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THOMAS F. MCFARLAND

October 5, 2012

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 35654, *Genesee & Wyoming Inc. -- Control -- Rail America, Inc., et al*

Dear Ms. Brown:

Hereby transmitted is a Joint Request For Conditions for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Replicants

TMcF:kl:1564\efSTB4

BEFORE THE
SURFACE TRANSPORTATION BOARD

GENESEE & WYOMING INC. --) FINANCE DOCKET
CONTROL -- RAIL AMERICA, INC., *et*) NO. 35654
al.)

JOINT REQUEST FOR CONDITIONS

WINAMAC SOUTHERN
RAILWAY COMPANY
P. O. Box 745
Kokomo, IN 46903

US RAIL CORPORATION
7846 Central Avenue
Toledo, OH 43617

By: THOMAS F. McFARLAND
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 mcfarland@aol.com

Their Attorney

DUE DATE: October 5, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

GENESEE & WYOMING INC. --)
CONTROL -- RAIL AMERICA, INC., *et*) FINANCE DOCKET
al.) NO. 35654

JOINT REQUEST FOR CONDITIONS

DESCRIPTION OF CONDITIONS SOUGHT

Pursuant to the Board's procedural decision in this proceeding served September 5, 2012, WINAMAC SOUTHERN RAILWAY COMPANY (WSRY) and US RAIL CORPORATION (USRP) hereby jointly request that if the control application is approved, such approval be conditioned as follows:

(1) that Rail America affiliate Toledo, Peoria and Western Railroad Corporation (TPW) grant trackage rights to WSRY-USRP over its rail line between Milepost 71.5 at or near Van and Milepost 74.5 at or near Logansport, IN, i.e. reinstate the terminated Trackage Rights Agreement, or negotiate a new agreement; and

(2) that TPW grant trackage rights to WSRY-USRP over its rail line between Milepost 74.5 at or near Logansport and a point of connection of TPW's rail line to a rail line of CSX Transportation, Inc. (CSXT) at or near Reynolds, IN; and

(3) that Rail America affiliate Central Railroad Company of Indianapolis (CERA) grant trackage rights to WSRY-USRP over its rail line between Kokomo and Michaelsville, IN.

Attached to this Request for Conditions as Appendix 1 is a map that illustrates the rail lines that are involved in this Request for Conditions.

Justification for imposing those conditions is contained in the attached verified statement of Mr. Gabriel Hall, President of USRP, and in the Legal Argument that follows that verified statement.

VERIFIED STATEMENT OF GABRIEL D. HALL

My name is Gabriel D. Hall. I am President of US Rail Corporation (USRP). USRP is a Class III rail carrier subject to the jurisdiction of the Surface Transportation Board (STB). I am familiar with the proposed control of Rail America, Inc. (RA) by Genesee & Wyoming, Inc. (GWI).

As here pertinent, in 2009 USRP leased approximately 58.89 miles of rail line from Winamac Southern Railway Company (WSRY) and Kokomo Grain Co., Inc. (KGC). Those rail lines are identified in Appendix 1 of this Joint Request. WSRY owns the Bringhurst Line, and the Kokomo Line. KGC owns the Amboy Line. USRP is the operator of all of those rail lines.

As noted in Appendix 1, USRP's lease included incidental trackage rights over a 3-mile rail line owned by RA affiliate Toledo, Peoria & Western Railroad Corporation (TPW) between Van Junction and Eighteenth Street Yard in Logansport, IN. The TRA was in effect for over ten years and was never an issue until RA lost its operating lease. The reason for termination were nothing more than an act of retaliation for losing the operating lease. RA has demonstrated its bitterness and has exercised its economic control by asserting anti-competitive actions to punish USRP/WSRY. WSRY used those trackage rights to connect its Bringhurst Line to its Kokomo Line. An Indiana Court has recently held that the trackage rights agreement between WSRY and TPW does not permit WSRY to assign its trackage rights to USRP.

Prior to USRP's lease of the WSRY and KGC rail lines, those lines had been leased to RA affiliate Central Railroad Company of Indianapolis (CERA). Upon expiration of the Lease Agreement between WSRY-KGC and CERA, WSRY and KGC chose not to renew that lease. Instead, the rail lines were leased to USRP beginning in 2009.

