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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

GENESEE & WYOMING INC. –)	
CONTROL – RAILAMERICA, INC.)	Docket No. FD 35654
ET AL.)	

**RESPONSE OF CENTRAL CALIFORNIA RAIL SHIPPERS & RECEIVERS
ASSOCIATION TO APPLICANTS' RENEWED REQUEST FOR EXPEDITED
CONSIDERATION**

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Dated: November 15, 2012

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Central California Rail Shippers & Receivers Association (“CCRSRA”) hereby submits this Response to Applicants Genesee & Wyoming Inc.’s (“G&W”) and RailAmerica, Inc.’s (“RailAmerica”) (collectively “Applicants”) renewed request for expedited consideration included with Applicants’ October 26, 2012 Reply.¹

On Reply, Applicants request expedited Board consideration of the transaction,² asserting, *inter alia*, that “[no] commenting party contested the evidence” on competitive impacts; that any legitimate concerns raised “predate the Transaction” and are “historical” and therefore need not be carefully considered by the Board; that expedition will “minimize uncertainty”; that “burden[some]” and “complicated” financial reporting would be avoided through expedited approval; and that a new, “significant

¹ While CCRSRA does not believe that this response implicates the Board’s “reply to a reply” rules, out of an abundance of caution, CCRSRA has sought leave to file this Response in the accompanying Petition for Leave to File Response.

² The Applicants previously requested expedited consideration of this transaction prior to the statutory deadline of 180 days following the filing of their Application, but that the Board previously declined to adopt that request. *See* STB Decision served Sept. 5, 2012 at 6. (“*Sept. Decision*”). Applicants now seek a final Board Decision by December 10, 2012, with a decisional effective date by December 31, 2012.

increase” and “serious trend” in RailAmerica employee safety injuries necessitate that the Board expedite consideration. *See* Reply at 1, 3-4, 15, 34.

Because this transaction is already being considered on an expedited basis,³ and given the Applicants’ lack of meaningful response to customers’ legitimate concerns about the serious competitive impacts connected with the transaction, CCRSRA strongly disagrees with Applicants’ assertion that “[t]here is no reason for a lengthy review of the record.” *See* Reply at 3. It is clear that the important public interest issues raised by CCRSRA require close and careful scrutiny by the Board that should not be undermined through attempts at expedition at the expense of full and fair consideration of all of the pertinent issues raised.

A. Applicants’ Uncertainty/Consumer-Impact/Burden Allegations

Applicants assert that expedited consideration is needed because expedition will “remove the uncertainty” customers are experiencing awaiting a STB decision by allowing G&W to promptly “deploy its locally based, customer-oriented service to the RailAmerica railroads,” and because there is a “lack of anticompetitive effects.” *Id.* at 4, 34. Contrary to Applicants’ suggestions, expedited Board consideration, without full and fair consideration of connected customer issues, would actually create more, not less uncertainty and the real possibility of significant anti-consumer impacts.

In this proceeding, CCRSRA has established on the record, through detailed factual and expert witness testimony, un rebutted evidence about ongoing, newly

³ *See* 49 U.S.C. § 11325(c).

pending, and growing anti-consumer programs involving, *inter alia*, improper double and triple billing, illegal line surcharges, improper switch maintenance fees, and improper credit term and security deposits – with program impacts likely to be exacerbated post-transaction. *See* CCRSRA Op. Comments V.S. Littlefield, V.S. Del Papa, V.S. Dreo; V.S. Hoegemeier. Faced with this significant, unrebutted verified evidence, Applicants were faced with a very simple question: Will you reasonably address these practices in a manner that ensures that consumers and the public interest are adequately protected post-transaction? Applicants’ Reply revealed a very simple answer: No.

