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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35177**

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**GENESEE & WYOMING INC. —  
CONTROL EXEMPTION —**

**THE ALIQUIPPA & OHIO RIVER RAILROAD CO.; THE COLUMBUS AND OHIO  
RIVER RAIL ROAD COMPANY; THE MAHONING VALLEY RAILWAY COMPANY;  
OHIO AND PENNSYLVANIA RAILROAD COMPANY; OHIO CENTRAL RAILROAD,  
INC.; THE PITTSBURGH & OHIO CENTRAL RAILROAD COMPANY; OHIO  
SOUTHERN RAILROAD, INC.; YOUNGSTOWN & AUSTINTOWN RAILROAD, INC.;  
THE YOUNGSTOWN BELT RAILROAD COMPANY; AND THE WARREN &  
TRUMBULL RAILROAD COMPANY**

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**REPLY OF GENESEE & WYOMING INC.  
TO COMMENTS OF DANIEL VAN EPPS**

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David H. Coburn  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 429-3000

Attorney for Genesee & Wyoming Inc

November 19, 2008

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Pursuant to 49 C.F.R. § 1104.13, Genesee & Wyoming Inc. (“GWI”) submits this reply to the Comments filed by Daniel Van Epps on November 3, 2008 in response to GWI’s October 1, 2008 Petition for Exemption seeking control of a group of Ohio railroads<sup>1</sup> In his Comments, Mr Van Epps, an individual who (it appears) is not himself a railroad, rail shipper or person otherwise engaged in the rail business, seeks various forms of extraordinary relief, including a restructuring of the ownership of certain rail lines and the manner in which rail business is conducted on those and other lines in Ohio. He seeks such relief even though this proceeding

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<sup>1</sup> Mr Van Epps styles his filing as a Motion to Compel, apparently because he seeks an order from this Board compelling GWI and Summit View to address a variety of conditions, none of which are transaction-related, through a major restructuring of railroad relationships and ownership. His filing, however, constitutes comments on the Petition for Exemption filed in this proceeding and thus GWI will refer to his filing as “Comments.”

involves no more than a request by GWI for an exemption to allow GWI to assume control of a group of ten railroads (the "Ohio Central Railroads") from their current owner, Summit View, Inc. ("Summit View" or "SVI") Mr. Van Epps apparently believes that this control proceeding offers an opportunity to remedy what he perceives (he offers no evidence that any railroads, shippers or others share his concerns) as six pre-existing situations that he claims raise competitive access or other efficiency issues that he would like to see remedied.

Mr. Van Epps is off the mark in apparently believing that this control proceeding offers an opportunity for the Board to restructure railroad relationships to suit his vision of how the Ohio Central Railroads and the State of Ohio might better organize the rail lines and railroads that he addresses. The conditions he seeks have nothing whatever to do with GWI's assumption of control, and therefore would not be appropriate conditions for the Board to impose, even if there were merit to any of his unsupported claims, which there is not. In fact, Mr. Van Epps has not come forward with any factual evidence to support his various allegations, or demonstrated that any shipper or traffic will be disadvantaged by GWI's control of the Ohio Central Railroads.

Mr. Van Epps also does not address the fact that, as reported in GWI's Petition, the Ohio Rail Development Commission ("ORDC") consented without condition to GWI's ownership of one of the Ohio Central Railroads as to which he seeks several conditions, the Columbus and Ohio River Railroad Company ("CUOH").<sup>2</sup> Nor does Mr. Van Epps suggest how the various line sales he proposes, including the transfer of lines to the State of Ohio, would be funded or indicate whether there is any ORDC support, or other support in the shipper or rail community, for the radical restructuring of line ownership and operation that he seeks. The Board should

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<sup>2</sup> GWI reported at page 7 of its Petition that on September 11, 2008, ORDC gave the consent needed under an ORDC/CUOH Agreement for GWI to replace Summit View as the entity that controls CUOH.

promptly decline his invitation to intrude itself into the way in which the Ohio Central Railroads are currently organized and should instead proceed to grant GWI's Petition for Exemption.

**I. Background and Legal Standard**

An examination of the posture of GWI's filing in this docket will illustrate both the standards the Board must apply in granting the petition, and Mr Van Epps' misunderstanding of the nature of the transaction.