In December, 2008, I met with representatives of RA in an attempt to discuss the transition from CERA to USRP as operator of the WSRY-KGC rail lines. I was immediately met with CERA's refusal to cooperate and to communicate in regard to interchange agreements and trackage rights. USRP was told that RA considered WSRY rail lines as three separate lines, i.e., (1) the Kokomo Line; (2) the Bringhurst Line; and (3) the Amboy Line. The RA representatives very clearly stated that RA would not cooperate in the transition, and that the Logansport trackage rights agreement was being reviewed to determine whether it could be terminated.

USRP requested a modified rate on traffic moving between Kokomo and Marion, IN with interchange to CERA at Michaelsville, IN. RA's response was "we are raising CERA's rates." Between January and April of 2009, CERA raised its rates in some cases to \$2,500 per car for transportation of a hazardous material that it had transported for \$450 per car. In addition, CERA generally raised rates significantly on traffic to or from points on USRP. That resulted in a significant amount of rail traffic being diverted to truck transportation. Several USRP customers stated that they could not afford CERA's increased rates and poor CERA service on Kokomo-Marion traffic.

By raising CERA's rates substantially, RA hoped to drive USRP off WSRY-KGC rail lines by driving off USRP's traffic, especially hazardous materials traffic. Almost 30 percent of 2008 WSRY-KGC traffic left the WSRY-KGC rail lines by 2011.

In February, 2009, RA took the position that WSRY's trackage rights in Logansport cannot be assigned to USRP. The practical effect of that was that WSRY is prevented from

operating between its Kokomo Line and its Bringhurst Line. Thereupon, TPW began to assess a high intermediate switching charge which had the effect of significantly raising the cost of rail shipment over truck shipment, and driving business away from the rails.

Numerous requests were made to RA to justify the high CERA and TPW rates, but RA never answered. On one occasion, a RA sales manager said that he never could be cooperative to WSRY-USRP because of the "situation", and that he was required to submit all rate requests to RA headquarters.

Both connecting rail carriers that provide the gateway for WSRY-USRP to Class I rail carrier connections are owned by RA (CERA and TPW). As a result, RA exerts substantial economic control over all rates for customers of WSRY-USRP. Thus, RA can continue to assess exorbitant rates and provide inadequate rail service, thereby causing customers of WSRY-USRP to stop shipping by rail.

RA has clearly shown that it will use its market power to raise rates to thwart WSRY-USRP. RA has demonstrated that it will assess punishment rates as a means to control rail traffic to or from WSRY-USRP's Kokomo and Bringhurst Lines.

RA has reduced its service to just one or two days per week at CERA-USRP and TPW-USRP interchanges. In some cases, the service was reduced to one day out of ten, which caused serious congestion and missed delivery times. That poor service has driven additional traffic off the rails. Several customers have complained directly to RA about that poor service. RA has promised to improve its rail service, but has never acted on that promise.

This harmful rate and service situation will materially worsen if GWI is permitted to control RA. A consolidated GWI-RA would be able to exert huge market power vis-a-vis smaller Class III rail carrier connections. For that reason, if GWI is permitted to control RA, conditions should be imposed to protect the interest of small Class III rail carriers such as WSRY-USRP. I describe such conditions below.

1. USRP should be given trackage rights over the 3-mile rail line in Logansport to permit WSRY-USRP to connect WSRY's Kokomo and Bringhurst rail lines; and
2. USRP should be given trackage rights over the consolidated GWI-RA between Logansport and point of connection to CSX Transportation, Inc. at Reynolds, IN in order to permit a direct connection between USRP and CSX, thus enabling USRP customers to ship via CSX, which therefore was prevented as a result of exorbitant rates and inadequate service when TPW is in the route; and
3. USRP should be given trackage rights over the consolidated GWI-RA between Kokomo and Michaelsville in order to access Norfolk Southern Railway at nearby Marion, IN, thus enabling USRP customers to ship via Norfolk Southern which theretofore was prevented as a result of exorbitant rates and inadequate service when CERA is in the route.

The trackage rights identified above should be imposed for a minimum of 50 years because that length of term would enable USRP to fend off any anti-competitive efforts by the consolidated company. Other commercial aspects of the trackage rights can be negotiated between WSRY-USRP and GWI-RA, with resort to the Board to establish terms, if necessary.

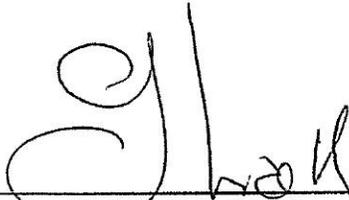
The consolidated GWI-RA should be ordered to act reasonably when establishing rates and providing service for traffic to or from points on WSRY-USRP.

