

BEFORE THE
SURFACE TRANSPORTATION BOARD

241719

FINANCE DOCKET No. 36064

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

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OBJECTION OF THE TRANSPORTATION COMMUNICATIONS UNION/IAM TO
GENESEE & WYOMING INC.'S PETITION FOR EXEMPTION

The Transportation Communications Union/IAM, AFL-CIO (“TCU/IAM”) hereby submits the following comment in opposition to Genesee & Wyoming Inc. (“GWI”)’s petition for an exemption under 49 U.S.C. §10502 and 49 C.F.R. §1121 to allow GWI to acquire control of Providence and Worcester Railroad Company (“P&W”), a Class III railroad. TCU/IAM represents approximately 46,000 members in the United States, most of whom are employed in the railroad industry, including employees at P&W. GWI seeks to acquire control of P&W through a merger between its newly-formed, wholly-owned non-carrier subsidiary Pullman Acquisition Sub Inc. and P&W, with P&W as the surviving entity following the merger. Although GWI acknowledges that *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979) (“*New York Dock*”) applies to this transaction, it requests that the Surface Transportation Board confirm that it is not required to engage in negotiations for an implementing agreement prior to the consummation of the merger. Petition at 11. However, TCU/IAM respectfully requests that the Board not permit GWI to circumvent the *New York Dock* requirements and instead ensure that it negotiates with TCU/IAM prior to consummation.¹

¹ TCU/IAM adopts and incorporates herein by reference the arguments set forth in the Objection filed on behalf of the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”).

The Board has long held that when a “consolidation” occurs, such as the merger transaction in this case, an agreement must be negotiated with employees prior to consummation of the transaction. *See, e.g., Norfolk Southern Railway Company - Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB Docket No. 35873, Decision No. 6 (served May 15, 2015), at 22. *New York Dock* requires that carriers give at least 90 days’ notice of the intended transaction by posting a notice on the bulletin boards convenient to the interested employees and by mailing notice to all union representatives. 360 I.C.C. at 85. Within five days of the receipt of this notice, the parties must select a place to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of the labor protections, and these negotiations are to commence immediately and continue for at least 30 days. *Id.* In the event that the parties are unable to agree within those 30 days, the parties—or the NMB, if the parties are unable to reach an agreement—are to select an arbitrator. *Id.* Importantly, the carriers cannot consummate the transaction until “after an agreement is reached or the decision of a referee has been rendered.” *Id.*

There is no dispute that a consolidation is occurring in this case.² P&W, a Class III railroad owns rail lines in Connecticut, Rhode Island and Massachusetts and operates trackage rights in Connecticut, Rhode Island, Massachusetts, and New York. Petition at 2. Following the proposed merger, it will become a wholly-owned subsidiary of GWI, a publically-traded non-carrier holding

² This is a consolidation, so *New York Dock* protections alone are proper. In line sales under 49 U.S.C. § 11323(a)(2), where both entities continue to exist as common carrier, protections are provided under *New York Dock, as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc. (Wilmington Terminal)*, 6 I.C.C.2d 799, 814-26 (1990). *See, e.g., Norfolk Southern Railway Company - Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB Docket No. 35873, Decision No. 6 (served May 15, 2015), at 22. Under *Wilmington Terminal*, each party negotiates with its own employees and the line sale transaction may be consummated before negotiations conclude. *Id.*

company that controls two Class II and 106 Class III carriers operating in the United States. *Id.* GWI asserts that P&W “will continue to operate as a separate railroad[.]” *Id.* at 4.

As GWI itself acknowledges, it would be inappropriate for the Board to “relieve a rail carrier of its obligation to protect the interests of employees” and, in fact, such action is prohibited by statute. 49 U.S.C. §10502(g). Yet, GWI asks the Board to do just that. In its Petition, GWI seeks confirmation from the Board that neither carrier is required to either “commence negotiations or consummate implementing agreements prior to consummation of the control transaction.” Petition at 11. It claims that because it is not “capable of making a full and adequate statement of labor changes before consummation of the transaction, and since P&W will be the surviving company in the Merger, ... there is no basis for negotiation of an implementing agreement until GWI and P&W decide to implement labor changes.” *Id.* Significantly, GWI does not deny that labor changes may occur as a result of this transaction.

Allowing carriers to simply assert a lack of knowledge as to whether employees will be impacted as a basis to circumvent the duty to negotiate substantially undermines 49 U.S.C. §10502(g). *New York Dock* “seek[s] to achieve a balance between the interests of labor and management.” *CSX Transp., Inc. v. United Transp. Union*, 86 F.3d 346, 349 (4th Cir. 1996). It provides employees and their representatives with the crucial opportunity to substantively participate at the outset of the merger process, which can have dramatic and wide-ranging consequences. Requiring an implementing agreement to be reached prior to consummation ensures that the employees’ interests are appropriately addressed during the merger process.

The only case cited by GWI in support of its position is easily distinguishable, as it involved the formation of a new rail carrier, which would then be operated by an existing carrier without

negatively impacting its employees.³ GWI cites *Norfolk Southern Railway Co., Pan Am Railways, Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern LLC*, STB Finance Docket No. 35147 (served March 10, 2009) (“*Norfolk Southern*”). In that case, the underlying transaction involved Norfolk Southern Railway Company (“NS”); Pan Am Railways Inc. (“PARI”), a non-carrier railroad holding company; and two of PARI’s subsidiaries: Boston and Maine Corporation (“B&M”) and the Springfield Terminal Railway Company (“Springfield Terminal”). *Id.* at 1. NS and B&M sought to jointly own and control a new rail carrier to be formed, which Springfield Terminal would operate. *Id.* This to-be-formed carrier, Pan Am Southern LLC (“Pan Am Southern”), then filed a Notice of Exemption for the acquisition and operation of B&M lines. In its Notice, Pan Am Southern LLC stated:

No adverse effects on any existing railroad employees are anticipated, inasmuch as the lines will be operated for the foreseeable future by the same railroad, Springfield Terminal, and by the same employees that now provide rail transportation service (including maintenance) over the lines and who will continue to provide such services under the same collective bargaining agreements. Norfolk Southern and Springfield Terminal in fact expect that their substantial investments in the new venture will lead to increased traffic over the lines, and hence new jobs for railroad employees.

Pan Am Southern LLC—Acquisition and Operating Exemption—Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1), Notice of Exemption (filed June 27, 2008), at 6. Likewise, in their Application for Approval, NS and PARI asserted that “the Transaction [would] result in no adverse effect on any of [their] employees” and that the “same employees” at Springfield Terminal would be “performing the same work under the same

³ GWI also cites *Norfolk Southern Railway Company - Acquisition and Operation - Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB Docket No. 35873, Decision No. 6 (served May 15, 2015) for the proposition that, under *New York Dock*, a single implementing agreement is required before consummation where an entity will cease to exist. Petition at 11. However, the Board in that case applied *New York Dock*, as modified by *Wilmington Terminal*, so it did not address the issue of whether the employer had to negotiate with employees prior to the consummation of the transaction.

agreements for the foreseeable future.” *Norfolk Southern Railway Co., Pan Am Railways Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern LLC*, STB Finance Docket No. 35147, Application for Approval for Joint Control of Pan Am Southern LLC and Operating/Pooling Agreements (filed May 30, 2008), at 34. NS and PARI, however, also noted that they expected the Board to apply the requirements of *New York Dock*.

Under the unique circumstances in *Norfolk Southern* and based upon the repeated assurances of the carriers that there would be no changes impacting employees as a result of the transaction, the Board took the unusual step of not requiring an implementing agreement to be negotiated at Springfield Terminal prior to closing on the transaction. *Norfolk Southern*, at 14. However, in doing so, the Board noted that there was no basis for negotiation of an implementing agreement because, “for the foreseeable future, there will be no adverse effect because work will continue to be performed under contract by the same Springfield Terminal employees who are performing it now.” *Id.* The Board was persuaded by the carriers’ repeated assurances regarding the protection of existing work. Despite diligent research, we are unaware of any case in which a similar exception to the *New York Dock* requirements has been applied by the Board again.

Unlike the carriers in *Norfolk Southern*, GWI makes no such assurances that employees will not be negatively impacted, much less anticipate an increase in new jobs following the merger. Notably, the Company does not say in its Petition that no employees will be adversely affected by the merger even in the short-term, but simply that P&W “will continue as an operating railroad, and there will be no combination of forces between P&W and any other carrier.” Instead, it asserts that it “has not yet determined whether or which employees, if any, may be dismissed or displaced as a result of the control transaction.” Petition at 11. If the Board allowed the merger to proceed by simply relying on this equivocation, the employees would be deprived of the valuable

opportunity to negotiate terms prior to the transaction's implementation, when the union's input is likely to be most meaningful. In fact, delaying negotiations until a carrier chooses to make a determination regarding labor changes would create a perverse incentive for employers to simply postpone this important decision-making until after the petition process.

In the light of these substantial concerns regarding the conditions requested by GWI in its application, TCU/IAM strongly urges the Board to not permit GWI to go forward with the merger prior to the parties reaching an implementing agreement as required by *New York Dock*. If GWI is to engage in this consolidation, it must follow the requirements as set forth in *New York Dock* to ensure that employees' interests are properly considered and protected as required under the law.