Nowhere on Reply do Applicants even attempt to meaningfully dispute CCRSRA’s evidence.⁴ Instead, Applicants’ strident and dismissive response simply labels such practices as “historical” or “pre-existing,” even though they do not dispute

⁴ Applicants’ do not dispute any of CCRSRA’s factual witness testimony. Also, their Reply witnesses only generally address Dr. Hoegemeier’s financial and economic testimony, and even then do not dispute his central points that, using established Board financial/debt analysis criteria, G&W’s fixed charge coverage ratio will increase substantially (by nearly 26%), forcing it to become more leveraged, that non-freight charges are built into the G&W pro-forma financial statements, and that such programs and practices can be expected to continue and be expanded post transaction, consistent with past similar transactions. Applicants simply call such testimony “exaggerated” asserting that the pro forma SEC filings used by Dr. Hoegemeier in his analysis are somehow inaccurate or unreliable, and are “not to be construed as an indication of prospective intentions.” *See* Reply at 21. However, Applicants themselves rely heavily on the same pro-forma financial statements in their evidence, the Board’s merger review rules rely on them, and so too do the Applicants in their forward looking SEC statements (*see, e.g.*, G&W’s Sept. 12 and Sept. 13 Prospectus Supplement (Form S-3)). Curiously, Applicants assert that G&W’s post-transaction debt level “is not even relevant” to the Board’s analysis (Reply at 20) even though the Board is required by statute to examine such matters. *See* 49 U.S.C. §11324(c) (“[w]hen the transaction contemplates a guaranty or assumption of payment of . . . fixed charges or will result in an increase of total fixed charges,” the Board must evaluate whether such obligations are “consistent with the public interest”).

that there are direct transactional market power impacts⁵ and that these programs are continuing and expanding.⁶

Applicants also assert that expedited consideration is in order and meaningful consideration is not necessary because CCRSRA's requested conditions are "micromanagement," "overly intrusive," "entirely unnecessary," and "unprecedented." Reply at 22. However, contrary to Applicants' hyperbole, CCRSRA's proposed conditions, including modest requests for meetings, a basic explanation of Applicants' anticipated post-transaction programs in areas where there is a clear threat of competitive

⁵ Applicants do not seriously dispute CCRSRA's evidence that there will be a growth in market power with respect to non-freight revenue programs post transaction, and their stated "gas station" example (*see* Neels Reply at 7) completely misses the point. This transaction clearly is not akin to "a single station in any single metropolitan area" where there are multiple gas station competitive alternatives. Instead, it entails bottleneck, monopoly railroads in defined regions controlled by a single holding company, with "control of all of the gas stations in a metropolitan area" – which even Applicants' witness acknowledges "would clearly seem to raise competitive concerns, and to create, at a minimum, short term opportunities for the exercise of market power." *Id.* Also, Applicants' new vague contentions about a lack of market power at the holding company level (*see id.* at 7-8) are otherwise refuted through recent public statements by company officers. *See, e.g.*, Presentation, RailAmerica, Inc. at JPMorgan Aviation, Transportation and Defense Conference – Final (Mar. 15, 2012) (RailAmerica CEO states that in 2008 the CFO and he alone came up with and created the new "non-freight" revenue programs that were "invented [through] a process called Value Sells, that we actually stole from McKinsey and – all from an article," which programs were aggressively implemented by holding company management across the RailAmerica systems, and which beginning on that "lovely day" began producing "high profit and probably 50% margin," resulting in "a very good success story for us") (webcast available at <http://investor.railamerica.com/phoenix.zhtml?c=66000&p=irol-EventDetails&EventId=4729262>; hard copy available through Wall St. J., Factiva).

⁶ For example, G&W's operating and service plan is predicated on continuation of the status quo, with each railroad operating as an "isolated island of service," with only "marginal changes to back office support functions," with no service plan changes and no labor force changes. Application Exhibit 15 at 7.

harm, modest Board post-transaction oversight and reporting, and holding Applicants to their record representations are clearly reasonable and conservative.⁷

To be clear, CCRSRA members do not seek or want “micromanagement,” they are simply seeking reasonable assurances and for G&W to actually commit to being the type of responsive, customer-focused railroad that it says it will be. Additionally, if these matters were truly only “pre-Transaction” or “historic” as Applicants claim,⁸ and if

⁷ On Reply, Applicants chose to largely ignore CCRSRA’s specific requests for conditions likely because they cannot meaningfully dispute that the conditions requested are responsive to the legitimate issues raised in CCRSRA’s comments concerning transactional impacts; are reasonable and feasible; are narrowly tailored to address the transaction’s effects; are consistent with conditions provided by the Board in past transactions; and produce net public benefits by mitigating the merger’s effects on CCRSRA members and their ability to reasonably engage in their businesses.