The conditions here sought would preserve competition between WSRY-USRP and GWI-RA. If the consolidated company sees the benefit of making its rates and service more competitive on traffic to or from points on WSRY-USRP, WSRY would have no need to implement the conditions here sought. However, if rates and service remain non-competitive, WSRY-USRP would have a means to remain competitive for the benefit of its customers. It is those customers and the public interest who would benefit from the conditions here sought.

VERIFICATION

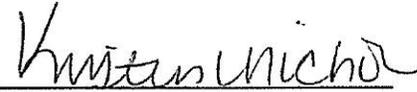
STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

GABRIEL D. HALL, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.

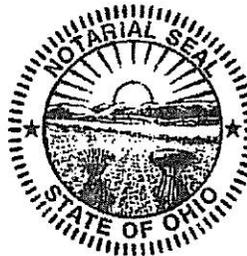


GABRIEL D. HALL

SUBSCRIBED AND SWORN to
before me this 28th day
of September, 2012.



Notary Public



KRISTEN L. NICHOLSON
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 02-15-15

My Commission Expires: 2/15/15

ARGUMENT

As here pertinent, it is provided in 49 U.S.C. § 11324(c) that:

. . . The board may impose conditions governing the transaction, including . . . requiring the granting of trackage rights and access to other facilities . . .

The Board has consistently taken the position that its authority to impose conditions to approval of a carrier consolidation is quite broad. Recently, a Court of Appeals stated, in the context of the Board's approval of a "minor" transaction, that the Board's conditions authority can be broader than its approval authority. *Village of Barrington v. STB*, 636 F.3d 650, 662 (D.C. Cir. 2011) (emphasis in original).

As a "minor" transaction under the Board's rules, the proposed GWI control of Rail America is *sui generes*. Nothing close to that transaction has been before the Board that will result in the consolidated carrier:

- (1) controlling 111 rail carriers;
- (2) managing 15,100 miles of track;
- (3) handling 1,835,000 carloads per year;
- (4) employing 4,300 persons;
- (5) operating 1,000 locomotives and 22,100 railcars; and
- (6) generating \$1.38 billion in annual revenue.

Though perhaps minor under Board rules, the proposed control is an unprecedented major shortline consolidation and a transaction of nationwide significance. Thus, the proposed transaction would result in a conglomerate of unprecedented size and strength, i.e., the substantial equivalent of a Class I rail carrier.

The competitive effect of creation of a powerful conglomerate of that nature is properly measured not from consideration of the extent to which GWI rail carriers and RA rail carriers connect with each other or overlap as alleged by the applicants, but instead from consideration of the significantly increased market power and economic strength that the consolidated GWI-RA will be able to exert on the smaller Class III rail carriers with whom they connect. The consolidated rail company will have the unquestioned ability to abuse its status through application of wholesale non-competitive freight rates with connecting carriers. The new company can repeat their USRP/WSRY conduct against other carriers who choose not to give in to their self-serving tactics. WSRY and USRP are smaller Class III rail carriers who connect with affiliates of Rail America at Logansport, IN (TPW) and Kokomo, IN (CERA).

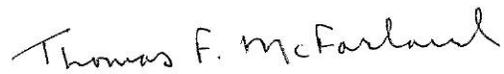
The attached verified statement of Gabriel D. Hall, President of USRP, identifies rate and service actions of TPW and CERA that are having a serious adverse effect on WSRY-USRP and their customers. Probably the most egregious of RA's anti-competitive behavior is its refusal to permit USRP to operate over the 3-mile rail line at Logansport in order to unify WSRY's Kokomo and Bringhurst rail line. The adverse effect of RA's actions would be substantially exacerbated as a result of the added market power and materially increased economic strength of a consolidated GWI-RA.

The conditions advocated by WSRY-USRP are tailored to provide WSRY-USRP with the means to avoid the seriously harmful effects of harsh treatment by the consolidated GWI-RA that Mr. Hall has identified in his statement. Thus, those conditions are very much in the public interest, and should be imposed by the Board in any decision that approves the proposed control.