**A. GWI's Petition**

GWI's October 1 Petition, filed pursuant to 49 U.S.C. § 10502, seeks an exemption to permit it to acquire control, through a stock transaction with the owner of Summit View, over ten Class III railroads currently controlled by that entity. GWI has requested expedited action on that Petition. Summit View was, until the transaction at issue here, wholly owned by Jerry Joe Jacobsen. Summit View, in turn, owned all the shares of the ten Ohio Central Railroads. In the transaction at issue, GWI purchased from Jerry Joe Jacobsen all of the shares of Summit View, obtaining indirect control over the Ohio Central Railroads.<sup>3</sup> Although the transaction can be expected to bring certain benefits identified in the Petition, GWI has no intention to modify or restructure the operations of the Railroads. As stated in the Petition, "GWI does not anticipate making any material changes in the scope or nature of the railroads' operations, or of the maintenance of their lines." Petition at 6.

For example, the GWI transaction will not result in the merger of any of the Railroads or in any other form of consolidation. Contrary to Mr Van Epps' apparent assumption, the entities sought to be controlled by GWI will continue to own and/or lease and operate their individual

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<sup>3</sup> As indicated in the Petition, the transaction was consummated prior to the receipt of Board approval. Voting trusts were employed in order to protect GWI from violation of the statutory control requirements pending a Board decision.

assets in the same manner as prior to transaction. In other words, GWI will step into the shoes of Summit View, rather than into the shoes of the operating railroads. This transaction is not about changes in individual railroad operations or agreements to which they are party, but rather about a mere change in the entity controlling the railroads.

**B. Mr. Van Epps Does Not Challenge the Issuance of the Requested Exemption**

Because this transaction involved a change in control, the Board has jurisdiction to regulate this transaction under 49 U.S.C. § 11323 *et seq.* and 49 C.F.R. Part 1180. Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. Part 1121, GWI filed a petition in order to obtain from the Board an exemption of the transaction from the regulatory requirements.<sup>4</sup>

As explained in the Petition, the Board is *required* to issue the exemption when the conditions are met:

[T]he Board, to the maximum extent consistent with this part, *shall* exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title, and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power

49 U.S.C. § 10502(a) (emphasis added). Addressing the essentially identical predecessor statute, the District of Columbia Circuit stated that where the agency “properly finds the conditions to be present, it has *no choice* but to grant an exemption.” *Coal Exporters Ass’n of U.S., Inc. v. United*

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<sup>4</sup> As explained in the Petition, GWI filed a petition because it was unclear whether it was entitled to use the class exemption that the Board has issued for some transactions. Petition at 8.

*States*, 745 F.2d 76, 82 (D.C. Cir. 1984) (emphasis added), *see also Lake State Ry Co. -- Abandonment Exemption—Rail Line in Otsego County, MI*, STB Docket AB-534 (Sub-No. 3X) (served July 16, 2007). The Petition explained why the GWI transaction met the standards of Section 10502 and should be deemed exempt from the Board's regulation. Petition at 7-11

Mr. Van Epps makes no effort to demonstrate that the exemption standards are not met. In fact, he ignores the standards altogether. As the Board has previously observed in similar situations: "Because the concerns raised. . . do not address the specifics of SEI's petition for exemption or the factors we must weigh in considering whether to grant the exemption, there is no remedy we can afford him in this case." *Southeastern Int'l Corp—Abandonment Exemption—In Wharton County, TX*, STB Docket AB-462 (Sub-No. 2X) (served August 6, 1999). Rather, what Mr. Van Epps seeks are unusual conditions that would essentially re-cast the entire transaction. For reasons stated below, the Board should not grant any of those conditions.

## **II. The Conditions Requested by Mr. Van Epps are Unrelated to the Transaction and Therefore Unjustified**

In his Comments and transmittal letter, Mr. Van Epps makes clear that he does not purport to have hard facts to back up his multiple and confusing allegations. He writes: "The opinions and information obtained from public sources provided herein is to the best of my knowledge true and accurate, *although some data is or may be dated and may not reflect the current situations as they may be, and thus should require further field verification.*" Transmittal letter at unnumbered 2 (emphasis added), *see also*, e.g., Comments at 3 ("The Neilston Connector is apparently a couple thousand feet of track that connects the very west end of the PRL to the Columbus downtown area CSX and NS lines ."); Comments at 6 ("STB apparently assigned CSX the Neilston Connector upon Conrail's conveyance to CSX and NS"); Comments

at 22 (“The current SVI Southern Division subsidiaries apparently operate under three different business models.. .”); Comments at 33 (“CUOH reportedly hired a contractor to remove some of the 890 Belden Brick Lead, 893 Stub, and/or 889 Wickes Lumber spur, but they also removed the U S. 36 grade crossing and all tracks beyond that including the 891 Belden Brick #1 and 892 Belden Brick #2 apparently by mistake, and none have been replaced”), Comments at 35 (“An appraisal may have been conducted when Conrail sold the PRL to Caprail I in 1992”).

