

Before the  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35654  
GENESEE & WYOMING INC.  
-CONTROL-  
RAIL AMERICA, INC., ET AL.

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REPLY TO MOTION TO ESTABLISH PROCEDURAL SCHEDULE

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August 16, 2012

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits this reply in opposition to the Motion to Establish Procedural Schedule (Motion), filed August 6, 2012, by applicants in the captioned proceeding.

Applicants are Genesee & Wyoming Inc. (GWI), and Rail America, Inc., et al. (RAI). Their 751-page application was filed August 6, 2012, simultaneously with their joint Motion for a procedural schedule.<sup>2/</sup>

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller road, Albany, NY 12205.

<sup>2/</sup> Two Additional contemporaneous filings are associated with the August 6 application. These are (1) Motion for Issuance of a Protective Order, and (2) Notice of Exemption (FD 35660) to exempt GWI Voting Trust and R. Lawrence McCaffrey from §11323 so as to acquire pre-approval control of RAI.

UTU is a collective bargaining representative for persons employed by several GWI/RAI carriers operating in New York and neighboring states, and elsewhere; and UTU is a collective bargaining representative for persons employed by the Class I carriers, such as CSX Transportation, Norfolk Southern Railway Company, Union Pacific Railroad Company, BNSF Railway Company, Kansas City Southern Railway Company, as well as the U.S. affiliates of the Canadian National and Canadian Pacific rail carriers, and jointly-owned carriers such as Consolidated Rail Corp.

UTU-NY has a strong interest in the proposed combination of GWI and rail carriers. Although the presence of a Class II carrier in the proposed transaction would allow for some employee protection, such would be most minimum, and inadequate to prevent substantial harm to employee interests.<sup>3/</sup>

#### Background

GWI and RAI control over 100 rail carriers, which operate throughout the U.S. and Canada.<sup>4/</sup> The rail lines for the majority of these carriers are believed to be spin-offs from the existing five major Class I rail carriers, or their major carrier predecessors, but with ownership of many of these GWI and RAI lines remaining with the Class I carriers. Typically, the GWI and RAI carriers "lease" their lines, from their larger connecting

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3/ 49 U.S.C. §11326(b). Wisconsin Central Ltd.-Acquisition Exem.-Union Pac. RR, 2 STB 218 (1997); Association of American Railroads v. Surface Transp. Bd., 162 F.3d 101 (D.C. Cir. 1998). See: Appl., at 23.

4/ The GWI/RAI application indicates 101 carriers (GWI with 60; RAI with 41). (App. 1,4). Two protestants indicate a higher 108 carriers. (Napa Valley RR Co. Reply, 8/9/12, at 3; Yreka Western RR Co. Reply, 8/9/12, at 3).

ers, under various arrangements, but often on a "user" or "per car" basis, with traffic usually interchanged with the parent major carrier, or its successor. In many instances, the GWI or RAI carrier is a "handling" rail carrier, with its stations listed in the major carrier tariff or directory, as well as in those for the GWI or RAI carrier itself. Each U.S. Class I rail carrier usually conducts annual or periodic meetings or conferences at which its "family" of affiliated short lines are present for collective discussions or planning. These gatherings generally are noticed in rail industry publications.

I. THE PROPOSED TRANSACTION IS WITHIN THE SCOPE OF 49 U.S.C. §11325(c).

Applicants contend that their proposed consolidation is a "minor" transaction governed by the expedited provisions of 49 U.S.C. §11325(d). The term "minor" is not in the governing statute; it is contained in the STB's rules.<sup>5/</sup> 49 CFR 1180.2(c). Applicants are wrong, as the proposed transaction is not "minor" and is not subject to §11325(d). The applicable provisions are those contained in 49 U.S.C. §11325(c). To be found minor, under §11325(d), the proposed transaction must not be of regional or national transportation significance. If a transaction is "significant," as here, the transaction is not "minor," and is governed by 49 U.S.C. 11325(c). A transaction is not significant if a determination can be made either (1) that the transaction clearly will not have any anticompetitive effects, or (2) any anticompet-

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<sup>5/</sup> The term "minor" is defined negatively, "A minor transaction is one which involves more than one railroad and which is not a major, significant, or exempt transaction. A "major" transaction is a control or merger involving two or more class I railroads. 49 CFR 1180.2(a).

itive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

The "clearly" standard is a high standard, and the STB's rules provide that the transaction is significant if neither (1) or (2) is satisfied. 49 CFR 1180.2(b)(2).

UTU-NY agrees with the view advanced by protestants Napa Valley RR, and Yreka Western RR, that the competition between holding companies which own or control Class III and Class II regional railroads is one class of relevant competition which in this instance (GWI/RAI) meets the national transportation significance standard, and that it cannot be said that the transaction clearly will not have any anticompetitive effects. (Napa Valley RR Reply, 8/9/12, at 2-4). UTU-NY will not burden the record with repetition on this score, and direct attention to additional arguments advanced in the joint reply by Winamac Southern Ry. Co. and US Rail Corporation, filed 8/15/12. Moreover, it is likely one effect of the proposed transaction would be for other short-line holding companies to consolidate or join the GWI/RA amalgam.

## II. THE TRANSACTION CLEARLY WILL REDUCE COMPETITION BETWEEN CLASS I CARRIERS.

Many, and perhaps a majority, of the 101 or 108 short-line carriers embraced in the GWI/RA transaction, are appendages to a Class I carrier, or other larger entity, which owns the short-line trackage and perhaps other facilities, in addition to serving as an interchange connector. Accordingly, placing the large number of GWI and RA carriers under common control can be expected to result in a reduction in competition between Class I rail carriers. For

example, two Class I carriers may compete for traffic served by different connecting carriers (GWI and RAI), such that the GWI/RAI transaction would have an anticompetitive effect upon the Class I carriers. The important competition affected could be market competition and geographic competition, and not restricted to direct carrier-to-carrier competition.

It is ironic that the instant GWI/RAI transaction comes at time when the STB has under consideration various rulemaking proposals directed to competition between railroads. UTU-NY sees the instant application as contrary to these other efforts.

CONCLUSION

The STB should deny the Motion to Establish A Procedural Schedule, and should find the proposed transaction to be significant. The STB should issue a schedule with the maximum times contemplated by 49 U.S.C. §11325(c).

Respectfully submitted,



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August 16, 2012

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.



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