Respectfully submitted,

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Kokomo, IN 46903

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7846 Central Avenue
Toledo, OH 43617

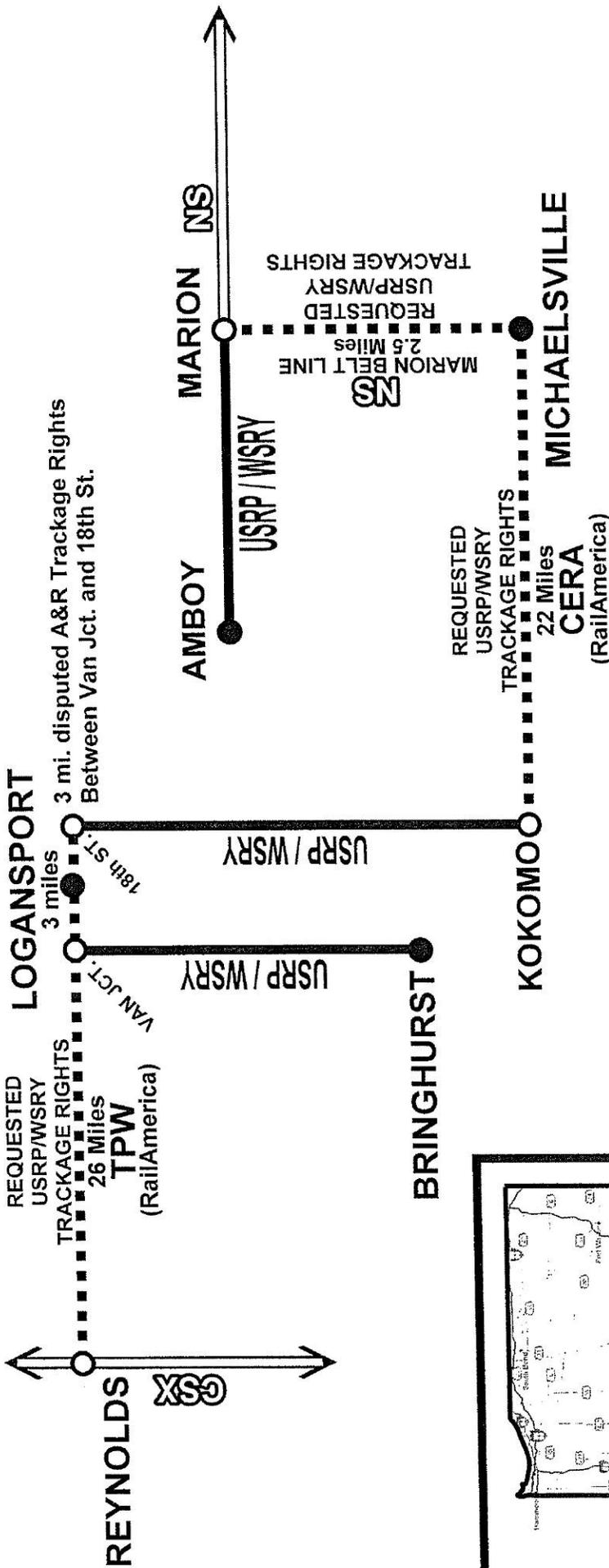


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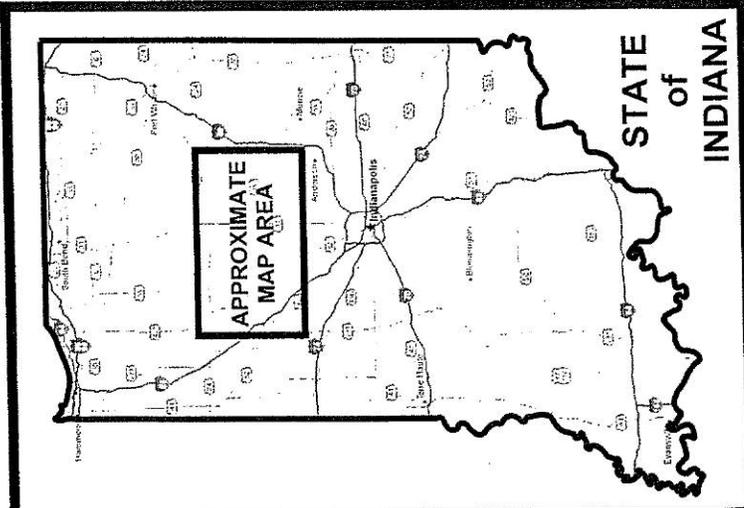
Their Attorney

DUE DATE: October 5, 2012

NOT TO SCALE



USRP/WSRY TRACKAGE MAP KOKOMO AND AMBOY RAIL LINES



CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, I served the foregoing document, Joint Request for Conditions, by first-class, U.S. mail, postage prepaid on all parties of record on the service list.

Thomas F. McFarland

Thomas F. McFarland