

BEFORE THE
SURFACE TRANSPORTATION BOARD

236008

STB DOCKET NO. FD 35799

RAPID CITY, PIERRE & EASTERN RAILROAD, INC. Office of Proceedings
-- ACQUISITION AND OPERATION EXEMPTION May 7, 2014
INCLUDING INTERCHANGE COMMITMENT -- Part of
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION Public Record

REPLY OF RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
TO PETITIONS OF LABOR INTERESTS TO REVOKE

ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: May 7, 2014

Attorneys for
Rapid City, Pierre & Eastern
Railroad, Inc.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35799

**RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT --
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION**

**REPLY OF RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
TO PETITIONS OF LABOR INTERESTS TO REVOKE**

Rapid City, Pierre & Eastern Railroad, Inc. (“RCP&E”) hereby submits this Reply¹ 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.² The Petitions seek to revoke RCP&E’s exemption to acquire from Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”)

¹ The only confidential information in this Reply is found in the Exhibit to the attached Verified Statement of John B. Ovitt (the “Ovitt V.S.”) The Highly Confidential Version of the Verified Statement is being filed separately under seal subject to the protective order adopted by the Board earlier in this proceeding.

² The Petitions were also filed in Docket No. FD 35800. The applicant in that proceeding, Genesee & Wyoming Inc. (“GWI”) is concurrently filing a separate response.

approximately 670 miles of rail lines in South Dakota, Wyoming, Minnesota and Nebraska (the “DM&E West Lines”) which became effective on April 25, 2014. The Petitions represent the latest attempt by the Labor Interests to impose the labor protections of 49 USC §11326 on an acquisition of rail lines by a newly-formed non-carrier under 49 USC §10901, despite the statutory prohibition on imposing labor protections on non-carrier acquisitions, and prior Board decisions that clearly establish that labor protections would not apply in a non-carrier acquisition exemption. The Petitions seek to undo the appropriate use of the long accepted two-step process of an exemption for RCP&E’s acquisition of the DM&E West Lines and incidental trackage rights under 49 USC §10901, in conjunction with an exemption for GWI’s continued control of RCP&E under 49 USC §11323 when RCP&E becomes a Class II carrier upon RCP&E’s acquisition of the DM&E West Lines (upon which the statutorily required labor protective conditions have been imposed). The Labor Interests seek this relief notwithstanding their acknowledgement that RCP&E has satisfied all of the Board’s regulatory requirements for its exemption.

As explained in more detail below, the Labor Interests have not met the standards for revocation of RCP&E’s exemption to acquire the DM&E West Lines. The two-step exemption process is established in the Board’s regulations, and RCP&E, and GWI in Docket No. FD 35800, have complied with both the letter and the spirit of those regulations. The Labor Interests’ narrow self-serving recollection of the Interstate Commerce Commission’s (“ICC”) objectives in adopting the class exemptions under 49 USC §10901 ignore that under 49 USC §10505, the Board *must* exempt transactions when regulation is unnecessary to implement the rail transportation policy and the matter

either is of limited scope or will not result in an abuse of market power.³ The Labor Interests also ignore that the ICC's "policy" of not imposing labor protection in acquisitions by non-carriers has been ratified by Congress and codified as 49 USC §10901(c). Recognizing the lack of justification for their request, the Labor Interests also argue despite the facts to the contrary that RCP&E is a "sham." Alternatively, they seek to twist the corporate reality of the holding company/family structure of RCP&E and GWI alleging an "alter-ego" structure in an attempt to circumvent the application of well-established law related to the recognition of the corporate form, which has long been accepted by both the Board and its predecessor ICC. Lastly, the Labor Interests have not demonstrated that there will be any unusual or significant harm to their members. As explained in more detail, RCP&E has taken extraordinary steps to mitigate the impact of the transaction on DM&E employees, including offering positions to 162 of the 184 DM&E employees who applied for positions. RCP&E has also offered retraining to minimize the number of employees affected.

As will be demonstrated more fully in the Discussion below, the Labor Interests have not satisfied the requirements for revoking RCP&E's exemption authority or shown any extraordinary impact on labor and, therefore, the Petitions should be denied. However, the mere pendency of the Petitions creates uncertainty for RCP&E as to the costs of the transaction, and for those employees working on the DM&E West Lines now and those scheduled to work on the Lines after consummation. Accordingly, RCP&E

³ For a general discussion of the legislative history of the ICC's exemption power, see *Simmons v. ICC*, 697 F2d 326, 334-342 (D.C. Cir. 1982).

requests that the Board deny the Petitions as soon as possible to minimize the lingering uncertainty and distraction created by the Petitions.

Procedural and Factual Background

In December 2012, Canadian Pacific Railway Ltd. (“CP”), the parent of DM&E, announced a strategic review process that included the possible sale of the DM&E West Lines. On January 2, 2014, CP and GWI (two publicly-listed companies)⁴ announced that an agreement had been reached between their respective subsidiaries under which the DM&E West Lines would be sold by DM&E to the newly-formed RCP&E. Assuming the transaction is consummated, DM&E would continue to be a Class II carrier and own and operate approximately 1,900 miles of rail lines.

Following the announcement, all DM&E employees who are currently working on the DM&E West Lines were invited to meet with representatives of RCP&E at “town hall” meetings on January 15, 2014 in Brookings and Huron, South Dakota, and on January 16, 2014 in Pierre and Rapid City, South Dakota, to discuss the transaction and the positions that were expected to be available on RCP&E. Shortly thereafter, on or about January 28, 2014, RCP&E posted a list of the 180 positions it anticipated for its initial employee roster, and certified to the Board that the posting had been completed. 49 CFR §1150.32(e). The notice that was posted, along with the meetings, explained the positions and terms of employment that would be available and explained how DM&E employees could apply to RCP&E for employment.

⁴ CP is listed on the Toronto and New York Stock Exchanges, and GWI is listed on the New York Stock Exchange, which listings generally require the disclosure of material information about the companies and their subsidiaries to public shareholders.

This proceeding was formally commenced on February 12, 2014, when RCP&E filed a notice of intent under 49 CFR §§1150.35(a) – (c), describing its intention to acquire the DM&E West Lines and become a Class II carrier. As required under the regulations, and as most relevant here, the notice of intent included a general description of the anticipated impacts on labor and was served on, among others, the unions representing the DM&E employees working on the DM&E West Lines, including the Labor Interests.

On March 11, 2014, more than 14 days after the notice of intent was filed, RCP&E filed its notice of exemption in accordance with the requirements of 49 CFR §1150.35(d). Although not required by the regulations, RCP&E included with its filing a public version of the Transaction Agreement governing the acquisition of the DM&E West Lines. Counsel for the Unions and for IAM were each provided with a highly confidential version of the Transaction Agreement promptly after their submission of the required undertakings under the protective order issued by the Board on February 13, 2014.

The Board issued a notice of the exemption on March 27, 2014. As noted in the Board's notice, absent a stay, the exemption became effective on April 25, 2014, 45 days after the filing of the notice of exemption. Letters of support were filed with the Board by various elected officials (including both US Senators and the sole Congresswoman from South Dakota), government agencies, economic development groups and shippers. Those submissions uniformly expressed support for and urged prompt approval of the transaction. No objections were filed, including by the Labor Interests. Nor did the

Labor Interests ask for any conditions. No requests for stay were filed by the April 11, 2014 deadline set forth in the Board's notice.

