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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36064

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

REBUTTAL OF GENESEE & WYOMING INC.

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Dated: October 20, 2016

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Genesee & Wyoming Inc. (“GWI”) commenced this proceeding by filing a petition (the “Petition”) for an exemption to acquire control of Providence and Worcester Railroad Company (“P&W”). Pursuant to the schedule issued by the Board in a decision served September 20, 2016, a number of parties filed replies to the Petition, some of which requested conditions. GWI is filing this Rebuttal to respond to the replies, including the requests for conditions so that the Board will have a complete record on which to rule on the Petition.

To the extent the Board is handling this matter under its modified procedures, GWI as the petitioner believes that it is permitted to file this rebuttal. *See* 49 C.F.R. §1112.2 (allowing “rebuttal” to a “reply,” but not replies to rebuttal material). Additionally, to the extent the replies that have been filed include requests for conditions, GWI believes that it should be entitled to file responses to the requests. Given that the Board’s decision served September 20, 2016, however, did not specifically provide for a rebuttal, GWI requests that the Board accept this rebuttal to the replies filed by various parties to the GWI Petition. To the extent the rebuttal is considered a “reply to a reply” that is not generally permitted under 49 C.F.R. §1104.13, GWI requests that the Board accept this short rebuttal in the interest of having a complete record. Allowance of the rebuttal will not prejudice any parties, and will not unduly prolong the proceeding. *See City of*

Woodinville – Petition for Declaratory Order, STB Docket No. FD 35905 (served October 7, 2015), slip op. at 4.

DISCUSSION

The replies filed by various parties fall into several distinct categories of filers, and this Rebuttal will address each group as a whole, except where unique relief has been requested by a particular party. None of the replies specifically asks that the GWI Petition to control P&W be denied. Some, however, request that the Board's approval of the transaction be conditioned.

Under 49 U.S.C. 11324(c), the Board has authority to impose conditions on a transaction subject to Section 11324(d) to ameliorate competitive harm that would result from the transaction. See *Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC (“PAS”)*, STB Finance Docket No. 351471 (served March 10, 2009), slip op. at 5; *Kansas City Southern – Control – The Kansas City Southern Railway Company, et al.*, STB Finance Docket No. 34342 (served Nov. 29, 2004), slip op. at 16. However, where the conditions sought by the parties do not relate to the preservation of competition, or do not relate to harmful effects caused by the transaction, the imposition of conditions is not appropriate. See *PAS, supra* at 5. GWI reiterates its position as set forth in the Petition that there will be no anticompetitive effects from its acquisition of control of P&W, and GWI does not believe that any of the individual requests for conditions are justified. However, in order to ameliorate some of the concerns raised, GWI is willing to make certain commitments as set forth herein.

1. Other Railroads.

No railroads in the region served by P&W filed any replies in opposition expressing any concerns, competitive or otherwise, regarding the proposed control of P&W by GWI. Vermont Rail System filed a reply fully supporting the transaction. The only other railroad that filed a reply, Springfield Terminal Railway Company (“ST”), also supports the Board’s approval of the transaction, subject only to the confirmation it received from GWI that GWI will not interfere with ST’s ability to interchange with CSX Transportation (“CSXT”) in Worcester, MA, in violation of applicable law or P&W’s existing Grant of Trackage Rights to CSXT dated June 30, 1989. As indicated in ST’s reply, GWI has agreed that its promise not to interfere can be entered by the Board as a condition on any approval.

2. Shippers.

The replies evidence widespread shipper support for the proposed transaction. Twenty-six shippers filed supporting letters or verified statements to evidence their support. Only one shipper, American Rock Salt (“ARS”), has raised concerns, and its concerns relate primarily to pre-existing issues that it appears to have with an unrelated GWI subsidiary. While ARS complains about lack of cooperation from its serving carrier in New York State, ARS presents no evidence to support its concerns that the proposed acquisition of control of P&W will exacerbate its issues. Indeed, ARS in its reply does not suggest that there is any condition that would address its concerns, nor does it request any condition. ARS has not demonstrated any specific rail route or rail service option that would become unavailable as a result of the proposed transaction to a shipper. While it is unfortunate that ARS is not happy with its unrelated serving

carrier, the replies of the other shippers show that ARS's experience is unique. No conditions to protect shippers have been requested, nor are any justified.

3. State Departments of Transportation.

The proposed transaction has wide support in the New England region. The Connecticut Department of Transportation, the Vermont Agency of Transportation, the Maine Department of Transportation and the New Hampshire Department of Transportation all filed statements in support of GWI's proposed control of P&W. The Rhode Island Department of Transportation filed a statement in support of passenger service, which will be discussed in Section 4 below. It did not raise any competitive concerns regarding the transaction.