Respectfully submitted,

/s/ Carmen R. Parcelli

Carmen R. Parcelli

Lisa M. Vickery

Guerrieri, Clayman, Bartos & Parcelli, PC

1900 M Street, NW, Suite 700

Washington, DC 20036

Telephone: (202) 624-7400

Facsimile: (202) 624-7420

cparcelli@geclaw.com

lvickery@geclaw.com

Counsel for the Transportation Communications
Union/IAM, AFL-CIO

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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 and electronic mail:

Eric M. Hocky
Clark Hill PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
ehocky@clarkhill.com

Robert B. Culliford
Pan Am Southern LLC
Springfield Terminal Railway Company
1700 Iron Horse Park
North Billerica, MA 01862

Aarthy S. Thamodaran
Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, VA 23510
aarthy.thamodaran@nscorp.com

Edward J. Rodriguez
Housatonic Railroad Company, Inc.
PO Box 687
Old Lyme, CT 06371
e.rodriguez@hrrc.com

Erika A. Diehl-Gibbons
SMART-TD
24950 Country Club Blvd., Suite 340
North Olmsted, OH 44070
ediehl@smart-union.org

Erica Mastrangelo
Burns & Levinson LLP
125 Summer St.
Boston, MA 02110
emastrangelo@burnslev.com

David W. Wulfson
Vermont Railway, Inc.
One Railway Lane
Burlington, VT 05401

Hon. Mark A. Cote
State of Rhode Island and Providence Plantations Senate
Room 220, State House
Providence, RI 02903
sen-cote@rilin.state.ri.us

Hon. Robert D. Phillips
State of Rhode Island and Providence Plantations House of Representatives
325 Dunlap St.
Woonsocket, RI 02895
rep-phillips@rilegislature.gov

James P. Redeker
Connecticut Department of Transportation
2800 Berlin Turnpike
PO Box 317546
Newington, CT 06131

Hon. Stephen M. Casey
State of Rhode Island and Providence Plantations House of Representatives
144 Woodland Rd.
Woonsocket, RI 02895
rep-casey@rilegislature.gov

Hon. James J. O'Day
Commonwealth of Massachusetts House of Representatives
Room 540, State House
Boston, MA 02133

Mark A. Marasco
Mapleleaf Distribution Services, Inc.
T-Branch LLC
14 Third St.
Palmer, MA 01069

Patrick C. Herlihy
New Hampshire Department of Transportation
7 Hazen Dr.
PO Box 483
Concord, NH 03302

Matt Danner
Stella-Jones Corp.
603 Stanwix St.
Pittsburgh, PA 15222

William J. Rankin
Baldwin Logistics Group, Inc.
14 Third St.
Palmer, MA 01069

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Dr., Suite 920
Chicago, IL 60606
rwimbish@fletcher-sippel.com

Richard J. Spallone
Greater Boston Transload LLC
1700 Iron Horse Park
North Billerica, MA 01862

Richard J. Spallone
Atlantic Forest Products LLC
240 W. Dickman St.
Baltimore, MD 21230

Hon. Harriette L. Chandler
Commonwealth of Massachusetts Senate
Room 333, State House
Boston, MA 02133
harriette.chandler@masenate.gov

John Rymes
Rymes Heating Oil & Propane
257 Sheep Davis Rd.
Concord, NH 03301

Hon. James P. McGovern
United States House of Representatives
438 Cannon House Office Building
Washington, DC 20515

Doug Beaupre
Resource Recovery LLC
PO Box 580
Putnam, CT 06260

Hon. David K. Muradian, Jr.
Commonwealth of Massachusetts House of Representatives
Room 156, State House
Boston, MA 02133

Gregory E. Christy
Northeast Treaters, Inc.
201 Springfield Rd.
Belchertown, MA 01007

Don Cotter
Univar
175 Terminal Road
Providence, RI 02905

Hon. Michael A. Morin
State of Rhode Island and Providence Plantations House of Representatives
180 Allen St., Unit 202
Woonsocket, RI 02895
rep-morin@rilegislature.gov

Daniel Kane
BB&S Treated Lumber of New England
PO Box 982
61 Bonneau Rd.
North Kingstown, RI 02852

Hon. Lisa Baldelli-Hunt
City Hall
PO Box B
Woonsocket, RI 02895
mayor@woonsocketri.org

Stephen Cotrone
Intransit Container, Inc.
53 Wisser Ave.
Worcester, MA 01607

Jason A. Manafort
CWPM LLC
25 Norton Place
PO Box 415
Plainville, CT 06062

Bryan Winther
Delaware Express Co.
PO Box 97
Elkton, MD 21922

Timothy B. Dennison
Dennison Lubricants, Inc.

692 Millbury St.
Worcester, MA 01607

Gene Klessner
Kloeckner Metals Corp.
760 Newfield St.
Middletown, CT 06457

Patricia LaPlatney
Can-Am Trading & Logistics LLC
PO Box 674
Old Lyme, CT 06371

Steven Cushman
Cushman Lumber Co.
96 Springfield Rd.
Charlestown, NH 03603

Frank DiCristina
Allnex USA
528 S. Cherry St.
Wallingford, CT 06492

Ed Evans
Gateway Terminal
PO Box 9731
New Haven, CT 06536

Rodney Corrigan
Logistec USA Inc.
200 State Pier Rd.
New London, CT 06320

Denny Jenks
Eagle Logistics Group LLC
140 Bethany Rd.
Monson, MA 01057
denny@eaglelg.com

Michael Traynor
City of Worcester
455 Main St.
Worcester, MA 01608

Dated: October 11, 2016

/s/ Carmen R. Parcelli

Carmen R. Parcelli