

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35654

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

**APPLICANTS' RESPONSE TO REPLIES IN OPPOSITION TO MOTION TO
ESTABLISH A PROCEDURAL SCHEDULE**

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

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

Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8198

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

Counsel for RailAmerica, Inc.

Counsel for Genesee & Wyoming Inc.

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Applicants Genesee & Wyoming, Inc. (“GWI”) and RailAmerica, Inc. (“RailAmerica”) (jointly “Applicants”) hereby submit this response to the replies to their August 6, 2012 Motion to Establish a Procedural Schedule filed by: (1) Napa Valley Railroad Company (“NVR”) and Yreka Western Railroad Company (“YW”) (which are commonly represented and filed virtually identical replies); (2) US Rail Corporation (“URC”), a shortline railroad jointly with Winamac Southern Railway Company (“WSRY”), a railroad from which URC leases rail lines; and (3) the United Transportation Union-New York State Legislative Board (“UTU-NY”) (collectively, the “Replies” or “Replying Parties”).¹

INTRODUCTION

Each of the Replies argues that the procedural schedule proposed by Applicants provides insufficient time to address certain issues raised by the acquisition of RailAmerica by GWI. What the Replying Parties are really challenging is whether the proposed transaction is a minor transaction as described in the Application, or whether it should be considered a significant

¹ On August 24, 2012, NVR/YW jointly filed a Petition to nullify the Notice of Exemption filed in Finance Docket No. 35660, *GWI Voting Trust and R. Lawrence McCaffrey Voting Trustee – Control – RailAmerica, Inc.* A reply to that Petition was submitted on August 27, 2012.

transaction under the Board's rules at 49 CFR Part 1180. NVRR and YW argue, in their virtually identical pleadings, that it "remains uncertain" whether the proposed transaction is a minor transaction justifying an accelerated procedural schedule in light of the fact that the transaction will result in the common control of a large number of shortline railroads. *See e.g.*, NVRR Reply at ¶¶ 1, 6. URC/WSRY similarly argue that Applicants' proposed procedural schedule is too short given that "GWI and RailAmerica individually are the two largest conglomerates of local and regional rail carriers in the United States." URC/WSRY Reply at 3. URC/WSRY ask that the Board adopt a procedural schedule that provides "the maximum time for issuance of a final Board decision on a significant transaction." *Id.* at 4. UTU-NY reiterates the assertions of NVRR, YW and URC/WSRY and argues further that the proposed transaction may "result in a reduction in competition between Class I rail carriers." UTU-NY Reply at 5. UTU-NY specifically asks that the Board treat the proposed transaction as a "significant" transaction and establish the maximum schedule permissible under the governing statute. *Id.* at 6.

None of the Replying Parties advances a valid reason to reclassify the transaction or to extend the procedural schedule beyond the schedule proposed by Applicants. NVRR, YW, and URC/WSRY do not even allege that the proposed transaction will restrain trade in the market for freight transportation services, the core issue in the Board's review of a proposed control transaction. These Replying Parties make vague claims about the size of the transaction but they do not contest Applicants' substantial evidence that the proposed transaction will have no impact at all on freight transportation services or prices. UTU-NY alleges that the combination of GWI and RailAmerica will affect transportation markets by reducing competition between Class I railroads, but UTU-NY's allegations are completely unsupported by the facts and implausible on their face.

As Applicants explained in their Motion for Procedural Schedule, Applicants' proposed procedural schedule will allow the acquisition of RailAmerica by GWI to close before the end of 2012, thus enabling the prompt implementation of the substantial benefits that will be achieved by the combination of GWI and RailAmerica. Applicants' proposed schedule provides adequate time for the Board and interested parties to address any legitimate issues that may be associated with the proposed transaction. The Replying Parties have not identified any issues that would justify extending the schedule beyond the end of 2012, and the sparse number of replies filed underscores that this proceeding raises no serious competitive or other issues that might otherwise warrant a more prolonged review.

ARGUMENT

A. The Board Should Accept Applicants' Response to the Replies

Applicants recognize that the Board's rules do not permit a reply to a reply in the ordinary course. *See* 49 C.F.R. § 1104.13(c). The Board, however, accepts such filings when doing so will "provide a more complete record, clarify the arguments, will not prejudice any party, and do[es] not unduly prolong the proceeding."² The Board should accept Applicants' Response in this case because it would establish a more complete record and assist the Board in resolving the issues raised by the Replying Parties.