Notwithstanding the ample notice of the Transaction and the procedural schedule for the exemption process, the Unions and IAM Petitions were filed late in the afternoon on Friday, April 18, 2014, just one week before the exemption was scheduled to become effective, and the SMART-Transportation Petition was filed on April 24, 2014, just one day before the exemption was scheduled to become effective.⁵ Because no stay was requested or issued, the exemption became effective on April 25, 2014.

Many of the comments received urged prompt approval of the transaction to allow RCP&E to assume operation of the DM&E West Lines before the grain harvest season begins. In order to be up and running in advance of the grain harvest, RCP&E is currently planning to consummate the transaction and to begin operations on or about June 1, 2014. As more fully discussed below in the Discussion, Section IV, RCP&E has been interviewing prospective employees and has made offers to 162 of the 184 employees currently working on the DM&E West Lines who submitted resumes. RCP&E has registered with the AAR for reporting marks and is preparing its tariffs for posting on or about May 9, 2014. In addition to the approximately 50 locomotives and 652 rail cars that RCP&E is acquiring through the assignment of leases from DM&E, RCP&E has also made arrangements to purchase an additional 121 rail cars and to lease

⁵ The SMART-Transportation Petition was not posted on the Board's website until April 28, 2014, and counsel for RCP&E was neither listed in the certificate of service nor served with a copy of the Petition.

approximately 2,200 rail cars to supplement the cars that will be available for shippers on the lines.⁶ *Ovitt V.S.*, ¶ 21.

Discussion

I. The Labor Interests have failed to demonstrate that the Board's standards for revocation have been met.

The Board has well established standards for considering a petition to revoke:

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption when it finds that application of a statutory provision is necessary to carry out the [Rail Transportation Policy (RTP)]. Only those portions of the RTP that are relevant or pertinent to the underlying statute—here, 49 U.S.C. § 11324, are considered. See *Vill. of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991) (Palestine). ... The party seeking revocation has the burden of showing that criterion is met, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See *Consol. Rail Corp.--Trackage Rights Exemption--Mo. Pac. R.R.*, FD 32662 (STB served June 18, 1998). The Board will also revoke an exemption when the transaction is shown to be a sham. See *Burlington N. R.R. Co. v. United Transp. Union*, 862 F.2d 1266 (7th Cir. 1988).

Watco Companies, Inc. – Continuance in Control Exemption – Boise Valley Railroad, Inc., STB Docket No. FD 35260 (served August 27, 2010), slip op. at 2. See also, *Iowa, Chicago & Eastern Railroad Corporation – Acquisition and Operation Exemption – Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177 (served January 21, 2003) (“ICE Revocation Decision”), slip op at. 4.⁷

⁶ RCP&E is also expecting to lease up to an additional 800 rail cars.

⁷ It has also been said that labor interests have standing to question the appropriate level of labor protection through a petition to revoke. In those cases, pre-ICCTA, the ICC would consider a departure from its policy not to impose labor protection on Section 10901 acquisitions only if the petitioner could demonstrate “exceptional circumstances” warranting such action. *FRVR Corporation – Exemption Acquisition and Operation –*

The Labor Interests have not demonstrated how revocation would help carry out any provisions of the RTP, or why reconsideration is warranted, especially given that RCP&E's exemption satisfied the statutory requirements of 49 USC § 10901 and the exemption requirements of 49 CFR §1150.35. Nor have the Labor Interests demonstrated that RCP&E is a sham corporation.

II. RCP&E has satisfied all of the requirements for the class exemption adopted by the Board for the acquisition of rail lines by a non-carrier that will become a Class II railroad.

A. Section 10901(a)(4) covers acquisitions of rail lines by all non-carriers, including RCP&E.

The acquisition of rail lines by a non-carrier such as RCP&E is clearly covered under 49 USC § 10901(a)(4).

The Labor Interests' argument that the proposed acquisition does not qualify for an exemption because it will result in the creation of a Class II carrier that is "too large" has no merit. In 1988, the ICC determined that the successful class exemption covering acquisitions by non-carriers should be retained for "larger" transactions – those involving the creation of a Class I or Class II carrier. However, in order to address concerns about the uncertainties created by such transactions, the ICC added a pre-filing notice, and extended the then applicable 7 day effective period to 21 days.⁸ The ICC also added

Certain Lines of Chicago and North Western Transportation Company – Petition for Clarification, ICC Finance Docket No. 31205 (served January 28, 1988), 1988 ICC Lexis 19 at *5-6 (exemption will be modified where labor can demonstrate unique or disproportionate injury), *aff'd sub nom. Railway Labor Executives' Association v ICC*, 914 F.2d 276 (D.C. Cir. 1990), *cert denied*, 499 U.S. 959 (1991). However, post-ICCTA, the Board does not have any authority to impose labor protection on any acquisition by a non-carrier of lines of railroad. 49 USC §10901(a)(4) and §10901(c).

⁸ The effective period was extended to the current 45 days when the effective period for the creation of Class III carriers was extended to 30 days.

additional information and notice requirements. *Class Exemption for the Acquisition and Operation of Rail Lines under 49 USC 10901*, Ex Parte No. 392 (Sub-No. 1) (“*Acquisition Exemption – Class I and IP*”), 4 ICC 2d 309 (1988). In adopting those additional requirements, the ICC recognized that in some instances the class exemption was being used in transactions that were larger than originally envisioned, and that not all transactions involve limited mileage, close-to-being-abandoned rail lines. But rather than carve Class I and Class II transactions out of the exemption, the ICC found that the concerns of affected parties, including States, shippers and rail employees, could adequately be addressed by the additional data and notice requirements adopted by the ICC. *Id.* The Labor Interests acknowledge that the notice of exemption filed by RCP&E satisfied all of the requirements of the Board’s regulations as set forth in 49 CFR 1150.35. The Petitions make no claim that RCP&E’s notice of exemption contained any false or misleading information. Thus, there is no claim that the exemption filings were inadequate or that the exemption is void *ab initio*.

Over the years, labor representatives have sought ways around these clear statutory directives, seeking to collapse the two-step process (acquisition by a non-carrier subsidiary, followed by control by the parent company). They have argued unsuccessfully that when the acquisition is of all of the rail lines of a carrier, that the transaction should be considered the acquisition of control of a carrier and not just of assets. They also have argued unsuccessfully in situations where the parent of the non-carrier is a carrier that the parent should be considered as the acquiring entity. The Board and the ICC, and the courts, have rejected these attempts time and time again. *See ICE Revocation Decision*, slip op. at 4-6; *Iowa, Chicago & Eastern Railroad Corporation –*

Acquisition and Operation Exemption – Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (served July 22, 2002) (“*ICE Stay Decision*”), slip op. at 9-11; *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 23-24, *aff’d sub nom. Brotherhood of R. Signalmen v. ICC*, 63 F.3d 638 (7th Cir. 1995); *The Bay Line Railroad, L.L.C – Acquisition and Operation Exemption – Rail Lines of Atlanta & St. Andrews Bay Railroad Company*, ICC Finance Docket No. 32435 (“*Bay Line*”) (served March 31, 1995), slip op. at 11-12; *Akron Barberton Cluster Railway Company – Acquisition and Operation Exemption – Certain Lines of Consolidated Rail Corporation*, ICC Finance Docket No. 32537 (“*ABC*”) (served January 12, 1996), slip op. at 4. Recently, the Board confirmed the applicable labor protection in the two-step transaction in which newly-formed Pan Am Southern, LLC (“PAS”) acquired the right to operate approximately 437 miles of track (238.3 to be owned by PAS, and 198.4 miles of trackage rights), and Norfolk Southern Railway Company and Pan Am Railways, Inc. and two of its railroad subsidiaries sought authority to control PAS when it became a carrier:

As required under 49 U.S.C 11326(a), we will impose the standard *New York Dock* labor protection conditions on our approval of the primary [control] application in STB Finance Docket No. 25147 and the *N&W* labor protection conditions on our approval of the related notices of exemption for the grant of trackage rights in STB Finance Docket No. 35147 (Sub-Nos. 2 and 3). *Under 49 U.S.C.10901(c), we are expressly precluded from imposing any labor protection conditions on our approval of an acquisition of a line by a noncarrier – the subject of the related notice of exemption in STB Finance Docket No. 35147 (Sub-No. 1).*

Norfolk Southern Railway Company, 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) (emphasis added) (footnotes omitted), slip op at 15.⁹

The only cases cited by the Labor Interests in which a court refused to recognize the structure of the transaction were *U.S. v. Marshall Transport*, 322 U.S. 21 (1940), which involved the failure of the parent to seek authority to control an additional carrier,¹⁰ and *Fox Valley & Western Ltd. – Exempt, Acq. and Oper.*, 9 ICC 2d 209 (1992), *aff'd sub nom. Fox Valley & Western Ltd. v. ICC*, 15 F.3d 641 (7th Cir. 1994), which involved unique circumstances in which a non-carrier sought to acquire the assets of two carriers at the same time.

In *New England Central*, the ICC explained that the *Fox Valley* decision was limited to the simultaneous acquisition of two carriers, which is not the situation in the current RCP&E transaction:

The Allied Rail Unions' reliance on the argument that NECR is acquiring an entire carrier as dispositive of the issue of the application of section 11343 [now 11323] necessarily involves the presumption that RailTex is the acquiring entity. Relying on the recent *Fox Valley* decision, petitioners argue that a noncarrier acquisition of an entire carrier would fall under section 11343. . . . *Fox Valley* involved the acquisition of two carriers. The present proceeding on the other hand, involves the acquisition of only one carrier. Thus, the Allied Rail Unions' argument would extend *Fox*

⁹ Based on the unique circumstances of the case in which the operator of the lines was not changing, the applicants in the control proceeding represented on the record that they would waive the defense that a claimed adverse effect was attributable to the asset acquisition alone. The Board felt that this resolved the issues between labor and applicants, but did not impose the additional labor protections that had been requested. *Id.*, slip op at 16.

¹⁰ That is not the case here as GWI has separately sought authority to control RCP&E when it becomes a carrier.

Valley to cover acquisition of a single carrier, creating a presumption that whenever a “noncarrier” subsidiary of an entity that is not a carrier, but that control carriers, seeks to purchase an entire rail line, the subsidiary is necessarily one and the same as the parent. This presumption would conflict with all of the line sale case precedent.

NECR at 24.

There is even less justification to disregard the two-step structure of this transaction where RCP&E is acquiring only approximately 25% of a single carrier’s track miles, and not the entire line of that carrier, and where RCP&E’s parent is itself not even a rail carrier. Further, even if the transaction could properly be characterized as an acquisition directly by GWI (and it cannot), it would still be an acquisition of rail lines by a non-carrier and it would still be subject to Section 10901. To allow the Labor Interests to disregard the two-step process in this proceeding would conflict with prior Board and court precedent:

Petitioners rely on *United States v. Marshall Transport*, 322 U.S. 21 (1944), and *Fox Valley & Western Ltd.– Exempt., Acq. and Oper.*, 9 I.C.C.2d 209 (1992), *aff’d sub nom. Fox Valley & Western Ltd. v. ICC*, 15 F.3d 641 (7th Cir. 1994) to support their “alter ego” argument. But their reliance on Marshall and Fox Valley is misplaced. Both of those cases concerned an acquisition by a noncarrier of two carriers, a type of acquisition that does require our approval under section 11323(a)(4). That type of acquisition necessarily places the two acquired carriers under common control. In contrast, the situation we have here, the acquisition of the rail lines of a single carrier by a noncarrier, is squarely covered by section 10901(a)(4), as added in the ICC Termination Act of 1996 (ICCTA). As we explained in [*Georgia & Florida Railroad Co., Inc. – Acquisition, Lease and Operation Exemption – Norfolk Southern Railway Company*, STB Finance Docket No. 32680 (STB served Mar. 18, 1996)], at 3:

“Prospective carriers and their owners have adopted a two-step process for obtaining control – the acquisition transaction and the continuance in control transaction. This procedure has been used

many times in the past and has been used by [applicants] here. This two-step process has been consistently upheld on judicial review.”

ICE Stay Decision, slip op. at 10-11 (footnotes omitted). Nonetheless, the Labor Interests ask the Board to disregard the corporate formalities and treat “GWI and its affiliated carriers” as the acquiring entity. This would require the Board to find not only that RCP&E is a sham entity, but also that RCP&E is the alter ego of both GWI *and* the alter ego of the rail carriers already controlled by GWI pursuant to authority previously granted by the Board. As explained in Section III below, this is certainly not the case.

B. Pre-ICCTA policies are consistent with current statutes and regulations and may not be changed by the Board.

It is also important to note that this is an individual proceeding filed by RCP&E seeking an exemption based on the governing statutes and the Board’s existing regulations. The Petitions need to be determined based on the facts of this proceeding. The Board has no authority to overturn or change the statutory determinations of Congress, or the Board’s governing class exemptions except in an appropriate rulemaking proceeding. The Labor Interests rely greatly on the “policies of the 1980’s” to explain their version of why non-carriers were “allowed” to acquire lines of railroad or the assets of existing carriers. They insist (contrary to reality) that the policy was limited to acquisitions by non-carriers that were not affiliated with other railroads and that the use of the exemption was limited to transactions that had the effect of saving rail lines from abandonment. First, these arguments are fallacious. The Petitions themselves cite numerous cases in which the acquiring non-carrier was affiliated with a holding company parent and the two-step process was utilized under those same policies of the 1980’s. Moreover, the Board itself has debunked that argument:

[T]here is no merit to the contention that the class exemption was only intended to be an expedited mechanism for rescuing lines in danger of abandonment. Use of the class exemption was not made to depend on such issues as the actual status of the line to be acquired or operated. Noncarriers frequently have used the class exemption to acquire or operate healthy lines. Indeed, the class exemption was adopted for a much broader purpose, to comply with the legislative directive to “grant exemptions and rely on ‘after the fact’ remedies, including revocations to correct any abuses.”

GWI Switching Services, LP – Operation Exemption – Lines of Southern Pacific Transportation Company; Genesee and Wyoming Industries, Inc. – Exemption Continuance in Control of a Nonconnecting Carrier, STB Finance Docket Nos. 32481 and 32482 (served August 7, 2001), slip op. at 6 (applying pre-ICCTA law) (citation omitted). Second, prior to ICCTA, the ICC only found unique and disproportionate harm to employees in situations where the selling carrier was going out of business. *See Bay Line*, slip op at 15; *New England Central*, slip op at 28.

Most importantly, the Labor Interests ignore the fact that the ICC’s “policies” have now been codified in 49 USC § 10901 and the regulations adopted by the Board thereunder. Since 1995, Section 10901(a)(4) has specifically provided that acquisitions under Section 10901 include the acquisition of a railroad line by a “person other than a rail carrier.” There is no requirement that the “person other than a rail carrier” not be affiliated with any other rail carrier. Further, Section 10901(c) prohibits the Board from imposing labor protection as a condition of any such non-carrier acquisition. These are no longer just “policies,” but rather they are now directives that the Board has no authority to overturn or change.

