabe Hall said that once the project is complete around March, he expects to cut the time it takes to get a car full of grain to Tipton to around four hours.

The move will also cut out one of the railways currently carrying Kokomo Grain's shipments, Hall explained.

Kokomo Mayor Greg Goodnight applauded the rail rehabilitation project, and said the city will be providing up to \$600,000 toward the project, in the form of property acquisition and infrastructure improvements.

Rail deal to reopen 12 miles of track Kokomo Tribune (Indiana) October 2, 2012 Tuesday

Goodnight said thinks Kokomo Grain and the railroads won't be the only companies to benefit from having more rail options in Kokomo.

"Kokomo and central Indiana companies will benefit from this world-class transportation system," Goodnight said. "As an economic development tool, access to a rail system is again becoming more important to agricultural, construction and manufacturing industries."

With about \$400 million in annual sales, Kokomo Grain operates a system of 10 grain elevators in Indiana and Tennessee.

Trucks may bring local grain harvests to the elevator on Kokomo's northside, but more than 90 percent of that grain leaves the elevator on rail, Ortman said.

Increase rail efficiency and better rail rates should allow the company to make better bids on grain to area farmers, which in turn should increase the volume of grain moving through the elevator, he added.

"Part of the problem of the business is the inelasticity of demand," Ortman said. "If you get higher volumes, you can protect your margins."

While local business stands to benefit, neighbors along the unused rail line will also have to adjust to trains going by.

Neighbors along East Madison Street may have a good deal less train traffic to deal with, because the trains traveling along the Central Railroad of Indiana tracks will now be heading south.

That means crossing signals will be upgraded at many crossings, and trains will again be using the trestle across Sycamore Street.

The trains will head southeast between OmniSource and Future Park, cross Markland Avenue just west of Diamond Street (near the Barker's BK restaurant), and then turn straight south to travel just west of Bona Vista.

The trains will turn back west at Bona Vista and travel to the north of the Inventrek Technology Park before turning southeast once more at Home Avenue.

Kokomo Grain shares owners with the Winimac Southern Railway (which owns the tracks running alongside the city's Industrial Heritage Trail).

Maintaining the possibility of establishing a more direct rail connection with Norfolk Southern was the main reason the Winimac Southern owners left the tracks in place alongside the city's walking/biking trail.

That's also why Kokomo Grain executives asked Norfolk Southern not to abandon rail lines the railroad owns to the south of the current U.S. 31.

The new U.S. 31 bypass will travel over the top of Norfolk Southern's line to Tipton, allowing trains to travel underneath the new road.

US Rail will operate the trains along the newly re-established line, and Hall said he's enthusiastic about the future.

"We see a major opportunity to increase rail traffic in this region," he said.

--Scott Smith can be reached at (765) 454-8569 or at scott.smith@kokomotribune.com

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Rail deal to reopen 12 miles of track Kokomo Tribune (Indiana) October 2, 2012 Tuesday

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The Associated Press State & Local Wire

October 2, 2012 Tuesday 11:23 AM GMT

SECTION: STATE AND REGIONAL

LENGTH: 131 words

HEADLINE: Rail line being revived between 2 C. Ind. cities

DATELINE: KOKOMO Ind.

BODY:

A central Indiana city's mayor says he hopes a project to re-activate 12 miles of railroad line will help the area's economy.

The \$5.5 million project will return tracks between Kokomo and Tipton into service. The work that is a partnership between Kokomo Grain, US Rail and Norfolk Southern railroad will cut a couple days off the movement of the grain company's freight.

Kokomo Mayor Greg Goodnight says the project announced Monday will improve rail access for companies in the city.

The Kokomo Tribune reports (<http://bit.ly/SjZw6D>) that the Norfolk Southern line has been dormant since 1997.

US Rail President Gabe Hall says the project is expected to be complete around March, when the company will operate trains on the line.

Information from: Kokomo Tribune, <http://www.ktonline.com>

LOAD-DATE: October 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Comments of Norfolk 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.



Maquiling B. Parkerson
Attorney for Norfolk Southern
Railway Company

Dated: October 26, 2012