

Before the  
SURFACE TRANSPORTATION BOARD

241731

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STB DOCKET NO. FD 36064

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GENESSEE & WYOMING INC.  
—ACQUISITION OF CONTROL EXEMPTION—  
PROVIDENCE & WORCESTER RAILROAD COMPANY

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OBJECTIONS OF THE TRANSPORTATION DIVISION OF  
THE INTERNATIONAL ASSOCIATION OF SHEET METAL,  
AIR, RAIL AND TRANSPORTATION WORKERS

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The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”)<sup>1</sup> submits this as its Objections to Genesee & Wyoming Inc.’s (“GWI”) request that the Board confirm that neither GWI nor Providence and Worcester Railroad Company (“P&W”) are required to commence negotiations or consummate implementing agreements prior to the consummation of the control transaction in Finance Docket (“FD”) No. 36064.<sup>2</sup>

**I. INTRODUCTION**

In FD 36064, GWI petitioned for an exemption under 49 U.S.C. § 10502 and 49 C.F.R. § 1121 from the provisions of 49 U.S.C. §§ 11323-24 to allow GWI to acquire control of P&W. Petition for Exemption, FD 36064 (hereinafter “Pet.”) at 1. GWI acknowledges that the lines

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<sup>1</sup> The Sheet Metal Workers International Association and United Transportation Union (“UTU”) merged to become SMART. The former UTU is now the Transportation Division of SMART (“SMART-TD”).

<sup>2</sup> SMART -TD adopts and incorporates herein by reference the arguments set forth in the Petition filed on behalf of Transportation Communications Union/IAM, AFL-CIO (“TCU/IAM”).

owned and operated by P&W connect with lines owned and operated by two railroads in GWI's corporate family and that this transaction is therefore not eligible for the class exemption at 49 C.F.R. § 1180.2(d)(2). Pet. at 1. GWI further acknowledges that because this transaction involves the control of two Class II carriers and several Class III carriers, the labor protection requirements of 49 U.S.C. § 11326(a), as set forth in *New York Dock Ry.—Control—Brooklyn E. Dist. Term.*, 360 I.C.C. 60 (1979), apply. Pet. at 10-11. *New York Dock* employee protective conditions require railroads to reach an implementing agreement with employees, using arbitration if necessary, before carrying out an operating change that may result in the dismissal or transfer of employees. 360 I.C.C. at 85. Citing its alleged uncertainty as to the displacement and/or dismissal of employees, GWI requests that the Board confirm that neither GWI nor P&W are required to commence negotiations or consummate implementing agreements *prior to* the consummation of the control transaction. Pet. at 11. As set forth below, such request is improper based on the facts at hand, and should be denied.

## II. ARGUMENT

Article I Section 4 of the *New York Dock* conditions state, in pertinent part:

- (a) Each railroad contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction which *may* cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended change or changes ... . Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. ...
- ...
- (b) If a notice of intended changes is served pursuant to this section 4, no change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

360 I.C.C. at 85. While GWI admits that the labor protection requirements of 49 U.S.C. § 11326(a), as set forth in *New York Dock* apply to this control transaction, it seeks to evade the

requirement that an implementing agreement be negotiated prior to the transaction's consummation. Pet. at 10-11. GWI contends that it need not negotiate an implementing agreement because it "has not yet determined whether or which employees, if any, may be dismissed or displaced as a result of the control transaction," purportedly relying on *Norfolk S. Ry. Co., Pam Am. Ry., Inc.—Joint Control and Operating/Pooling Agreements—Pan Am. S. LLC*, STB Finance Docket No. 35147 (served March 10, 2009), and *Norfolk S. Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Delaware & Hudson Ry. Co.*, STB Docket No. 35873, Decision No. 6 (served May 15, 2015).<sup>3</sup> Pet. at 11.