III. RCP&E is an independent legal entity and is not a sham or the “alter-ego” of its parent company.

Under the Board’s alter ego test, the Board considers:

(1) whether the noncarrier subsidiary was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection; and (2) whether the indicia of independence establish that the noncarrier subsidiary is sufficiently independent of its parent or affiliated carriers. *Mountain Laurel Railroad Company—Acquisition and Operation Exemption—Consolidated Rail Corporation*, STB Finance Docket No. 31974 (STB served May 15, 1998) (*Mountain Laurel*).

ICE Revocation Decision, slip op. at 5. The Board’s objective is to ensure that the two companies are not so intertwined so as to be considered a single entity. *Id.* “It is not required that the new noncarrier be totally independent of its affiliates, simply that it be a separate, real company in its own right, responsible for its own accounts.” *ICE Stay Decision*, slip op. at 11. Even before the adoption of the amendments to 49 USC §10901 in 1995, the ICC and the courts “uniformly rejected requests to disregard the status of a noncarrier subsidiary simply because it would become part of a family of affiliated carriers, *Arkansas Midland Railroad Company Inc. – Acquisition and Operation Exemption – Missouri Pacific Railroad Company*, Finance Docket No. 31999 *et al.* (ICC served December 13, 1993), slip op. at 3-4, so long as there was shown to be a legitimate business reason for the corporate structure chosen.” *Mountain Laurel Railroad Company – Acquisition of Operation Exemption – Consolidated Rail Corporation*, STB Finance Docket No. 31974 (“*Mountain Laurel*”) (served May 15, 1998), slip op. at 9.

The burden is clearly on the Labor Interests to demonstrate either that RCP&E was formed for the sole purpose of evading labor protection, or that the subsidiary is dependent on its parent, both financially and operationally. *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 25 (noncarrier subsidiary is presumed to be an independent entity, separate from its parent).

In order to demonstrate that RCP&E is the alter ego of GWI or any of its subsidiary railroads, the Labor Interests must show more than just corporate control. In Finance Docket No. 35800, GWI has acknowledged that, in owning all of the stock of RCP&E, it will “control” RCP&E. That is why GWI has obtained an exemption under 49 USC §11323(a)(5) and 49 CFR §1180(2)(d) as a “person that is not a rail carrier but that controls any number of rail carriers.” *See also*, 49 CFR §1150.31(b) reminding non-carrier applicants acquiring rail lines that: “Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at §1180.2(d)(1) and (2).”

There cannot be any real question about whether RCP&E was formed for substantial and legitimate business purposes, or whether it is a bona fide company. The Labor Interests’ assertion that the RCP&E was formed for the sole purpose of avoiding labor protection is without support or merit.

RCP&E was incorporated in Delaware in late December 2013, filed its certificate of incorporation with the Delaware Secretary of State, adopted bylaws and elected directors and officers. RCP&E has its own independent employer identification number and corporate existence. RCP&E will have its own accounts with the Railroad Retirement Board and with the Federal Railroad Administration. RCP&E will maintain its own books and records. *Ovitt V.S.*, ¶ 2. The DM&E West Lines do not connect to any other GWI railroads and it makes clear business sense for the DME& West Lines to

be owned and operated by a new independent entity. Ovitt V.S., ¶14. Additionally, the corporate structure elected by GWI and RCP&E assures that the existing railroads in the GWI family will be insulated from the financial risks of the new operations of RCP&E, and vice-versa.

RCP&E has hired its own operating employees and a general manager dedicated to operations on the DM&E West Lines who will not be shared with any other railroads. The offer letters sent out to potential RCP&E employees were sent directly from RCP&E, on stationary with solely RCP&E's letterhead and signed by John B. Ovitt, the President of RCP&E. RCP&E also has hired a local manager of sales and marketing and an assistant vice president of marketing to grow business on the DM&E West Lines. Ovitt V.S., ¶¶ 11, 16.

RCP&E will have its own assets and will operate the RCP&E rail line. The RCP&E purchase is an "asset deal" and by its very definition, the assets being acquired (including land and contracts for the use of the land, locomotives and equipment) will be held by the new entity itself and not the parent company. Post-closing, RCP&E will be responsible for the risks and financial obligations arising from its operations. Further, RCP&E has entered into its own contracts for separate and distinct office space, that is not in the vicinity of, and that will not be shared with, GWI or any of GWI's subsidiary railroads. Ovitt V.S., ¶17. Other than the guaranty associated with RCP&E's obligations under the Transaction Agreement related to the acquisition from DM&E, and the associated commitments thereunder, and the initial supply of capital required to pay the purchase price, GWI will not be responsible for the contracts or operating expenses of RCP&E.

RCP&E will hold itself out to provide rail service in its own name and will have its own reporting marks and tariffs. Ovitt V.S., ¶15. As RCP&E's parent, GWI is not a carrier, and does not have railroad reporting marks nor any authority to operate as a rail carrier. In addition to the approximately 50 locomotives and 652 rail cars that RCP&E is acquiring through the assignment of leases from DM&E, RCP&E also has made arrangements to purchase an additional 121 rail cars and to lease approximately 2,200 additional rail cars. Ovitt V.S., ¶21. It is estimated that RCP&E will begin operations with approximately \$60 million in annual revenue, which will be sufficient to support its operations. Ovitt V.S., ¶ 19. Moreover, RCP&E has made offers to more than 160 DM&E employees and is still looking to hire more. Ovitt V.S., ¶9.

All of the foregoing factors are indicia of RCP&E's independence and demonstrate that the transaction clearly has legitimate and substantial business reasons unrelated to the labor issue. *ICE Revocation Decision*, slip op. at 7, fn 9 (citing *South Kansas and Oklahoma Railroad, Inc. – Acquisition and Operation Exemption – The Atchison, Topeka and Santa Fe Railway Company – Petition to Revoke*, ICC Finance Docket No. 31802 (Sub-No. 1) (served November 27, 1992), slip op. at 3) (factors include whether new entity has its own employees, management and equipment, publishes its own tariffs, operates under its own name, and whether it is responsible for its own financial and contractual obligations); *Mountain Laurel*, slip op. at 13-14 (business purposes include insulation from business risks and potential liabilities, and using underutilized managerial experience of affiliates), and 17 (serving on-line customers with own marks and locomotives, recognized by other carriers and

governmental agencies as independent, and sole responsibility for own contracts are all signs of operational independence).

The Labor Interests seem to acknowledge that they need to go beyond piercing the corporate veil to RCP&E's non-carrier parent GWI in order to treat GWI and its carrier subsidiaries as a single carrier unit. The Labor Interests focus first on the combined income of the GWI subsidiary railroads. However, in approving the GWI merger with and control of the RailAmerica railroads, the Board found that a group consisting of many smaller railroads does not have the same market power or raise the same concerns as a single large enterprise. *Genesee & Wyoming Inc. – Control - RailAmerica, Inc., et al*, STB Docket No. FD 35654, Decision No. 5 (served December 20, 2012), slip op. at 3 (finding the transaction was not likely to cause a substantial lessening of competition or create a monopoly where railroad will continue operate and compete in their own local markets).¹¹ Moreover, size itself is not relevant to a determination of whether RCP&E (or GWI) is entitled to an exemption. *Watco Companies, Inc. – Continuance in Control – Boise Valley Railroad, Inc.*, STB Docket No. FD 35260 (served August 27, 2010), slip op at 3.