Mr Van Epps is thus not clear on the facts. However, one fact is abundantly clear: *his allegations have nothing to do with the transaction at issue in this proceeding*

It is well-established that the Board will not impose conditions in a control transaction that are unrelated to the transaction:

The Board has broad authority to impose conditions in railroad control transactions under 49 U.S.C. 11324(c). However, the Board’s power to impose conditions is not limitless, the record must support the imposition of the condition at issue. Moreover, *there must be a sufficient relationship between the condition imposed and the transaction before the agency*, and the condition imposed must be reasonable.

*CSX Corp et al —Control and Operating Leases/Agreements—Conrail, Inc et al*, STB Finance Docket No 33388, 1997 WL 600074 at \*2 n 2 (served Oct 1, 1997) (emphasis added) In a later decision in the same docket, the Board rejected relief that a party had requested, stating that “the relief M&E seeks has nothing to do with the Conrail Transaction, as it is not addressed to any harms that were caused or exacerbated by the Conrail Transaction.” *CSX Corp et al —Control and Operating Leases/Agreements—Conrail, Inc et al*, STB Finance Docket No 33388 (served Oct. 20, 2004) (quoting prior decision to effect that Board “will not impose conditions to remedy pre-existing conditions that are unlikely to be exacerbated by the transaction”)<sup>5</sup>

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<sup>5</sup> See *Erie-Niagara Rail Steering Committee v STB*, 247 F.3d 437 (2<sup>nd</sup> Cir. 2001) (affirming STB’s use of its conditioning power to address transaction-related concerns.)

The Board recently reiterated its standard for imposing conditions in STB Finance Docket No 35087, *Canadian National Railway Company And Grand Trunk Corporation Control -- IJ&E West Company*, 2008 STB LEXIS 220 \*10, n.2 (served Apr. 25, 2008), where the Board held that, "there must be a sufficient nexus between the condition imposed and the transaction before the agency, mitigation is not imposed to correct *pre-existing* conditions, and the condition imposed must be reasonable." And most recently the Board denied a condition seeking to extend two pre-existing agreements, observing that, "We do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation " STB Finance Docket No 35081, *Canadian Pacific Railway Company, Et Al --Control--Dakota, Minnesota & Eastern Railroad Corp . et al .*, 2008 STB LEXIS 549 (served Sept 30, 2008)

Here, Mr Van Epps fails to identify how the change in control GWI requests will cause any competitive or other harm To the contrary, all of the "harms" alleged by Mr Van Epps -- and GWI does not agree that there are any competitive or other problems warranting regulatory attention -- are patently pre-existing and thus unrelated to this transaction.

### **III. The Extraordinary Relief Mr. Van Epps Seeks is Unwarranted**

Mr. Van Epps asks the Board to impose six extraordinary and unprecedented conditions on the GWI control transaction The first four would involve a forced sale and re-organization of rail lines in Ohio to re-create the competitive situation of the Panhandle Rail Line as he claims it existed in years past The fifth seeks to have the Board compel the creation of an altogether new subsidiary to operate the Panhandle Rail Line. And the sixth seeks (among other relief) to have the Board compel officials of the State of Ohio to perform an audit on rail infrastructure in that state

Mr. Van Epps offers no information on the operating, financial or other implications of the conditions he seeks to have imposed It is not clear where the funding would come from to

support the various line sales, new businesses and audits he describes. However, the Board need not reach these problems with his proposals since none of those proposals are related to this transaction and thus none would be an appropriate condition to impose on GWI's planned control of the Ohio Central Railroads<sup>6</sup>

**A. Neilston Connector**

The Neilston Connector is a short stretch of track that connects the former Panhandle Rail Line (PRL) to downtown Columbus. The thrust of Mr Van Epps' allegation is that, by controlling the sole means of access to CSX and NS rail lines in Columbus, GWI will be able to limit access. He thus seeks a Board order compelling the conveyance of the Neilston Connector to either ORDC or Caprail I so that it can be fully integrated into the PRL to ensure unimpeded rail access between the PRL and the Columbus rail network.