⁸ While the Board in past merger proceedings has sometimes declined to impose conditions to remedy certain pre-existing conditions with little nexus to the proceeding that are unlikely to be impacted by the transaction, that is not the case here where there exists uncontravened evidence of the imminent threat of continued consumer harm. Also, contrary to Applicants’ Reply arguments, the agency has been vigilant in ensuring that unfair pricing practices and related matters implicated by a transaction are fully addressed through appropriate conditions. *See, e.g., Canadian Nat. Ry. et al. – Control – Illinois Cent. Corp. et al.*, 4 S.T.B. 122, 153-161 (1999) (STB implements conditions holding applicants to various and specific representations made on the record; Board also retains jurisdiction to impose additional conditions as necessary to address unforeseen harms including unfair pricing practices; Board imposes condition even on “a preexisting situation with little nexus to the merger” where issue is “important[t]”); *Canadian Nat. Ry. et al. – Control – Wisconsin Cent. Transp. Corp. et al.*, 5 S.T.B. 890, 909-911 (2001) (STB implements extensive service assurance, reporting, and operational monitoring conditions, and holds applicants to all of their record representations); *CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 283, 367-71 (STB imposes East of Hudson competitive conditions addressing unconnected, pre-existing competitive conditions, because “[we] strongly believe that we must forcefully use this opportunity to restore a modicum of the competition that was [previously] lost”; STB requires applicants to meet with regional and local authorities and to establish a committee to promote growth of rail traffic to and from the Greater Buffalo area; STB holds applicants to their representations on numerous and specific areas including on

there was no risk of continuation and expansion of these programs post-transaction, there would be no reason for CCRSRA to be participating in this proceeding and seeking reasonable conditions, and there would be little reason for the Applicants to be strongly objecting to CCRSRA's reasonable requests. Applicants have been given ample opportunity to openly and meaningfully address CCRSRA's concerns, and unfortunately, thus far have instead chosen to largely ignore them. As "the instrument chosen by Congress to regulate interstate commerce in the public interest," and in the face of uncontested evidence of the nature brought by the CCRSRA, the STB has a special responsibility to address this matter, as "the right of the public must receive active and affirmative protection at the hands of the [STB]." *Aberdeen & Rockfish R.R. v. United States*, 270 F. Supp. 695, 711 (E.D. La. 1967).

Finally, Applicants' request for expedition based on their vague financial reporting "burden" contentions have been previously raised (*see* Applicants August 6, 2012 Petition at 4), they have provided no new legitimate reason for expedition based on any new reporting burdens, or even provided any detailed or compelling reporting burden explanation. Additionally, any impending end-of-year financial reporting burden issues are largely self-caused, as the applicable 180-day statutory review period was well known to the Applicants and the timing of the filing of the Application was completely under their control. Further, there is no reasonable public expectation of expedition, as G&W has informed its investors in its SEC filings that "GWI expects an STB decision on its plans for new investments and how the carrier will be managed and dispatched; STB orders significant post-transaction reporting requirements).

control application by February 6, 2013, which decision, if favorable, will become effective within 30 days thereafter and after which the RailAmerica operations can be consolidated with GWI's." See G&W SEC Form 8-K, filed September 5, 2012 at Item 8.01, "Surface Transportation Board Update."

B. Applicants' New Safety Contentions

Applicants provide another new factual basis which they contend requires expedited Board consideration of the transaction. Applicants allege that "RailAmerica has experienced a significant increase in the number of employees injured on its railroads" since the Application was filed, and that this "serious trend of increased injury activity" requires "prompt approval" of the transaction to allow G&W's "roll out its industry leading safety program." *Id.* at 4. While railroad safety is obviously a significant concern, Applicants' new safety contentions appear in large part to be a red herring⁹ and a blatant attempt to circumvent orderly Board consideration of the transaction and the legitimate concerns that have been raised by parties over transaction impacts.