² *See, e.g., BNSF Railway Co. – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Ill.*, STB Docket No. AB 6 (Sub-No. 470X), slip op. at 5 n.9 (served Apr. 26, 2011). *See also, e.g., SMS Rail Service, Inc. – Adverse Discontinuance of Service Exemption – Gloucester County, NJ*, STB Docket No. AB 1095X, slip op. at 1 n.2 (served Mar. 2, 2012); *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB Docket No. FD 34914, slip op. at 5 (served May 7, 2010); *King County, Wa. – Acquisition Exemption – BNSF Railway Co.*, STB Finance Docket No. 35148, slip op. at 2 (served Sept. 18, 2009).

Although establishing an appropriate schedule is typically a purely procedural matter, the Replying Parties have raised issues in their replies relating to the merits of the proposed acquisition of RailAmerica by GWI and the treatment of the proposed acquisition as minor or significant. Indeed, at least one of the Replying Parties expressly asks the Board to affirmatively determine that the control transaction should be considered “significant.” Given the procedural posture in which these issues have been raised, Applicants will not have a timely opportunity to inform the Board of their views on the arguments raised and relief requested by the Replying Parties unless the Board accepts Applicants’ Response. Applicants’ Response will help clarify the issues and assist the Board in making an informed decision. Applicants therefore request that the Board accept this Response.

B. The Transaction Raises *No* Competitive Issues that Warrant Extended Review or Re-Classification of Applicants’ Minor Application

The governing statute instructs the Board to approve an acquisition of control unless there is evidence that the transaction will produce a “substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.” *See* 49 U.S.C. § 11324(d). Applicants presented substantial evidence in their August 6, 2012 Application and attachments showing that the proposed acquisition of RailAmerica by GWI will have *no* adverse impact on competition. Applicants showed that there would be no area in the United States where competition for freight services would be reduced at all as a result of the proposed transaction.

Specifically, Applicants demonstrated that the railroads owned by each Applicant are, with only a handful of exceptions, geographically dispersed throughout the country. These dispersed railroads do not currently compete with one another and the proposed combination of these railroads under common control would therefore have no impact at all on competition

among them. Even in those few locations where a GWI railroad is proximate to an RailAmerica railroad, Applicants showed that the proposed common control will have no adverse impacts on competition and will result in no 2 to 1 service reductions for shippers. Application at 17-20; Neels V.S. at 7-42.

With the exception of a single Class II railroad owned by GWI, the railroads owned by Applicants are small Class III railroads. Even combined under common ownership, they will remain small players in the freight rail transport world. The GWI and RailAmerica railroads collectively transport only about 2.8% of the carloads handled by freight railroads in the United States and earn only 1.1% of the total gross freight revenue earned by United States railroads, based on the most recently available data. These railroads have limited pricing power; for about 40% of the traffic they handle, the railroads at issue here have no ability at all to set prices. The transaction will not change that situation or the fact that much of the traffic that these railroads handle for relatively modest distances at origin or destination points is truck-competitive for those distances. Application at 9; Neels V.S. at 6, 10, 20, 28.

Further, as the Application demonstrates, the proposed common control will have no adverse impact on shortlines unaffiliated with GWI or RailAmerica that connect with lines controlled by one of these Applicants or the other. As reported in the Application, Applicants' expert witness Dr. Neels "identified two instances where a short line that is not controlled by GWI or RailAmerica connects or interchanges with both a GWI Railroad and a RailAmerica Railroad. For each such non-affiliated short line, Mr. Neels explains why the Transaction would not reduce routing options available to the short line (or the shippers it serves), or otherwise prejudice the short line from a competitive viewpoint." Application at 19-20; Neels V.S. at 41-42.

The Replying Parties do not contest the competition evidence submitted by Applicants. The Replying Parties' silence on these issues should be seen as an implicit concession that the proposed transaction does not raise any competition concerns in the areas that are the core focus of the Board's analysis in a control transaction. Instead, the Replying Parties ask the Board to extend the procedural schedule in this case based on vague and unsupported assertions about issues that are extraneous to the focus of the Board's inquiry in a control transaction. To the extent the issues raised by the Replying Parties are even intelligible, they do not justify an extension of the procedural schedule.

C. The Replying Parties Do Not Raise Any Issues Related To Competition That Would Justify An Extended Schedule.

The governing criteria for Board consideration of the transaction is set forth at 49 U.S.C. § 11324(d), which provides that the Board "shall approve" an application with respect to a transaction that does not include control of at least two Class I carriers unless it finds both that (1) "as a result of the transaction, there is likely to be a 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."