The other attributes that Labor Interests focus on are issues that the Board and the courts have determined are common among parents and affiliated carriers, and do not detract from their independence.

- *Startup capital and guarantees.* GWI will be providing startup capital for the RCP&E acquisition and initial working capital. All GWI entities utilize a single

¹¹ The class exemption at 49 CFR §1180.2(d)(2) governing control of a nonconnecting carrier (such as GWI's proposed control of RCP&E) is similarly based on the premise that the control is not likely to affect the parent company's market power.

consolidated source of bank financing that increases the amount of capital available and lowers the costs of that capital. GWI also will be guaranteeing RCP&E's obligations under the Transaction Agreement and the associated commitments. However, RCP&E's other obligations to third parties in the ordinary course for ongoing operating expenses, including related to customers and rail operations, are *not* being guaranteed by GWI or any affiliated carriers. Both the Board and the ICC have long held that it is customary for parent companies to provide such financing assistance:

In numerous cases applying this test, the Board and its predecessor, the Interstate Commerce Commission (ICC), have stated that the parents and affiliates of acquiring noncarrier subsidiaries can offer financial support without compromising their financial independence. Indeed, the ICC found that it was "customary" for parents to supply money for start-up expenses and initial capital as well as specific loan guarantees. *Willamette & Pacific Railroad, Inc.—Lease and Operation Exemption—Southern Pacific Transportation Company*, Finance Docket No. 32245 et al. (ICC served Sept. 7, 1995) (*Willamette*), slip op. at 9.

ICE Revocation Decision, slip op. at 5 (footnote and additional citations omitted). *See also, Mountain Laurel*, slip op. at 14 (customary for parent to supply money for start-up expenses and initial capital as well as specific loan guarantees). RCP&E will be solely responsible for the ongoing costs of its day-to-day operations, including those related to freight loss and damage, personal injuries and property damage, none of which are being assumed or guaranteed by GWI. *Mountain Laurel*, slip op. at 4, 14-15.

- *Independent corporate existence.* RCP&E is not a mere legal extension of GWI. Although there is some overlap in the individuals serving as officers of RCP&E and GWI, RCP&E has its own separate board composed of different directors from GWI, with separate voting and its own board meetings. *See ICE Stay Decision*, slip op. at 11 (sharing of certain management is common and does not detract from independence);

Mountain Laurel, slip op. at 16 (shared officers and directors does not negate operational independence). Moreover, the Board's regulations provide (1) that all "interlocking directorates" except those involving two Class I carriers are exempt, and (2) that no authority is necessary to hold the position of officer or director of two or more carriers if the carriers are operated under common control or management pursuant to an order or exemption of the STB. See 49 CFR §1185.1 and §1185.5.¹² Similar conclusions are found in contexts outside of Board proceedings. See *Birbara v. Locke*, 99 F.3d 1233, 1235 (1st Cir. 1996) (applying Mass law) (holding that parent corporation was not liable for subsidiary corporation's breach of investment contracts with investors for several reasons, among them since the two companies had separate boards of directors and board meetings). See also *Gibraltar Sav. v. L D Brinkman Corp.*, 860 F.2d 1275, 1291-92, 1988 U.S. App. LEXIS 16334 (5th Cir. Tex. 1988) (affirming the lower court's ruling that the "alter ego" argument failed where the subsidiary had its own board of directors and board meetings); *Greene v. Long Island R.R. Co.*, 280 F.3d 224, 235 (2d Cir.2002) ("[C]orporate ownership of a subsidiary and overlapping offices and directorates are not, without more, sufficient to impose liability on the parent for conduct of the subsidiary"); *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) ("It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts").

- *Commonly stylized logos.* The fact that the subsidiary railroads of GWI all have similarly stylized logos does not establish that the railroads are intertwined with

¹² Since the exemption in STB Docket No. FD 35800 is effective, GWI has the authority to control RCP&E in common with the other railroads under its control, and it is proper for the railroads, RCP&E and GWI to share officers and directors.

each other. To the contrary, a review of the logos indicates that each railroad has its own unique logo reflecting its “initials” or railroad marks. Thus, if observing a particular railroad’s logo, one might know that the railroad is a subsidiary of GWI, but one would also be able to determine exactly which individual railroad is referenced.

- *Intercompany service arrangements.* That Genesee and Wyoming Railroad Services Inc. (“GRSI”),¹³ a subsidiary of GWI, will provide certain administrative and corporate services for RCP&E is not an indication that GWI and RCP&E are one entity. All GWI subsidiary railroads take advantage of and use GRSI services, which includes corporate communications, legal and accounting services, information technology (including website design¹⁴ and maintenance) and administrative services. *Ovitt V.S.*, ¶18. Providing these services through GRSI provides each of the railroads with a greater level of these services than any one railroad could afford on its own. Each of the railroads in the GWI family, which will include RCP&E, is billed by GRSI for its services on an equitable basis. Such intercompany agreements are common among affiliated carriers and do not detract from the financial and operational independence of subsidiary carriers such as RCP&E so long as the services are provided on an arm’s length basis. *Mountain Laurel*, slip op. at 16. *See also Akron Barberton*

¹³ Although not specifically relevant to the issue presented here, it should be noted that the employees of GRSI are covered by the Railroad Retirement and Unemployment Acts.

¹⁴ The fact that GRSI maintains a single website for GWI and each of its subsidiary railroads does not support an argument that the corporate entities are not distinct from one another. As noted below, GWI, as a public company, is required in its public presentations to include information on all of its subsidiaries. Moreover, as noted by the Labor Interests in their Petitions, each of the railroads has its own independent tab that shows information related to that railroad, including contact information, a map and tariffs, as applicable. Unions’ Petition at 10.

Cluster Railway Company – Acquisition and Operation Exemption – Certain Lines of Consolidated Rail Corporation; Wheeling Corporation – Continuance in Control Exemption – Akron and Barberton Cluster Railway Company, ICC Finance Docket Nos. 32537 and 32538 (served January 12, 1996), 1995 ICC LEXIS 333 at *11 (provision of services including locomotive repair, maintenance, accounting, freight claims settlement, data processing and tax services under arms-length contract do not establish a lack of independence)¹⁵ The approach and analysis applied by the STB in the aforementioned cases is consistent with general applications of alter ego theory in various jurisdictions. *See Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358, 1363 1974 U.S. App. LEXIS 6221 (10th Cir. Kan. 1974) (affirming the trial court’s conclusion that the corporate separation was maintained where the executive staff of the parent provided its subsidiary corporations with general financial, legal, tax and administrative services). *See also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1128, 1134-35 (N.D. Ala. 1993) (“Transactions between corporations are legitimate and commonplace, and, when between one company and another with a significant or even controlling stock ownership in the former, do not necessarily suggest improper domination or a failure of the parties to respect their separate corporate identities... These arrangements -- involving the

¹⁵ As the Board was aware at the time it extended the class exemption for control transactions to include control of nonconnecting carriers (as is being utilized by GWI to acquire control of RCP&E): “The major beneficiaries of this class exemption are short-line railroads. As the short-line interests point out, their continuing expansion has both resulted in and been facilitated by ‘group owners,’ i.e., individuals or corporate parents that own or control a group of noncontiguous rail carriers or lines. These short-line conglomerates often provide common administrative, maintenance, marketing and other management functions, thus permitting economies of scale and lower costs.” *Rail Consolidation Procedures – Continuance in Control of a Nonconnecting Carrier*, 2 ICC 2d 677, 678 (1986).

payment of consideration for services rendered -- during the formative years of a subsidiary's existence do not suggest a degree of involvement by the parent that supports a claim for piercing the corporate veil many years later.”) In fact, courts have found that the parent’s charging of the subsidiary for such services is evidence that the companies are not one entity. *See Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1486 (C.D. Ill. 1996) (the fact that a parent assesses its subsidiaries a fee to obtain centralized services such as legal services, printing services, and cash management services, was not improper).