Even assuming *arguendo* that it was true that there is a "serious trend" of recent RailAmerica accidents,¹⁰ neither Applicant attempts to explain how this safety

⁹ On Reply, and in their Application, Applicants confirm that RailAmerica's historical and *current* reportable injury rates are below the industry average, and, in fact, these injury rates have been highlighted by RailAmerica in each of its past acquisition proceedings as a reason for the Board to *approve* its short line railroad acquisitions. Additionally, while employees and unions are often active participants in Board merger proceedings, none have filed comments in this proceeding on safety issues, and neither has the Federal Railroad Administration ("FRA"), the federal agency with primary jurisdiction over railroad safety.

¹⁰ Such assertions have very recently been contradicted by company officers. See

issue has arisen; the relevant facts involved; on which lines it is occurring; why they waited until their Reply in this proceeding to raise the matter; and what, if anything, is currently being done to address the matter. Moreover, while Applicants repeatedly publicize G&W's "safety program," that program remains largely undocumented and only briefly described.¹¹ This transaction involves the integration of 45 new short line railroad properties, operating over 7,500 new route miles (larger in size than G&W), with 1,800 new employees. However, no detailed work force or operations safety plan has been submitted for the Board, the FRA, and the public to review to be adopted as a reasonable assurance of safety in executing the proposed transaction, and to maintain and improve safety at every step of the integration process.¹²

Additionally, Applicants' assertions on top-down, coordinated safety planning appear self-contradicting given their repeated contentions on the record on the hands-off approach of the holding company, with post-transaction short line operations, management, and decisionmaking to be conducted by "decentralized" and "locally-based management teams." Reply at 19. Given the unprecedented size and scope of this

Q3 2012 Genesee & Wyoming Inc. Earnings Conference Call (Nov. 5, 2012) (webcast at 30:40 et seq., available at <http://phoenix.corporate-ir.net/phoenix.zhtml?p=irol-eventDetails&c=64426&eventID=4854073>) (G&W's CEO lauds RailAmerica's safety performance, its programs, and its "significant" safety improvements, and remarks that "our intent is to extend and amplify" RailAmerica's safety programs.)

¹¹ See V.S. Hellmann at 2.

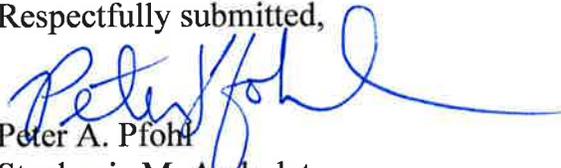
¹² The Board requires a well-developed Safety Integration Plan ("SIP") to be adopted in all merger transactions where the "Board concludes that a SIP is necessary in its proper consideration of the application or other request for authority." 49 C.F.R. § 1106.2. No SIP has been filed to date in this proceeding, even though this matter involves the integration of 100+ short line railroads under one holding company.

transaction,¹³ CCRSRA respectfully submits that the new safety concerns raised by the Applicants strongly suggest that the responsible answer here is to provide for more, and not less, agency scrutiny and oversight of this important transaction given the important customer and safety issues at stake.

CONCLUSION

CCRSRA members respectfully submit that the reasonable response here is not to allow the important consumer protection matters raised by CCRSRA to be swept under the rug by ignoring the problems and through expedited consideration, but to address them openly, thoroughly, and responsibly. The public interest requires no less.

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¹³ See, e.g., *Sept. Decision* (Vice Chairman Mulvey dissent) at 8 (the proposed transaction involves “more than 100 shortline railroads, operating in 37 states,” whose “magnitude is of regional or national transportation significance”).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served this 15th day of November, 2012, by first-class mail, postage pre-paid, or by more expeditious means, upon all Parties of Record in this Proceeding.


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