Massachusetts Department of Transportation ("MassDOT") filed a reply that focuses on concerns that it has about pre-existing problems with delays of Amtrak service on unrelated lines of railroad which MassDOT asserts have been caused by another GWI subsidiary. GWI vehemently disputes MassDOT's characterization of the causes of the Amtrak delays, but will not publicly debate the unrelated issue in this proceeding, particularly when, as MassDOT notes, it is already the subject of negotiations among MassDOT, Amtrak and the relevant GWI subsidiary. MassDOT additionally raises an unsupported concern that GWI's acquisition of control of P&W will deplete GWI's funds needed for future repairs on this unrelated line. GWI is a publicly-traded holding company and an examination of its publicly available financial statements would demonstrate that GWI's financial condition is much stronger than P&W's, and that it has access to ample funds that can be provided to cover any necessary capital needs of all of its subsidiaries. Furthermore, GWI, as a holding company, operates its railroads independently, and the profitability and capital needs of one subsidiary railroad do not affect

those of GWI's other operations or subsidiaries. MassDOT does not raise any legitimate or supported concerns that, post-closing, P&W will not continue to be maintained in a safe and efficient condition. Since MassDOT has not demonstrated any anticompetitive effects from the proposed transaction, no conditions are justified.

4. Proponents of Passenger Service.

A number of elected officials, the City of Worcester, the Rhode Island Department of Transportation, and several passenger groups have filed replies to express their support for the passenger service that Boston Surface Railroad Company, Inc. ("BSRC") proposes to provide, as well as for an existing seasonal excursion service provided by P&W to benefit the Blackstone Valley Tourism Council ("BVTC"). In addition, BSRC has filed a reply seeking to have GWI "clarify its position with respect to BSRC and confirm continued negotiation with BSRC so as to reach a mutually acceptable final agreement." BSRC reply, p. 3. BSRC goes on to additionally request that GWI be required to have P&W host and operate BSRC equipment over BSRC's proposed route, despite there not being any existing agreement on the terms of any such operations. BSRC, reply, p. 4. It is important to note that none of the various replies suggest that the proposed transaction should not be allowed to proceed.

Excursion service is not subject to the Board's jurisdiction. The excursion service here is provided seasonally by P&W, including the BVTC-sponsored "Polar Express." Arrangements are made between P&W and BVTC on a year-by-year basis. Agreements are in place for 2016. P&W will continue to honor its 2016 agreements.

Additionally, the Board should take note that, while BSRC has been authorized by the Board to provide interstate commuter passenger service over the P&W lines, the Board's

decision does not require P&W to make its facilities available to BSRC or to handle BSRC's trains. See *Boston Surface Railroad Company, Inc. – Petition for Partial Exemption from 49 U.S.C. Subtitle IV (“Boston Surface”)*, STB Docket No. FD 36043 (served September 15, 2016). As noted by the Board in its decision, BSRC sought authorization “pending entry into a final agreement with Providence and Worcester Railroad.” As BSRC confirms in its reply, it has not yet reached an agreement with P&W for the use of its facilities or to operate BSRC's trains.¹ All that is in effect between BSRC and P&W is a preliminary agreement that includes a commitment to negotiate in good faith. The preliminary agreement sets forth preliminary expectations and understandings of the parties and is non-binding. See BSCR's Petition for Partial Exemption, Exhibit D-1, filed June 22, 2016, in *Boston Surface*. P&W will continue to honor the preliminary agreement and will negotiate in good faith. On the other hand, the nature of BSRC's reply and the conditions it requests would preempt the contemplated commercial negotiations.

Since GWI filed a petition for exemption it was not required to include an operating plan or to specifically discuss impacts on commuter and passenger rail transportation. With a petition for exemption, GWI is only required to demonstrate (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101, and (2) either the transaction is limited in scope or regulation is not needed to protect shippers from the abuse of market power. The focus of the standards for an exemption is the effects of the proposed transaction on competition. Despite BSRC's citation of a potentially contrary dissenting opinion, the Board has held that in control proceedings, passenger service issues generally do not involve adverse competitive

¹ BSRC will also need to reach an agreement with the National Railroad Passenger Corporation (“Amtrak”) to travel on and use Amtrak-owned infrastructure, including trackage, signal systems, and stations. See BSCR's Petition for Partial Exemption, Exhibit D-2, filed June 22, 2016, in *Boston Surface*.

impacts, and the issues between parties and passenger service providers are better left to private commercial negotiations. *Commuter Rail Division of the Regional Transportation Authority, Metra v. STB ("Metra")*, 608 F.3d 24, 32 (D.C. Cir. 2010). Based on the foregoing, no passenger service conditions are justified.

Notwithstanding, GWI has no intention, assuming its control of P&W is approved, of having P&W seek to avoid its contractual obligations. GWI confirms that P&W will comply with the preliminary agreement and continue to negotiate in good faith with BSRC. GWI cannot guarantee the result of the negotiations; BSRC's request that GWI agree that P&W will allow BSRC to operate over the P&W's tracks would circumvent the existing preliminary agreement between BSRC and P&W to negotiate in good faith, and should not be imposed by the Board. *See Metra, supra*. GWI also commits that it will agree to an extension of the current due diligence period from December 31, 2016, until March 31, 2017, if BSRC has not completed its due diligence because completion has been delayed as a result of the control proceeding.