- *Public Statements and Securities Filings.* The Labor Interests make much of certain public statements by GWI officers and references in GWI’s filings with the U.S. Securities and Exchange Commission whereby they allege that GWI is making the acquisition of the DM&E West Lines from CP. These general statements do nothing to undermine the actual legal structure of the transaction as set forth in the Transaction Agreement (which RCP&E voluntarily filed with its Notice of Exemption) under which RCP&E is acquiring the Lines from DM&E.¹⁶ As public companies, GWI and CP are required to make certain disclosures about themselves and their subsidiaries. The acquisition by a subsidiary of 670 miles of rail lines for more than \$200 million is certainly a material development that is properly the subject of disclosure by GWI. The suggestion by the Labor Interests that such statements indicate that GWI is actually the party making the acquisition (or that CP is actually the party selling the Lines) ignores the obligations of GWI and CP under the securities laws. Moreover, the statements relied upon by the Labor Interests are clarified and refuted in the clear statements immediately

¹⁶ As the Labor Interests have pointed out elsewhere, GWI is a guarantor of RCP&E, but is not a party to the Transaction Agreement.

following the table of contents in GWI's Form 10-K filed with the U.S. Securities and Exchange Commission which states, "*Unless the context otherwise requires, when used in this Annual Report on Form 10-K (Annual Report), the terms "Genesee & Wyoming," "G&W," the "Company," "we," "our" and "us" refer to Genesee & Wyoming Inc. and its subsidiaries. All references to currency amounts included in this Annual Report, including the financial statements, are in United States dollars unless specifically noted otherwise*". Indeed, the use of words such as "we," "our" and "us" is required under the Plain English guidance incorporated into the U.S. Securities Laws. *See also Fletcher v. Atex, Inc., 68 F.3d 1451, 1460 (2d. Cir. 1995)* (use in promotional materials and in annual reports of terms such as "merger," "acquisition," "agency" as well as use of logos was not evidence of two distinct companies operating as a "single economic entity");¹⁷ *Coleman v. Corning Glass Works, 619 F. Supp. 950, 956 (W.D.N.Y. 1985)* (upholding corporate form despite "loose language" in annual report about "merger" and parent's reference to subsidiary as a "division").

¹⁷ In *Fletcher*, the court noted that the plaintiffs referred to "(1) a promotional pamphlet produced by EPPS (a/k/a Atex) describing Atex as a business unit of EPPS and noting that EPPS was an 'agent' of Kodak; (2) a document produced by Atex entitled 'An Introduction to Atex Systems,' which describes a 'merger' between Kodak and Atex; (3) a statement in Kodak's 1985 and 1986 annual reports describing Atex as a 'recent acquisition[]' and a 'subsidiary . . . combined in a new division'; and (4) a statement in an Atex/EPPS document, 'Setting Up TPE 6000 on the Sun 3 Workstation,' describing Atex as 'an unincorporated division of Electronic Pre-Press Systems, Inc., a Kodak company.' They also refer generally to the fact that Atex's paperwork and packaging materials frequently displayed the Kodak logo." The court went on to hold: "Viewed in the light most favorable to the plaintiffs, these statements and the use of the Kodak logo are not evidence that the two companies operated as a 'single economic entity.'"

Thus, nothing raised by the Petitions is inconsistent with RCP&E's separate and independent corporate existence and control of the local rail service it will be providing, or suggests that RCP&E is the alter ego of GWI or any of its railroad subsidiaries.

IV. RCP&E has taken steps to minimize the effects on DM&E employees, and there will be no extraordinary or substantial impacts on labor.

With the adoption of 49 USC §10901(c) in 1995, there is no longer any discretionary basis for the Board to impose labor protection on an acquisition by a non-carrier even if there were unique or extraordinary harms to employees. Moreover, in this instance, it is clear that the proposed acquisition by RCP&E will not have any extraordinary or significant impacts on employees working on the DM&E West Lines. Despite having almost five months since the transaction was announced, and almost four months since the expected positions to be filled by RCP&E were posted, and over two months since the offer letters were sent to the bulk of the employees, the Labor Interests have not demonstrated any specific, unique or extraordinary harms that would indicate otherwise. The Board has determined that advance notice to employees is an effective way, outside of labor protection, to protect employees from the disruptions of a possible sale. *See Acquisition Exemption – Class I and II* (requiring for Class II transaction, a notice of intent, including description of impacts on labor, to be sent to labor unions with employees); and *Acquisition of Rail Lines under 49 USC 10901 and 10902 – Advance Notice of Proposed Transactions*, STB Ex Parte No. 562 (served September 2, 1997) (requiring for transactions over \$5,000,000, the advance posting of positions available). *See also Public Participation in Class Exemption Proceedings*, STB Ex Parte No. 659 (served October 19, 2006) (extending the notice periods for various exemptions, including those for transactions involving the creation of a Class I or Class II carrier). As

set forth in the Procedural and Factual Background above, RCP&E has complied with all of the advance notice requirements adopted by the Board in 49 CFR §1150.35 and 49 CFR §1150.32(e).¹⁸ RCP&E went beyond the requirements of the regulations and held four town hall meetings across South Dakota to explain in person its plans for the new railroad and the hiring process it intended to follow, and to respond to questions from DM&E employees. Every employee working on the DM&E West Lines had the opportunity to participate in the meetings and RCP&E estimates that over 190 employees attended the meetings. *See* Ovitt V.S., ¶ 3.

RCP&E believes that the interview process was extremely successful. As set forth in the Ovitt V.S., RCP&E originally identified 180 positions that would be available. RCP&E received resumes from 184 of the 243 employees¹⁹ that DM&E identified as working on the DM&E West Lines, and RCP&E interviewed all 184 of those applying for positions. There were 59 employees working on the DM&E West Lines who elected not to apply to RCP&E for a position. RCP&E extended offers to 162 of the 184 DM&E employees who applied and only 4 did not accept their offers.²⁰ The main reason why certain candidates were not extended offers was because there were not enough slots available in their craft. Ovitt V.S., ¶ ¶8, 9.

¹⁸ Employees were made aware of the possibility of a sale of the DM&E West Lines approximately a year earlier when CP discussed its strategic plan.

¹⁹ At the time the Transaction Agreement was signed, DM&E had identified 215 employees as working on the DM&E West Lines. By the time of interviewing and hiring, DM&E had updated the list to 243 employees (including seasonal and furloughed employees).

²⁰ RCP&E also received applications from 12 non-DM&E candidates. From these candidates, 4 were offered positions and 3 accepted. There were 8 candidates that were rejected.

Since the original posting in January, RCP&E has increased the number of positions it is seeking to fill to 187, an increase of 7 positions - primarily for operating personnel in the positions of engineer and/or conductor. Notice of the remaining and new positions has been provided to the employees working on the DM&E West Lines, including those who had not previously been extended offers of employment. RCP&E has notified current DM&E employees that they may apply for the additional positions even if they are not currently qualified for those positions and that if offers are made and accepted, RCP&E will provide training for employees that need it. Further, applicants who were not previously extended offers are being fast-tracked through the application process since they already have been interviewed.²¹ *Ovitt V.S.*, ¶13.