The Board and the ICC before it have repeatedly explained that the inquiry under this standard is whether the transaction would give the combined entity the power to raise rates or reduce 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.*, FD 32549, 1995 WL 528184, at *47 (ICC served Aug. 23, 1995). *See also*

Kansas City S.—Control—Kansas City S. Ry. Co., Gateway E. Ry. Co., et al., FD 34342, at 16 (STB served Nov. 29, 2004) (“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., et al.*, FD No. 34424, at 7 (STB served Apr. 9, 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.”); *CSX Corp., et al.—Control & Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp.*, 3 S.T.B. 196, 1998 WL 456510, at *26 (STB served July 23, 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).”).

While the Replying Parties loosely allege that the combined entity will have market power, they present no coherent arguments as to how the combined entity will have any power to raise rates or reduce service. The central complaint in each of the Replies is that the transaction will result in a large number of shortline railroads coming under common control. See NVRR & YW Replies ¶¶ 6-7; URC/WSRY Reply at 3. But the number of railroads in the combined entity has no bearing on the question whether the combined entity will have any power to raise rates or reduce service. As noted above, with one exception, each of the railroads at issue here is a small, Class III railroad with no or limited ability to set prices. Moreover, the railroads are almost entirely disconnected from one another and operate in geographically distinct regions of the country. Where there are connections between the railroads to be combined, Applicants have shown that competition will not be harmed by the combination. There is no reason to believe

that the combination under a parent company of small, disconnected shortline railroads will create any market power where none exists today.

The Board's regulations recognize that it is not the number of railroads in a proposed combination that could raise potential competition concerns but rather the nature of the connections between the railroads. Indeed, the Board has established a class exemption at 49 C.F.R. § 1180.2(d)(2) for transactions involving Class II and Class III railroads where there are no connections between the railroads in the acquiring and acquired entities. This exemption allows such transactions to go into effect in 30 days with no extended scrutiny. *See* 49 C.F.R. § 1180.4(g). Notably, the exemption can apply regardless of the number of shortline railroads involved in the transaction. Thus, contrary to the Replying Parties' suggestions, the mere fact that the GWI/RailAmerica transaction involves a large number of shortline railroads does not raise competitive concerns. The proposed transaction could have been approved under the Board's class exemption within a thirty day period with no extended scrutiny at all but for the small number of connections between the railroads in the two holding companies. Applicants addressed in detail the competitive circumstances in each of the handful of cases where there was a connection and showed that competition will not be harmed by the combination.

NVRR and YW further claim that the Board needs to consider "competition between the holding companies which own or control the Class III or local and Class II or regional railroads of this country." *See* NVRR & YW Replies at ¶ 4; *see also* UTU-NY Reply at 5 (agreeing with NVRR's and YW's arguments). NVRR and YW do not allege that they would suffer direct competitive injury from the transaction and in fact there is no reason to believe that the transaction will have any competitive impact on either of them. NVRR and YW each connects with a RailAmerica railroad, but since the two railroads connect only to RailAmerica railroads

now, the transaction does not change in any way the competitive circumstances of these railroads. Nor do NVR/ YW explain in what respect holding companies supposedly compete with one another, how that supposed competition would be affected by the proposed transaction, or how they or any other entity would be injured by any change in that presumed competition. The Board should not adopt an extended procedural schedule based on vague claims that do no more than allege potential harm to competition without explaining what harm would supposedly result from the transaction or who would be adversely affected..

Moreover, the governing statute instructs the Board to examine the competitive impact of a proposed transaction “in freight surface transportation in any region of the United States.” 49 U.S.C. §11324(d)(1). Holding companies do not engage directly in “freight surface transportation.” Holding companies participate in freight surface transportation markets through the individual railroads that they own, not as holding companies per se. The individual railroads owned by holding companies may compete if their service areas overlap, and the potential for the creation or expansion of market power among the individual railroads in these areas could be a legitimate subject of inquiry by the Board in a proposed combination of shortline railroads. But Applicants showed that in this case there is no area where the overlap between railroads in the GWI and RailAmerica families will create market power that could affect rates or service.³

³ Although it does not appear to be relevant to their concerns over the procedural schedule, NVR/ YW argue that Applicants failed to file a copy of the voting trust agreement that will be used to hold RailAmerica railroads pending final STB approval of the transaction along with the Application, which NVR/ YW assert is required by section 1013.3(b) of the Board’s regulations. In fact, the regulations do not require that a copy of the voting trust agreement be filed with the Application. Applicants intend to file the voting trust agreement with the Board when it is executed and the voting trust is established. Further, an unexecuted copy of the trust agreement was submitted to the Board staff for its informal review, and the staff opined that the agreement would insulate GWI from unlawful control.