The situation to which his proposed line sale condition is directed is no different whether GWI or Summit View is the parent of the railroad (CUOH) that owns the Neilston Connector. In other words, the GWI control transaction leaves this Agreement, including the provisions governing access to the Neilston Connector, just as it is today. Thus, no transaction-related remedial action is warranted.

It also bears note that the ORDC/CUOH agreement that governs the operation of the PRL does not, as Mr Van Epps claims, "permit" CUOH to admit other users to access the Neilston Connector, but rather provides for access to joint users of the PRL. Section 5B of the ORDC/CUOH Agreement (Attachment 3 to Mr. Van Epps' Comments) gives ORDC the right to

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<sup>6</sup> The issues raised by Mr. Van Epps rest on his unconfirmed and often confusing factual allegations. The absence in this Reply of a point by point refutation of any particular factual assertion by Mr. Van Epps should not be taken as a tacit agreement that the facts are as he alleges.

determine whether other carriers will be joint users of the line. If ORDC permits joint use, CUOH "will" provide access to Neilston for those carriers through appropriate interchange agreements.

Mr. Van Epps seeks here, and in the other requests described below, to substitute an entirely different transaction for the one that was agreed upon by the parties. In addition to the lack of any justification for these conditions, he offers no legal basis on which the Board could exercise sweeping authority to re-write the deal that the parties have reached or to broadly re-structure rail ownership and control relationships in Ohio. And Mr. Van Epps' overlooks the fact that the ORDC has previously approved, without condition, GWI's assumption of ownership of the CUOH in connection with the transfer of ownership provisions of an ORDC/CUOH agreement.

**B. Columbus-Newark Division**

Mr. Van Epps contrasts a situation that existed years ago in which the C-N Division had multiple tracks facilitating multiple carrier operations with the current situation in which there is a single track with CUOH as the sole operator. As already noted, the transaction at issue in this proceeding will have no bearing on the status quo. Mr. Epps acknowledges this, noting that the current ownership situation "will remain even after the G&W buyout, continuing the aforementioned issues." Comments at 10-11. Mr. Epps' proposal to change the ownership structure on the C-N Division is therefore not transaction-related, but again reflects no more than his wish as to how ownership and business relationships might be restructured.

Currently, CUOH owns 50% of the line, which it operates on its own behalf, and the remaining 50% is owned by Caprail (which is an entity controlled by ORDC), and operated by CUOH. Mr. Van Epps' proposal is to require CUOH to sell its 50% to Caprail/ORDC, and have 100% of the lines operated by CUOH alone pursuant to the existing agreement. Under that

proposed solution, CUOH remains the sole entity operating on the Division. It is not clear how his proposal – which *decreases* the number of owners and leaves the same number of operators – could remedy any market defects, even if such defects existed (which they do not). In addition, Mr Van Epps does not explain how the sale would be funded or indicate that there is governmental or public support for his proposal

**C. Morgan Run-Trinway Region**

Mr Van Epps targets Ohio Central Railroad lines that he claims have become so integrated under a common parent that they cannot stand on their own to adequately serve certain shippers. Comments at 15 (“Because of the integrations neither subsidiary’s line can now stand alone independently to serve those and other regional customers feasibly and efficiently”). He names several shippers allegedly affected by this lack of independence, but he offers no evidence that any of these shippers have suffered any harm or favor the relief he seeks.

Once again, Mr Van Epps has failed to identify how his proposed solution to the alleged service problems he identifies has anything to do with this transaction. His complex “solution” speaks for itself in that regard.