Although the Labor Interests make bold assertions about how employees might be affected, they have proffered no 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). The only “data” provided by the Unions are its indications that there are currently between 75 and 80 BMWED employees on the DM&E West Lines currently, and that there will be only 45 of such positions on the RCP&E. Unions’ Petition at 17-18. However, the Unions have provided no information regarding how many of the BMWED members applied for jobs with RCP&E or how many of those who applied were offered jobs. From its records, RCP&E believes that 39 members of BMWED (including seasonal

²¹ Two of the previously rejected applicants have since been offered employment in other crafts.

employees) did not apply for jobs with RCP&E, and that only 6 who did apply were not offered positions.²² No information was provided on the effects on employees in any of the other Unions. Additionally, the Unions acknowledge that some of the affected employees will be able to exercise their seniority and move to other positions on the DM&E. *Id.* 18-19. While the Unions complain that they will not be entitled to labor protection imposed by the Board, they do not discuss what protections they have or might receive under their existing collective bargaining agreements with DM&E.²³ Similarly, neither IAM nor SMART – Transportation has provided any specific evidence of harm - IAM indicated only that not all of its members are expected to secure jobs in their craft with RCP&E (IAM Petition at 2)²⁴, and SMART-Transportation did not even assert that its members are being adversely affected at all.

The Unions provide specifics about only *four* BMWED employees who will be affected - two who have accepted jobs with RCP&E, but who may earn less per hour because of a change in position, and two who have not been offered positions yet. Unions Petition at [18], G. Owen Verified Statement, ¶¶5, 7. While it is true that not all of the BMWED members who applied have been hired by RCP&E, and while it is true

²² RCP&E actually has approximately 54 maintenance of way/engineering slotted positions. Substantially all of those BMWED employees who applied for positions received offers. Ovitt V.S., ¶10.

²³ The harm to employees was more likely to be found “unique” in situations where operations of the selling carrier were not continuing. *Bay Line*, slip op at 15; *New England Central*, slip op at 28. Such is not the case here as DM&E will continue operating as a Class II carrier.

²⁴ IAM, while identifying how many overall DM&E employees that it represents, does not indicate how many it contends work on the DM&E West Lines or how many positions will remain on the 1,900 miles that DM&E will continue to operate.

that some may earn less on a per hour basis, RCP&E disagrees with the implication that employees will be worse off. RCP&E is offering substantially the same hourly rate of pay as DM&E for the same positions. Less than 5% of the DM&E employees have been hired for a “lower” position and thus will see a decline in their hourly rates. Conversely, some current DM&E employees will receive an *increase* in pay based on the position for which they have been hired. Additionally, all of the hourly employees are eligible to receive a safety bonus of up to 5% which, depending on performance, could serve to increase their pay and otherwise offset, in whole or in part, any decreases in pay. Employees’ years of service at DM&E and CP will be carried over in determining vacation benefits. RCP&E also offers a generous relocation package if employees are required to move; however, RCP&E does not believe that any of its hires will be required to relocate. Ovitt V.S., ¶11 and Exhibit A, and ¶12.

RCP&E also disputes the claim by BMWED that employees will see an increase in health care contributions and that coverage amounts are unknown. Unions Petition at [18], G. Owen Verified Statement, ¶8. RCP&E believes that the aggregate of its health care offerings is comparable to what DM&E is providing. There are a wider range of options and many employees will see a reduction in their contribution. A description of the plans and the costs were included in each offer letter so prospective employees know exactly what their benefits, and their cost, will be. Ovitt V.S., ¶11 and Exhibit A.

Thus, while a small number of DM&E employees who applied for jobs may not have received offers, or may be starting out at a lower rate of pay, the overall effect of the transaction on employees is insubstantial.

CONCLUSION

Quite simply, this proceeding involves an acquisition by RCP&E, a newly-formed non-carrier. As set forth above, the Labor Interests have not demonstrated that RCP&E was not formed for legitimate business purposes or for the exclusive purpose of avoiding labor protection or that GWI or the other carriers in its system should be considered as the alter ego of RCP&E. Accordingly, RCP&E requests that the Board find that the Labor Interests have not demonstrated that RCP&E's exemption should be revoked for the purpose of imposing labor protection contrary to the requirements of 49 USC §10901(a)(4) and §10901(c).

Respectfully submitted,



ERIC M. HOCKY
CLARK HILL PLC
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103
(215) 640-8500
ehocky@clarkhill.com

Dated: May 7, 2014

Attorneys for
Rapid City, Pierre & Eastern
Railroad, Inc.

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:

Erika A. Diehl-Gibbons
Assistant General Counsel
SMART – Transportation Division
(formerly United Transportation Union)
24950 Country Club Blvd., Suite 340
North Olmsted, OH 44070-5333

Joseph Guerrieri, Jr.
Carmen Parcelli
Guerrieri, Clayman, Bartos & Parcelli, PC
1900 M. Street, NW
Suite 700
Washington, DC 20036

Terence M. Hynes
Sidley Austin LLP
1501 K Street, NW
Washington DC 20005

Richard S. Edelman
O'Donnell, Schwartz and Anderson, P.C.
1300 L Street, N.W.
Suite 1200
Washington, DC 20005

Hon. Dennis Daugard
Office of the Governor
500 E Capitol Ave
Pierre, SD 57501

Hon. Tim Johnson
United States Senate
136 Hart Senate Office Building
Washington, DC 20510

Darin Bergquist, Secretary
South Dakota Department of
Transportation
Becker-Hansen Building
700 East Broadway Avenue
Pierre, SD 57501-2586

Hon. Kristi Noem
United States Congress
1323 Longworth House Office Building
Washington, DC 20515

Hon. Dave Heineman
Office of the Governor
P.O. Box 94848
Lincoln, NE 68509-4848

Nebraska Department of Roads
Attention: Rail & Public Transportation
Division
PO Box 94759
1500 Nebraska Highway 2
Lincoln, NE 68509-4759

Hon. Mark Dayton
Office of the Governor
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Tom Sorel, Commissioner
Minnesota Department of Transportation
Transportation Building, MS-100
395 John Ireland Boulevard
St. Paul, MN 55155-1899

Hon. Matt Mead
Office of the Governor
State Capitol
200 West 24th Street
Cheyenne, WY 82002-0010

John Cox, Director
Wyoming Department of Transportation
5300 Bishop Boulevard
Cheyenne, WY 82009-3340

Hon. John Thune
United States Senate
511 Dirksen Senate Office Building
Washington, DC 20510

Hon. Fred W. Romkema
State Capitol
500 East Capitol Ave.
Pierre, SD 57501

Hon. Corey W. Brown
500 East Capitol Avenue
Pierre, SD 57501

Hon. Brian Gosch
500 East Capitol Avenue
Pierre, SD 57501

Steve Conzet
Greater Rapid City Area Economic
Development Corporation
525 University Loop Suite 101
Rapid City, SD 57701

Mayor Gary Hendrickson
City of Belle Fourche
511 6th Avenue
Belle Fourche, SD 57717

Richard Jones
Bentonite Performance Minerals
3000 N. Sam Houston Parkway East
Houston, TX 77032