Additionally, P&W will fulfill its agreements to provide excursion service for BVTC for the 2016 season. Moreover, GWI commits that P&W will also agree to negotiate similar arrangements with BVTC to provide seasonal excursion service in 2017. Thereafter, P&W will review BVTC's requests for excursion service on a year-to-year basis just as P&W has done in the past.

5. Labor.

Two unions that represent P&W employees, the Transportation Communications Union / IAM, AFL-CIO ("TCU/IAM") and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART-TD"), filed replies. Both

unions represent employees of P&W and are parties to collective bargaining agreements (“CBAs”) with P&W. Both unions agree with GWI that *New York Dock* represents the correct level of labor protection to be applied in this proceeding. What the unions disagree with is GWI’s request that the Board confirm that GWI should not be required to negotiate an implementing agreement prior to its acquisition of control of P&W. The unions argue that, even though GWI has not made any determinations about post-closing changes for covered employees, GWI should have to negotiate an implementing agreement before assuming control of P&W.

Specifically, TCU/IAM argues that there is no dispute that a “consolidation” is occurring. TCU/IAM reply, p. 2. However, although P&W will be “merged” with a newly-formed acquisition entity, P&W will be the surviving entity in the merger, and there will be no consolidation of railroad properties or operations of multiple carriers. The governing statute, 49 U.S.C. §11323, covers “consolidations, merger and acquisition of control;” this proceeding involves an “acquisition of control” of at least two rail carriers by a person that is not a rail carrier, 49 U.S.C. §11324(a)(4), and not a consolidation or merger. This is not a transaction where entities, operations or rosters of multiple railroads are going to be merged or combined at the time of the transaction, or where the employing railroad will no longer exist. Thus, there is no need for implementing agreements prior to closing.

While the negotiation of an implementing agreement prior to closing may be necessary to address the “dramatic and wide-ranging consequences” for covered employees when a consolidation or merger of railroad properties or operations is involved (TCU/IAM reply, p. 3), there are no such consequences in control transactions such as this where P&W will continue to

operate as a separate railroad with its existing properties and covered workforce under existing CBAs. There is no basis for distinguishing this transaction from the transaction in *PAS*, *supra* at 16-17, where the Board found that implementing agreements did not have to be negotiated prior to closing.

P&W covered employees will receive the full protection of the *New York Dock* conditions. As indicated in the Petition, GWI acknowledges that under Article I, Section 4 of the *New York Dock* conditions, it will be required to give 90 days' notice, and to negotiate, *before making changes* in operations, services, facilities or equipment until the provisions of Section 4 have been satisfied. Petition at 11. In the event this language is not clear, GWI specifically confirms that post-closing, P&W does not intend to terminate or displace any P&W covered employees as a result of the proposed transaction. P&W will continue to honor all current CBAs, and to negotiate all expired CBAs in good faith. For the foreseeable future, there will be no adverse effect on P&W covered employees because work will continue to be performed under existing CBAs by the same P&W covered employees who are currently performing the work.² There will be no adverse actions with respect to covered employees as a result of the proposed transaction unless and until P&W first provides its covered employees and their union representatives with at least 90 days' notice, and compliance with the other requirements of Section 4 of the *New York Dock* conditions. GWI is not seeking to avoid the imposition of *New York Dock* conditions, or the obligation (post-closing) to give notice and negotiate an implementing agreement if and when appropriate.

² Both TCU/IAM (reply p. 4,5) and SMART-TD (reply 4,5) raise this as the determinative factor in *Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC (“PAS”)*, STB Finance Docket No. 25147 (served March 10, 2009).

CONCLUSION

For the foregoing reasons, GWI requests that the Board, under 49 U.S.C. §10502, grant the Petition to exempt GWI's proposed acquisition of control of P&W from regulation under 49 U.S.C. §§11323-11324, subject only to compliance with the commitments specifically made by GWI herein.

Respectfully submitted,



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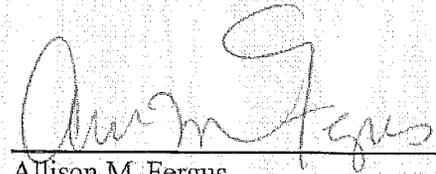
Dated: October 20, 2016

Attorneys for Genesee & Wyoming Inc.

VERIFICATION

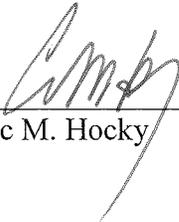
I, Allison M. Fergus, General Counsel & Secretary of Genesee & Wyoming Inc., verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on October 20 2016.


Allison M. Fergus

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was on each of the parties of record in this proceeding, in the manner shown, on Exhibit A to this Certificate of Service.



Eric M. Hocky

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Exhibit A

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