I therefore request that STB compel 1) SVI and/or G&W to convey the OHCR line segment between OHCR MP 110.5 at Morgan Run to MP 127.75 at Trinway at a fair market price to either ORDC or Caprail I and have ORDC or Caprail I fully integrate the segment into the PRL proper to be governed under the current ORDC-CUOH Operating Agreement, 2) SVI and/or G&W to terminate the southern end of the OHCR proper at OHCR MP 110.5 at Morgan Run where it interchanges with the PRL, and extend the northern terminus of the OSRR proper over the OHCR main line north to OHCR MP 127.75 at Trinway where it interchanges with the PRL, 3) ORDC and future PRL assigns to grant G&W and its future assigns trackage rights over the PRL segment between PRL MP 110.5 at Morgan Run to MP 127.75 at Trinway and over the OHCR segment between OHCR MP 110.5 at Morgan Run to MP 127.75 at Trinway for seamless access between OHCR and OSRR subsidiary lines to ensure all parties enjoy unimpeded rail access on both the PRL and OHCR Morgan Run-Trinway segments and

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to those segment's customers as a condition of the G&W's proposed buyout of SVI's Southern Division subsidiaries.

The proposed forced realignment of rail ownership and relationships, typical of the kind of relief Mr. Van Epps seeks, is offered with no credible explanation of why this type of broad-brush relief should be imposed on GWI as a consequence of GWI's proposed assumption of control, and no evidence that ORDC supports his position. Since the issues he raises are pre-existing circumstances, and given the absence of any evidence that there is really a problem to solve here, Mr. Van Epps cannot sustain his position. The Board should summarily reject his sweeping request.

**D. Carman Connecting Track**

Mr. Van Epps seeks to have the exemption conditioned on a transfer of the Carman Connecting Track to either ORDC or Caprail I so that it can be integrated into the PRL or the Piney Fork Line and governed so as to allow unimpeded rail access between those lines. He also seeks compliance with the Board's regulations governing the construction of a rail line.

Access to the Carman Track has nothing to do with the GWI transaction. Mr. Van Epps is again seeking to address pre-existing conditions that are unrelated to this transaction. And again he offers no discussion of how his proposed transfer of track would be funded, and no evidence of public or other support for his proposal.

**E. Separate GWI subsidiary**

Mr. Van Epps requests that the Board require a new GWI subsidiary to be created to own and maintain the PRL line, while allowing other carriers to operate over the line. He goes into six pages of detail about the way in which the new entity would maintain the line (see pages 26-31 of his Comments). However, he fails to offer a credible explanation of why, as a consequence of GWI's assumption of control of the Ohio Central Railroads from Summit View, GWI should

be required to create a new rail subsidiary. In fact, he expressly acknowledges that, “The same SVI-PRL fiscal issues [which he alleges justify a new subsidiary] will continue under the new G&W ownership and administration, but then on a worldwide scale.” Comments at 25

Mr. Van Epps does not address the substantial administrative costs and time burden associated with establishing a new subsidiary. Further, his confusing justification for doing so – to address alleged issues arising from the operation of different business models – does not warrant the type of re-ordering of corporate relationships he demands. In addition, Mr. Van Epps cites no authority for the extraordinary proposition the Board could compel the formation of a new PRL subsidiary to operate the lines.

#### **F. Audit of rail infrastructure**

Mr. Van Epps requests that the Board compel CUOH and SVI to identify PRL infrastructure that has been altered, removed or liquidated over a period of many years and compel the State of Ohio Auditor to conduct various audits and appraisals relating to the PRL and lines owned or controlled by ORDC. Mr. Van Epps provides no transaction-related justification for this unusual request and does not explain the basis on which the Board could require a state agency to undertake such an audit. Moreover, it is doubtful that the Board has authority to order the State of Ohio to conduct audits, even if it were so inclined. *See Printz v United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

#### **IV. Conclusion**

Fundamentally, Mr. Van Epps is asking the Board to disrupt existing private agreements and to establish a new structure for the operation of the Ohio Central Lines. For the foregoing reasons, GWI requests that the Board deny his requests and promptly issue an order exempting GWI’s acquisition of Summit View and its proposed control of the ten Ohio Central Railroads

from regulation under 49 U.S.C. § 10502. Doing so expeditiously will allow the voting trusts to be dissolved and allow GWI to attain control of the Railroads so that the benefits of its transaction can be attained as soon as possible.

Respectfully submitted,



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David H. Coburn  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 429-3000

Attorney for Genesee & Wyoming Inc.

November 19, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19<sup>th</sup> day of November 2008 served a copy of the foregoing reply on Mr Van Epps by first class mail, postage prepaid.

A handwritten signature in black ink, appearing to read "David H. Coburn", written over a horizontal line.

David H. Coburn