USR/WSRY make the conclusory assertion that the combined GWI/RailAmerica will have increased market power that will allow the combined entity to “impose its will” on USR/WSRY in future disputes. USR/WSRY Reply at 4. USR/WSRY explain that they currently connect with two railroads in the RailAmerica family and that they have disputes from time to time with those two connecting RailAmerica railroads.⁴ But USR/WSRY fail to explain how the combination of GWI, which does not own any railroads that connect with USR/WSRY, and RailAmerica would have any impact at all on the relationship between USR/WSRY and the RailAmerica railroads. The proposed transaction does not change anything as it relates to the markets in which USR/WSRY and the RailAmerica railroads compete.

Finally, UTU-NY claims that the proposed transaction may reduce competition between Class I rail carriers, but it fails provide any coherent basis for its concern. The fact that many GWI and RailAmerica railroads act as handling carriers for Class I railroads does not suggest that the combination of GWI and RailAmerica will affect competition between the Class I railroads. There is no reason to believe that there would be any change at all in competition between the Class I railroads that use shortline railroads as handling carriers as a result of the transaction. UTU-NY’s references to the possible effects on “market competition” and “geographic competition” are so vague and unsupported that they do not merit any serious consideration.

⁴ Indeed, the Board has partially stayed the effectiveness of a notice of exemption filed by USR because of a dispute as to whether WSRY has assignable trackage rights over three miles of track owned by Toledo, Peoria & Western Railway Corporation, a RailAmerica subsidiary. *See U.S. Rail Corp.—Lease & Operation Exemption—Winamac S. Ry. Co. & Kokomo Grain Co.*, FD 35205 (STB served Jan. 15, 2009). There is no reason to believe that the proposed transaction between GWI and RailAmerica will affect this dispute or any other disputes between GWI or RailAmerica railroads and USR/WSRY.

In addition, UTU-NY asserts that labor protections are inadequate. UTU-NY does not allege, however, that the labor protection would be any different if the transaction were considered significant as opposed to minor, and indeed it would not be. In either event, since the proposed transaction involves only one Class II carrier and a number of Class III carriers, labor protection will be governed by the provisions of 49 USC §11326(b) regardless of the classification of the transaction. Additionally, the application makes clear that there will be no adverse effect on employees of the railroads, nor will the transaction be used to make any changes in existing collective bargaining agreements. In any event, the relevance of UTU-NY's opposition is called into question by the fact that the UTU itself -- its parent union -- has filed a letter with the Board supporting the proposed transaction between GWI and RailAmerica.

CONCLUSION

For the reasons stated above and in Applicants' Motion to Establish a Procedural Schedule, Applicants request that the Board adopt the procedural schedule set out in their August 6, 2012 Motion to Establish a Procedural Schedule. The proposed transaction is a minor transaction that does not raise any issues of competitive concerns and therefore does not warrant a prolonged procedural schedule. There is substantial support for the proposed transaction as reflected in the numerous support letters submitted to the Board from government representatives and shippers. Moreover, as Applicants explained in their Motion to Establish a Procedural Schedule, approval of the transaction by the end of 2012 will remove uncertainty, allow shippers and Applicants promptly to take advantage of the benefits of the transaction such as the extension of GWI's safety program to RailAmerica railroads, and reduce the burdens on the voting trustee to manage the RailAmerica railroads while waiting for STB approval. The schedule proposed by Applicants allows adequate time for comments to be filed and reviewed by

the Board while ensuring prompt implementation of the proposed combination. Further, the proposed schedule is consistent with the mandate in the Rail Transportation Policy 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.”

Respectfully submitted,



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

Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8198

Counsel for RailAmerica, Inc.



Allison M. Fergus
General Counsel and Secretary
Genesee & Wyoming Inc.
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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

Counsel for Genesee & Wyoming Inc.

August 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Applicants' Rebuttal to Replies in Opposition to Motion to Establish a Procedural Schedule in STB Finance Docket No. 35654, by first class mail, properly addressed with postage prepaid, upon the following:

Fritz R. Kahn
Fritz R. Kahn, P.C.
1919 M Street, NW (7th Fl.)
Washington, DC 20036
(202) 263-4152
xiccgc@gmail.com

Gordon P. MacDougall
1025 Connecticut Avenue, NW
Washington, DC 20036

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street – Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
mcfarland@aol.com

Dated at Washington, D.C., this 28th day of August, 2012.



David H. Coburn