

BEFORE THE  
**SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD 35800

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Office of Proceedings  
May 7, 2014  
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Public Record

**GENESEE & WYOMING INC.  
– CONTINUANCE IN CONTROL EXEMPTION –  
RAPID CITY, PIERRE & EASTERN RAILROAD, INC.**

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**REPLY OF GENESEE & WYOMING INC.  
TO PETITIONS OF LABOR INTERESTS TO REVOKE**

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Dated: May 7, 2014

Attorneys for Genesee & Wyoming Inc.

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Genesee & Wyoming Inc. (“GWI”) hereby submits this Reply to the petitions for revocation of exemption (the “Petitions”) submitted by the Brotherhood of Maintenance of Way Employees Division /IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers/Mechanical Division (the “Unions”), the International Association of Machinists & Aerospace Workers District Lodge 19 (“IAM”), and International Association of Sheet Metal, Air, Rail and Transportation Workers/Transportation Division (“SMART – Transportation” and, collectively with the Unions and IAM, the “Labor Interests”) in this proceeding.<sup>1</sup> The Petitions ostensibly seek to revoke GWI’s authority to continue in control of RCP&E, a noncarrier, together with other railroads in GWI’s corporate family, upon RCP&E’s becoming a Class II railroad when RCP&E consummates its acquisition of the DM&E West Lines.

However, the primary arguments made in the Petitions challenge the propriety of RCP&E’s acquisition exemption in Docket No. FD 35799, claiming either that GWI is the true

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<sup>1</sup> The Petitions were also filed in Docket No. FD 35799. The applicant in that proceeding, Rapid City, Pierre & Eastern Railroad, Inc. (“RCP&E”) is concurrently filing a separate response.

acquiring party, or that RCP&E is the “alter ego” of GWI. Those arguments have been fully addressed by RCP&E in the Reply being filed in Docket No. FD 35799. GWI hereby incorporates by reference, and adopts, the arguments of RCP&E as if set forth fully herein. GWI believes that upon consideration of the RCP&E Reply, the Board will agree that RCP&E properly filed for and obtained an exemption to acquire the DM&E West Lines. Further, the Board should find that RCP&E is a bona fide, independent corporation that was not established for the purpose of avoiding labor protection and is not a sham entity or the alter ego of GWI or any of the rail carriers in its corporate family.

There is no basis for the Labor Interests’ request to revoke the GWI common control exemption. GWI clearly met all of the requirements of 49 CFR §1180.2(d)(2) in seeking its exemption to continue in control of a nonconnecting carrier, which exemption became effective on April 10, 2014. STB Notice of Exemption served March 27, 2014 (noting that the RCP&E exemption would not be effective until April 25, 2014). No requests for stay or protests were filed.

The Petitions do not assert that the GWI notice of exemption contained any false or misleading information. In addition, the Labor Interests have not proffered any evidence of “reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary.” *See, e.g., Consol. Rail Corp.--Trackage Rights Exemption--Mo. Pac. R.R.*, STB Finance Docket No. 32662 (served June 18, 1998). As noted in the STB Notice of Exemption served March 27, 2014, employees affected by the control transaction will be afforded “full” labor protection under *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979). Thus, revocation of the

exemption or more detailed scrutiny of the control transaction would not result in any additional labor protection for affected employees.

IAM makes one additional argument in its Petition that is not truly part of the revocation request. IAM seeks to have the Board determine that the employees of DM&E are affected by the GWI control transaction in this proceeding, rather than by the sale by DM&E of the DM&E West Lines to RCP&E in Docket No. FD 35799. IAM Petition at 15-16. However, IAM's Petition itself acknowledges that DM&E is not a party to the control transaction and its employees are not directly affected by it. IAM Petition at 8 (citing *Buffalo & Pittsburgh Railroad Inc. – Exemption – Acquisition and Operation of Rail Lines in New York and Pennsylvania*, ICC Finance Docket No. 31116 (June 20, 1989)). The argument has been made and rejected many times in the past. See, e.g. *New England Central Railroad, Inc. – Acquisition and Operation Exemption – Lines between East Alburgh, VT and New London, CT*, ICC Finance Docket No. 32432 (“*New England Central*”) (served December 9, 1994), slip op. at 19, *aff'd sub nom. Brotherhood of R. Signalmen v. ICC*, 63 F.3d 638 (7th Cir. 1995) (because the employees of the selling carrier CV were not involved in the continuance in control proceeding, the labor protective conditions in the control proceeding would not extend to those employees). In *New England Central*, the ICC made its decision despite the fact that all of the lines of CV were being acquired and CV would no longer be an operating railroad. In this transaction, it is even more clear that DM&E is not a party to the GWI control transaction – after the sale of the DM&E West Lines to RCP&E, DM&E will continue to operate as a Class II carrier over 1900 miles of rail lines. Thus, no credible legal or factual argument can be made that GWI is acquiring control of DM&E or that DM&E's employees should be covered by the labor protection that applies in the GWI control proceeding.

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### Conclusion

For all of the foregoing reasons the Petitions to revoke GWI's exemption in this continuance in control proceeding should be denied.

Respectfully submitted,



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Dated: May 7, 2014

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## CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following by U.S. first class mail, postage pre-paid:

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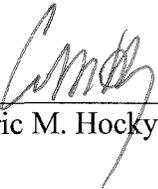
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Dated: May 7, 2014