Sam Kooiker
City of Rapid City
300 Sixth Street
Rapid City, SD 57701-2727

Hon. David E. Lust
P.O. Box 8014
Rapid City, SD 57709

Hon. Mark Mickelson
29001 South Fifth Avenue
Sioux Falls, SD 57105

James W. Olson
Wilson Olson Nash Becker
P.O. Box 1552
Rapid City, SD 57709

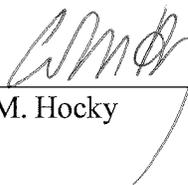
Linda Rabe
Rapid City Area Chamber of Commerce
P.O. Box 747
Rapid City, SD 57709-0747

Timothy Rave
South Dakota Senate
Legislative Post Office
500 East Capitol Avenue
Pierre, SD 57501

Billie H. Sutton
South Dakota Legislature
State Capitol
500 East Capitol Avenue
Pierre, SD 57501-5070

Benjamin L. Snow
Greater Rapid City Area Economic
Development Corporation
525 University Loop, Suite 101
Rapid City, SD 57701

Hon. Michael Vehle
132 North Harmon Drive
Mitchell, SD 57301



Eric M. Hocky

Dated: May 7, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35799

**RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT --
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION**

VERIFIED STATEMENT OF JOHN B. OVITT

I, John B. Ovitt, hereby state as follows:

1. I am the President of the newly incorporated Rapid City, Pierre & Eastern Railroad, Inc. ("RCP&E"). As such, I have been involved in planning the operational aspects of the proposed acquisition and start up of RCP&E operations.
2. RCP&E is a duly formed Delaware corporation that has its own independent employer identification number and corporate existence. RCP&E will also have its own accounts with the Railroad Retirement Board and with the Federal Railroad Administration. RCP&E will maintain its own books and records.
3. As one of the first steps following the announcement of the transaction on January 2, 2014, all DM&E employees who are currently working on the DM&E West Lines were invited to meet with me and with other representatives of RCP&E and DM&E at "town hall" meetings on January 15, 2014 in Brookings and Huron, South Dakota, and on January 16, 2014 in Pierre and Rapid City, South Dakota, to discuss the transaction and the positions that were expected to be available on RCP&E. Over 190 DM&E employees attended the meetings.

4. RCP&E posted a list of the 180 positions it anticipated for its initial employee roster at the workplaces of the DM&E employees.
5. The notice that was posted, along with the meetings, explained the positions and terms of employment that would be available and explained how DM&E employees could apply to RCP&E for employment.
6. As was explained to prospective employees, RCP&E is offering substantially the same hourly rate of pay as DM&E for the same positions. Additionally, employees' years of service at DM&E and CP will be carried over in determining vacation benefits. RCP&E also offers a generous relocation package if employees were required to move; however, RCP&E does not believe that any of its hires will be required to relocate.
7. RCP&E believes that the aggregate of its health care offerings is very comparable to what DM&E is providing. There are a wider range of options, and many employees will see a reduction in their contribution. A description of the plans and the costs were included in each offer letter so prospective employees know exactly what their benefits, and their cost, will be.
8. RCP&E originally identified 180 positions that would be available. RCP&E received resumes from 184 of the 243 employees that DM&E ultimately identified as working on the DM&E West Lines, and interviewed all 184 of those applying for positions. There were 59 employees working on the DM&E West Lines who elected not to apply to RCP&E for a position.
9. RCP&E extended offers to 162 of the 184 DM&E employees who applied, and only 4 did not accept their offers. The main reason why candidates were not extended offers was because there were not enough slots available in their craft.

10. In particular, RCP&E has approximately 54 maintenance of way/engineering slotted positions. Substantially all of those BMWED employees who applied for positions received offers.
11. The offer letters sent out to potential RCP&E employees were sent directly from RCP&E, on stationary with solely RCP&E's letterhead and signed by me as the President of RCP&E. *See* form of letter, with selected enclosures describing benefits, attached thereto as Exhibit A. Most of the offer letters were sent between February 25 and February 27, 2014. Additional offer letters were sent through March 10, 2014.
12. Less than 5% of the DM&E employees have been hired for a "lower" position and thus will see a decline in their hourly rates. However, some employees will receive an increase in pay based on the position for which they have been hired. Additionally, all of the hourly employees are eligible to receive a safety bonus based on results, of up to 5% which, depending on performance, could serve to increase their pay and otherwise offset any decreases in pay. Employees' years of service at DM&E and CP will be carried over in determining vacation benefits. RCP&E also offers a generous relocation package if employees were required to move; however, RCP&E does not believe that any of its hires will be required to relocate.
13. Since the original posting in January, RCP&E has increased the number of positions it is seeking to fill to 187, an increase of 7 positions - primarily for operating personnel in the positions of engineer and/or conductor. Notice of the remaining and new positions has been provided to the employees working on the DM&E West Lines, including those that had been previously rejected. RCP&E has indicated that current DM&E employees can apply for the open positions even if they are not currently qualified for those positions,

and that if offers are made and accepted, RCP&E will provide training for employees that need it. Previously rejected applicants are being fast-tracked through the application process since they have already been interviewed.

14. The DM&E West Lines do not connect with any other railroads that are controlled by RCP&E's parent company Genesee & Wyoming Inc. ("GWI"). As such, it will have its own local management and operating personnel.
15. RCP&E will hold itself out to provide rail service in its own name, and will have its own reporting marks, tariffs and interchange agreements with connecting carriers, including DM&E and BNSF Railway Company.
16. RCP&E has hired its own operating employees and a general manager dedicated to operations on the DM&E West Lines that will not be shared with any other railroads. RCP&E has also hired a local manager of sales and marketing, and an assistant vice president of marketing to grow business on the Lines.
17. Further, RCP&E has entered into its own contracts for separate and distinct office space, that is not in the vicinity of, and that will not be shared, with GWI or any of GWI's subsidiary railroads. RCP&E will be responsible for the risks and financial obligations arising from its operations.
18. RCP&E, like other GWI subsidiary railroads will receive certain administrative and corporate services from Genesee and Wyoming Railroad Services Inc. ("GRSI"), a subsidiary of GWI. All subsidiary railroads take advantage of and use GRSI services, which include corporate communications, legal and accounting services, and information technology (including website design and maintenance). By obtaining these services through GRSI, RCP&E like other railroads will get a greater level of services than it

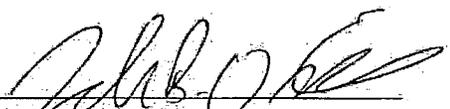
would be able to afford on its own. RCP&E which will be billed by GRSI for its services on an equitable basis, and at a rate that is less than if a third party provided the services.

19. It is estimated that RCP&E will begin operations with approximately \$60 million in revenue, sufficient to support its operations
20. RCP&E is planning to begin operations on or about June 1, 2014. RCP&E is registering with AAR for marks and preparing its tariffs for posting on or about May 9, 2014. RCP&E will have a separate tab on the GWI website that list contact information for RCP&E, and will link to RCP&E's tariffs.
21. Initially, RCP&E will be acquiring through the assignment of leases from DM&E, approximately 50 locomotives and 652 rail cars. Additionally, in part to handle the upcoming harvest, RCP&E has also made arrangements to purchase an additional 121 rail cars, and to lease approximately 2,200 rail cars, to supplement the rail cars that will be available for shippers on the lines. RCP&E is also expected to lease an additional 800 rail cars.

VERIFICATION

I, John B. Ovitt, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 7, 2014



John B. Ovitt, President
Rapid City, Pierre & Eastern Railroad, Inc.

EXHIBIT A

DRAFT OFFER LETTER

[contents of Exhibit A are Highly Confidential]