The fact that GWI has not yet made a determination as to which employees, if any, will be dismissed and/or displaced from the control transaction is not material. Pet. at 11. Indeed, *New York Dock* requires that the mere contemplation of a transaction which may cause the dismissal or displacement of any employees, or rearrangement of forces, give the requisite 90 days' notice and begin negotiations. *New York Dock*, 360 I.C.C. at 85 (Article I, section 4(a) of the conditions); *see also R.J. Corman R.R. Company/Memphis Line—Acquisition—CSX Transp., Inc. Line Between Warwick and Uhrichsville, OH*, FD 31388, 1989 WL 238083 at \*1 (March 2, 1989) (noting CSXT has commenced negotiation of appropriate agreements with its employees who may be adversely affected by this transaction pursuant to *New York Dock*, and that RJCM plans to integrate the line into its existing operations, "so the proposed transaction should have no adverse effect on RJCM employees"). The transaction may not be consummated until "after an agreement is reached or the decision of a referee has been rendered." *New York*

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<sup>3</sup> The transaction in FD 35873 involved the acquisition and control of certain rail lines. The Board applied *New York Dock*, as modified by *Wilmington Terminal*, under which the negotiation of the respective employee agreements cannot delay the consummation of the transaction.

*Dock*, 360 I.C.C. at 85 (emphasis added). Moreover, the decisions relied upon by GWI do not support its unprecedented request for Board confirmation regarding its obligations in advance, where it does not deny that employees may be adversely affected. See, e.g., *Atlantic Richfield Co. and Anaconda Co.—Control—Butte, Anacondo & Pacific Ry. Co. and Tooele Valley R.R. Co.*, 5 I.C.C.2d 934, 942, n.9 (Sept. 12, 1989) (imposing minimum protections of *New York Dock* where railroads factually represented throughout proceedings that no adverse effects would result); *Mid Michigan R.R. Co., Inc.—Lease and Operation Exemption—Missouri Pac. R.R. Co.*, 1990 WL 287758 (August 17, 1990) (applying *Mendocino Coast*, as modified by *Wilmington Terminal* conditions, which do not require an implementing agreement prior to consummation, and noting carrier’s assertion that there is no need for negotiation of implementing agreement where transaction will have no adverse effect on employees).

In FD 35147, the unions requested that the Board direct the carriers to negotiate an implementing agreement under *New York Dock* before closing on the transaction. The Board declined to do so, noting:

The requirement in *New York Dock* that an implementing agreement be negotiated prior to consummation of a transaction presumes that the carrier is capable of making the required “full and adequate statement” of the expected labor changes before the transaction is consummated, including an “estimate of the number of employees in each class to be affected by” the transaction. See *New York Dock*, 360 I.C.C. at 85 (Article I, section 4(a) of the conditions). In some consolidation proceedings subject to *New York Dock*, the effect of the transaction on employees is readily apparent, allowing carriers to provide statements of labor changes and use them as a basis for negotiating an implementing agreement prior to closing the transaction. Here, however, 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.* at 16-17 (emphasis added). In its Petition, however, GWI gives no such assurance. There is no evidence that the entities here are not “capable of making the required ‘full and adequate statement’ of the expected labor changes before the transaction is consummated,” nor any

statement that the work will continue to be performed under contract by the same P&W employees who are performing it now. Notably, it has failed to state that there is no contemplated change in operations and that there are no expected adverse effects on employees resulting from the transaction. Instead, GWI merely states that “P&W will continue as an operating railroad,” and that it “has not yet determined whether or which employees, if any, may be dismissed or displaced as a result of the control transaction.” Pet. at 11 (emphasis added). This is not sufficient to overcome *New York Dock*’s requirement regarding negotiation of an implementing agreement prior to the consummation of the transaction. 360 I.C.C. at 85. To hold otherwise would provide an incentive for carriers to claim ignorance and postpone their statutory and *New York Dock* obligations. Accordingly, GWI’s request should be denied at this time.

### III. CONCLUSION

Based upon the foregoing, the Board should deny GWI’s request for confirmation that neither it nor P&W is required to commence negotiations or consummate implementing agreements prior to communication of the transaction.

Respectfully submitted,

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Dated: October 11, 2016

## **CERTIFICATE OF SERVICE**

I certify that on this 11<sup>th</sup> day of October, 2016, I served copies of the foregoing document upon the following parties of record in this proceeding by first-class or electronic mail:

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