

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35098

GENESEE & WYOMING INC.—CONTROL EXEMPTION—
MARYLAND MIDLAND RAILWAY, INC.

Decided: November 13, 2007

On October 22, 2007, Genesee & Wyoming Inc. (GWI), a noncarrier, filed a verified notice of exemption¹ to permit GWI to acquire indirect control of Maryland Midland Railway, Inc. (MMID), upon consummation of a merger agreement between GWI, MMID Holding Inc. (MMID Holding), MMID Acquisition Sub Inc. (MMID-ASI), and MMID.² Pursuant to the merger agreement, MMID-ASI would merge with MMID and the surviving corporation would continue as MMID. MMID's sole shareholder would be MMID Holding and GWI would own a majority of shares of MMID Holding. Accordingly, MMID Holding would have direct control and GWI would have indirect control over MMID.³

GWI seeks an exemption for this transaction pursuant to 49 CFR 1180.2(d)(2). Under 49 CFR 1180.2(d)(2), an acquisition of control is exempt if the applicant certifies that: (i) the railroads would not connect with each other or any railroads in their corporate family; (ii) the acquisition of control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (iii) the transaction does not involve a Class I carrier.

On October 29, 2007, Patriot Rail Corp. (Patriot), filed a petition to reject the verified notice of exemption. Patriot argues that GWI has not met the second criterion because there is evidence that indicates that GWI intends to connect MMID with York Rail (York), another

¹ The notice was initially filed on October 22, 2007. Because supplemental information was filed on November 2, 2007, that date will be considered the filing date.

² The full version of the merger agreement, as required by 49 CFR 1180.6(a)(7)(ii), was concurrently filed under seal along with a motion for protective order. A decision on GWI's motion for protective order will be issued separately from this decision.

³ According to GWI, MMID Holding is not listed as an applicant in the verified notice of exemption because MMID Holding would obtain control of only one rail carrier (MMID) following consummation of the proposed merger transaction and therefore does not need to obtain an exemption under 49 U.S.C. 11323.

carrier owner by GWI.⁴ Patriot notes that, in the notice of exemption, GWI does not use the exact language set forth in 49 CFR 1180.2(d)(2). Patriot also points to two comments made in a local newspaper article. The first comment was made by an executive at Lehigh Cement Company (Lehigh), the largest shareholder of MMID as well as MMID's largest shipper, stating that Lehigh hopes the transaction will provide Lehigh with access to more competitive rail transfer rates and hopes that future GWI acquisitions will allow MMID to connect to other lines. The second comment was made by GWI's chief executive, who stated that MMID's proximity to York "lends itself to efficiencies" that make GWI's acquisition of MMID attractive.

GWI filed a response to Patriot's petition to reject on November 2, 2007. In its response, GWI clarifies that its acquisition of MMID is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family. GWI explains that it used slightly different wording from the language in the 49 CFR 1180.2(d)(2) because the actual language from the regulation was not appropriate in this situation given that GWI is not itself a "railroad." In any event, GWI argues that there is no requirement that the notice of exemption contain the verbatim language as in the regulatory requirement of 49 CFR 1180.2(d)(2).

GWI also disputes that the two comments from the newspaper article show an intent to connect MMID with York. In response to the comment from the Lehigh executive, GWI notes that Lehigh does not speak on behalf of GWI and that the statement was made without the involvement of GWI. GWI argues that the Lehigh executive's statement simply reflected Lehigh's "hope" that GWI's acquisition of MMID would provide Lehigh with more competitive rates. GWI avers that, despite Lehigh's hope, GWI is not planning to engage in transactions that would connect MMID with York. Regarding the statement from GWI's chief executive, GWI claims that the reference to the fact that MMID's proximity to York "lends itself to efficiencies" referred to the financial efficiencies associated with consolidating administrative and management support of the two railroads.

Patriot has failed to demonstrate that the verified notice of exemption should be rejected. GWI has provided sufficient explanation to rebut Patriot's assertions about GWI's intentions. Moreover, GWI has removed any doubt as to its intentions by reaffirming in its response that GWI's acquisition of MMID is not part of a series of anticipated transactions to connect MMID with any other railroad in GWI's corporate family. Also, GWI is correct that our regulations do not require verbatim recital of the language at 49 CFR 1180.2(d)(2). Accordingly, Patriot's petition to reject GWI's notice of exemption will be denied.

⁴ Patriot also notes that it attempted to acquire MMID and that it is pursuing its "remedies in other forums." On November 1, 2007, Patriot submitted for informational purposes a copy of its complaint against MMID for breach of contract (among other claims) in Florida state court.

It is ordered:

1. Patriot's petition to reject GWI's notice of exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary