

ORIGINAL

Before the

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SURFACE TRANSPORTATION BOARD

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November 18, 2019
Part of
Public Record

Docket No. FD 36326

BROOKFIELD ASSET MANAGEMENT, INC, and DJP XX, LLC-
CONTROL EXEMPTION-GENESEE & WYOMING, INC., ET AL.

PETITION FOR RECONSIDERATION
AND/OR PETITION TO REVOKE

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November 18, 2019

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Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY), pursuant to 49 CFR 1115.3-4, submits this petition for reconsideration of the decision by the Surface Transportation Board (STB, or Board), dated October 28, 2019 , served October 29 (7pp.), in the captioned cause, which determined that the notice of exemption filed July 9, 2019 (211pp.), by Brookfield Asset Management, Inc. and its affiliate (Brookfield), to acquire Genesee & Wyoming, Inc. (GWI), had not been shown to undermine applicability of the 49 CFR §1180.2(d)(2) class exemption process for the

^{1/} New York State Legislative Director for SMART-Transportation Division, with offices at 35 Fuller Road, Albany NT 12205.

exemption, thus allowing the exemption to take effect. (Decision, 4,6).^{2/} The STB nevertheless conditioned its decision to require Brookfield and its affiliate remain subject to the STB's earlier directive for updates regarding the status of FCIUS^{3/} review, and provide an update within seven days after notified of the outcome of such review. (Decision, 5). 84 Fed. Reg. at 58800.

This petition also embraces an alternative (and/or) petition to revoke the STB's Notice of Exemption, newly decided sua sponte by the STB on October 28, 2019, served October 29, 2019 (4pp.), simultaneously (but separately), following release of the earlier aforesaid STB decision now subject to petition for reconsideration., publishing Brookfield's original notice of exemption which notice of exemption had been filed July 9, 2019.^{4/}

Decisional Background

The STB published actions provide many of the factual and legal matters, but certain additional information is necessary to an accurate understanding of the issues, argument, and actions:

1. Official Notice. Relevant material has become available subsequent to the September 5, 2019 closure of the evidentiary record, the due-date set in the STB's procedural schedule, to govern its expedited proceeding, served July 22, 2019 (2pp.).^{5/} These items should be received not necessarily for the truth of their contents, but for reference as background not ordinarily

^{2/}The text of the Board's decision is published at 84 Fed. Reg. 58798. (Nov. 1, 2019).

^{3/} Committee on Foreign Investment in the United States. 50 USC 4565(l)

^{4/} The text of the Board's new action is published at 84 Fed. Reg. 58801 . (Nov. 1, 2019).

^{5/} The text of the Board's order is published at 84 Fed. Reg. 36157. (July 26, 2019).

available at the STB offices or library facilities: Congressional Research Service, The Committee on Foreign Investment in the United States (CFIUS)(October 23, 2019); U.S. Dept. Of Treasury: Sheet: Proposed CFIUS Regulations to Improve FIRRMA (Sept. 17, 2019); U.S. Dept. Of Treasury: Summary of Public Stakeholder Briefings on Proposed Regulations Implementing FIRRMA by Senior Treasury Officials (Sept. 27, 2019).

GWJ's SEC Form 10-Q for the quarterly period ended September 30, 2019, recently filed, should be given official notice, in part, for its overview of current operations, at p. 31. The circled matter is attached, in Appendix 1..

2. July 22 Decision. The STB did not initially institute a proceeding to consider the Brookfield-GWI notice of exemption, filed July 9, 2019, pursuant to the Board's class exemption regulations. Although the Board's class exemption rules require that notice to the public be given within 16 days of the Brookfield July 19, 2019 filing, by publication in the Federal Register, the Board declined to do so until after its service of the October 29, 2019 action permitting the July 9, 2019 Brookfield exemption notice to become effective. The required notice form is set forth in the Agency's exemption regulations. The published notice must provide considerable details, concerning the proposed transaction, due dates for service of protests or other comments to the Board, service of comments upon applicant(s), and other information. 49 CFR 1180.4(g).^{6/}

However, rather than issuing and publishing the standard Federal Register notice of exemption, the Board on July 22, 2019, issued a decision (2pp), stating Brookfield had filed a notice under the class exemption to acquire GWJ. The Board's July 22 decision gave a single-

^{6/} Brookfield's July 9, 2019 exemption filing, at p.1, opening paragraph, specifically directed attention to §4(g) for the agency's guidance.

page, three-sentence, description of the proposed transaction, followed by a recitation of Brookfield's statement the proposed transaction falls within the class exemption set forth at 49 CFR §1180.2(d)(2), because (I) the GWI railroads do not connect with any rail line owned by its affiliate or Brookfield, (ii) the proposed transaction is not part of a series of anticipated transactions that would connect any railroad owned or controlled by Brookfield or its affiliate with any GWI Railroad, or that would connect any of the GWI Railroads with other; and (iii) the proposed transaction does not involve a Class I carrier. (Decision, 7/22/19, at 1). 84 Fed. Reg. at 36157 (July 26, 2019).

The STB announced in its July 22 order, that the agency is considering whether the class exemption is appropriate (emphasis supp.) for the transaction, citing 49 USC 10502(d). To provide sufficient time to consider the issues, the Board ruled the exemption will not become effective pending further order of the Board, citing its action in FD 36279, SJRE-R.R. Series-Exemption Under C.F.R. §1150.31-Rail Line in Harris Cty., Tex. (Apr. 5, 2019).^{7/} 84 Fed. Reg. 36157. (July 26, 2019).

In addition, to the extent the transaction is subject to review by CFIUS, the STB's July 22, 2019 action directed Brookfield and its affiliate to provide updates regarding the status of such review, and an update within seven days after notification of the outcome. (Decision, 7/22/16, at 1-2), 84 Fed. Reg. at 36157.

3. September 27 Decision. The STB on September 27, 2019, approved the motion (2pp.) by Brookfield and affiliate, filed September 24, 2019, for a protective order concerning updates for

^{7/} Additional citations are given in the STB's further decision, served June 6, 2019, in that proceeding.

the status and outcome of the CFIUS review proceeding, claiming highly confidential, competitively sensitive, and commercially sensitive information regarding the CFIUS review process and the financial arrangements associated with the transaction at issue. The STB's Office of Proceedings summarily stamped its approval.^{8/}

4. October 29 Decision. The STB's October 29, 2019 decision (7pp.), the subject of this petition for reconsideration, at the outset, stated that Brookfield and affiliate (applicants), would remain subject to the Board's direction to provide periodic updates regarding the status of review being conducted by CFIUS. The Board's decision, throughout, continually makes reference to CFIUS. (Decision, at 1, para. 1; 2, para. 3; 4, para. 2; 5, para. 4). 84 Fed. Reg. at 58799, 58800. The Board makes the astounding conclusion the overall transaction is subject to CFIUS approval. (Decision, 4), \84 Fed. Reg. at 58800:

“...the overall transaction is also subject to CFIUS approval.”

The source for the STB's statement of required CFIUS approval is the footnote reference to Brookfield August 16, 2016 Comment, at p. 16. (Decision, 4fn.12). 84 Fed.Reg. 58800 n.11.

The Board's decision deals with issues raised by various parties, and response thereto by the Brookfield interests (Decision 2-4), but the STB concludes that the comments submitted do not undermine the applicability of the 49 CFR §1180.2(d)(2) process. The STB finds that the three applicable criteria are met:

- (I) the railroads would not connect with each other or any railroads in their corporate family,

^{8/} It is perhaps noteworthy, to the contrary, the CFIUS confidentiality rule excepts information or documentary material which may be relevant to any administrative or judicial action or proceeding.⁵⁰ U.S. 4565(c).

(ii) the acquisition or continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family, and

(iii) the transaction does not involve a Class I carrier.

In response to certain objectors to the notice of exemption, the Board's decision states that the applicability of §1180.2(d)(2) to control of carriers outside the U.S. is not within the Board's jurisdiction, and that international foreign market competition is likewise outside Board jurisdiction, citing 49 USC §10501(a); 11323(a). (Decision, 5). 84 Fed. Reg. at 58000..

Board Member Oberman commented he believed the transaction meets the requirements of the Board's regulations, and that the comments have not undermined applicability, but questions whether it is appropriate for such major transactions to be eligible under such regulations. (Decision, 6-7). 84 Fed. Reg. at 58800-58801).

5. October 29-Second Decision. On October 29, 2019, following service of the decision now subject to reconsideration, the STB published and served public notice of the Brookfield notice of exemption, which Brookfield had filed earlier with the Board on July 9, 2019. There is no change in the agency's docket number, FD 36326. The new STB notice is dated October 28, served October 29, published at 84 Fed. Reg. 58801 (Nov. 1, 2019), The public can file petitions to revoke at the Board, with service of any pleadings upon counsel for applicants. The STB served its October 29, 2019 new Notice of Exemption (4pp.) upon all parties who had participated, in the cause now under reconsideration.

ARGUMENT

This pleading embraces two proceedings, where the STB has split a single filing by applicants (July 9, 2019), into sections. The first is stated to involve the applicability of the transaction under the agency's class exemption regulations; the second involves whether it is appropriate to process the transaction under the class exemption.

The first matter is raised by the first phase of FD 36236, involved in this petition for reconsideration; the second matter is raised by the second phase of FD36236, involved in this petition to revoke. If the October 29 decision(7pp.) is set aside and the cause reopened for reconsideration on the present record or for further pleadings, the petition to revoke should be dismissed, without prejudice.

I. THE DECISION SHOULD BE SET ASIDE AND REOPENED FOR FINDINGS REGARDING AN APPROPRIATE PROCEEDING.

The Board did not give its standard public notice following Brookfield 's 211-page July 9, 2019 filing. Instead, the Board questioned whether use of the class exemption would be appropriate for this transaction. The transaction was termed "by far the largest and most geographic diverse collection of railroads..ever to be processed as a class exemption."^{9/} The Board's July 22, 2019 decision, establishing a schedule, stated the agency was considering whether use of the class exemption is appropriate for this transaction, supra at 4-6. 84 Fed. Reg., at36157.(July 26, 2019).

^{9/} (Decision, Board Member Oberman, at 6). 84 Fed. Reg. at 84 Fed. Reg. 58800-58801.

Although the STB's July 22, 2019 procedural decision announced it sought comments whether use of the class exemption was appropriate, (Decision.84 Fed Reg. 36157(July 26. 2019), the October 29, 2019 decision ignored the appropriate question, and substituted as an unintended issue, whether the class exemption was applicable to the transaction. (Decision 4). 84 Fed. Reg. 58800. (Nov. 1, 2019).

The Board should set aside the October 29, 2019 decision, and determine whether the class exemption is here appropriate to the class exemption. As between applicable and appropriate, the exemption statute, 49 USC 10502(b) & 10502(d) employs the term appropriate throughout.^{10/}

Moreover, the objectors to the proposed transaction have been deprived of due process by the Board's false notice, and were not given fair notice. Moreover, the Board's switch in terms of the proceeding was without adequate (or any) explanation..

II. FCIUS DOES NOT "APPROVE" THE TRANSACTION; THE STB CANNOT DEFER NATIONAL SECURITY MATTERS TO FCIUS

A. Approval. STB asserts that the overall transaction is subject to CFIUS approval. This statement is not correct. FCUIS is concerned with "national security," 50 USC §4565, et seq. The STB has certain national defense obligation.under the rail transportation policy. 49 USC 10101(4). Moreover, it is noteworthy that CFIUS is a multi-agency with seven voting members, and two non-voting ex officio members, none of whom are designated the Secretary of Transportation. The voting members are the secretaries of Treasury, Homeland Security,

^{10/} It is of note that concurring STB Member Oberman recognized the importance of appropriate for class exemptions of this magnitude (Decision 6.). 84 Fed. Reg. at 58800-58801.

Commerce, Defense, State, and Energy, and the Attorney General. The two non-voting members are the Secretary of Labor(ex-officio), and the Director of National Intelligence (ex officio). 50 USC 4565(k)(2). ^{11/}

In essence, the STB in its October 29 decision stating the “overall” transaction is subject to FCIUS, is wholly improper, as well as to delegate national defense, and perhaps other functions, to CFIUS. But the basis for the STB’s statement apparently does not come by its reading of the statutes; rather, STB cites only a Brookfield pleading in this proceeding. (Decision, 5n.12). There is no foundation to the Brookfield statement. The attention of FCIUS is directed to national security related matters. The agency does not “approve” the transaction; it can negotiate mitigation agreements, but it does not “approve” transactions of this sort. It merely may issue a finding there are no unresolved national security issues with the transaction thatares the subject of a notice or report. Where a voluntary notice is filed with CFIUS, any non-action by the agency is a “safe harbor” the best a party can expect, such that CFIUS cannot reopen its review of that specific transaction.

B. Rail Transportation Policy. The STB has a directive to ensure the development and continuation of a sound rail transportation system with effective competition to meet the needs of the public and the national defense. 49 USC 10101(4). This duty is not a meaningless command to be taken over by CFIUS. A reviewing court has vacated and remanded a rail class exemption for failure, among other matters, to adequately evaluate national defense concerns under the rail transportation policy. Illinois Commerce Com’n v. ICC, 787 F.2d 616, 630-31

^{11/} Provision is made for the heads of other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.

(D.C. Cir. 1986).

The STB should reopen its own proceeding to consider national security and defense. STB action should follow, rather than precede CFIUS review, particularly inasmuch as CFIUS has power to negotiate mitigation measures. 50 USC §4565(l). It has not been unusual in recent years for acquiring corporate entities to sell or dispose of some part of an acquisition to adequately pay down debt acquired by a purchase; such matters should not evade or influence STB evaluation if otherwise required.

The so-called "Byrd Amendment" to CFIUS procedures arose as a result of considerable controversy over the proposed foreign acquisition of ports by Dubai Ports World. Here, GWI subsidiaries and joint ventures provide rail service at more than 40 major ports (Appendix 1). STB participation in review of rail service should prove helpful.

III. THE STB SHOULD INCLUDE FOREIGN CARRIERS, AND FOREIGN COMPETITION IN DECIDING THE EXEMPTION.

The STB's decision failed to evaluate and render findings concerning control of another carrier outside the U.S., STB's decision claiming such is not within the STB's jurisdiction, and does not make an entity into a rail carrier. Similarly, the Board ruled the same non-regulation applies to the transportation between the U.S. and a foreign market.

The STB's October 29 decision misunderstands the objections by protesters to the Board's failure to consider GWI's ownership or operation of foreign carriers, or transportation occurring outside the U.S., the Board's decision asserting lack of jurisdiction, supra, at 7. (Decision, 5). 84 Fed. Reg. at 58800..

First, the STB has jurisdiction over rail rates, joint or otherwise, involving transportation

between the U.S. and adjacent foreign countries, such as the U.S. and Canada or Mexico. This is of long standing For example, see: News Syndicate Co. v. New York C.R., 275 U.S. 179 (1927); Lewis-Simas -Jones v. Southern P. Co., 283 U.S. 654 (1931); Great Northen v. Sullivan, 294 U.S. 458 (1935); Porter Co. v. Central Vermont Ry., 366 U.S. 1961; Canada Packers, Ltd. v. Atchison, T. & S.F. Ry., 385 U.S. 182 (1966).

The international joint rail-ocean transportation rates are subject to STB and/or FMC regulation. Commonwealth of Pennsylvania v. ICC, 561 F.2d 278 (D.C. Cir. 1977).

Moreover, the issue is not merely whether U.S. agencies have jurisdiction over foreign carriers engaged in commercial ventures, or joint transportation with U.S. carriers, for U.S. class exemption regulation, but also whether such ventures are to be considered by U.S. regulators in imposing regulation upon the U.S. carrier participants.. Here, the STB's decision has closed its eyes on the real world, erroneously claiming lack of jurisdiction to even look and render findings on reality.

On reopening of the October 29 decision, the agency is to examine GWI's world-wide interests as part of the overall transaction.

CONCLUSION

The STB should grant reconsideration for its 7-page decision served October 29, 2019, and reopen for findings and conclusions that the proposed transaction is not appropriate for the class exemption. If the agency should deny reconsideration, it should institute a proceeding to revoke the exemption noticed in the second 4-page October29, 2019 notice of exemption.

Respectfully submitted,



GORDON P. MacDOUGALL
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Washington DC 20036

November 18, 2019

Attorney for Samuel J. Nasca

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.

Washington DC

I



Gordon P. MacDougall

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
FORM 10-Q**

(Mark One)

☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the quarterly period ended September 30, 2019
or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from _____ to _____
Commission File Number 001-31456

GENESEE & WYOMING INC.
(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of
incorporation or organization)



20 West Avenue, Darien, Connecticut 06820
(Address of principal executive offices)(Zip Code)
(203) 202-8900
(Registrant's telephone number, including area code)

06-0984624

(I.R.S. Employer
Identification No.)

Securities registered pursuant to Section 12(b) of the Act:

<u>Title of Each Class</u>	<u>Trading Symbol</u>	<u>Name of Each Exchange on Which Registered</u>
Class A Common Stock	GWR	New York Stock Exchange (NYSE)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. ☒ Yes ☐ No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). ☒ Yes ☐ No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	☒	Accelerated filer	☐
Non-accelerated filer	☐	Smaller reporting company	☐
		Emerging growth company	☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).

☐ Yes ☒ No

Shares of common stock outstanding as of the close of business on October 31, 2019:

<u>Class</u>	<u>Number of Shares Outstanding</u>
Class A Common Stock	57,037,678
Class B Common Stock	2,072

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS.

The following discussion should be read in conjunction with our consolidated financial statements and related notes set forth in this Quarterly Report on Form 10-Q and our 2018 Annual Report on Form 10-K. Our consolidated financial statements were prepared in accordance with accounting principles generally accepted in the United States (U.S. GAAP).

When comparing our results of operations from one reporting period to another, it is important to consider that we have historically experienced fluctuations in revenues and expenses due to acquisitions and divestitures, changing economic conditions, commodity prices, competitive forces, changes in foreign currency exchange rates, rail network issues and congestion, the ability to attract and retain skilled workers, one-time freight moves, fuel price fluctuations, customer plant expansions and shutdowns, sales of property and equipment, derailments and weather-related conditions, such as hurricanes, cyclones, tornadoes, high winds, droughts, heavy snowfall, unseasonably hot or cold weather, freezing and flooding, among other factors. In periods when these events occur, our results of operations are not easily comparable from one period to another. Finally, certain of our railroads have commodity shipments that are sensitive to general economic conditions, global commodity prices and foreign exchange rates, such as steel products, iron ore, paper products, lumber and forest products and agricultural products, as well as product specific market conditions, such as the availability of lower priced alternative sources of power generation (coal) and energy commodity price differentials (crude oil and natural gas liquids) or congestion at ports (intermodal). Other shipments are relatively less affected by economic conditions and are more closely affected by other factors, such as winter weather (salt) and seasonal rainfall (agricultural products). As a result of these and other factors, our results of operations in any reporting period may not be directly comparable to our results of operations in other reporting periods.

When we discuss foreign exchange impact, we are referring to the change in our results due to the change in foreign currency exchange rates. We calculate foreign exchange impact by comparing the prior period results translated from local currency to United States dollars using current period exchange rates to the prior period results in United States dollars as reported. Constant currency, which is a non-GAAP measure, reflects the prior period results translated at the current period exchange rates. When we discuss results from existing operations or same railroad operations, we are referring to the change in our results, period-over-period, associated with operations that we managed in both periods (*i.e.*, excluding the impact of acquisitions and divestitures).

Overview

We own or lease 119 freight railroads worldwide that are organized in eight operating regions with approximately 8,000 employees and 3,000 customers. The financial results of our eight operating regions are reported in the following three distinct segments:

- Our North American Operations segment includes six regions (Coastal, Midwest, Northeast, Southern, Western and Canada) that serve 42 U.S. states and four Canadian provinces and include 113 short line and regional freight railroads with more than 13,000 track-miles.
- Our Australian Operations segment serves New South Wales, the Northern Territory and South Australia and operates the 1,400-mile Tarcoola-to-Darwin rail line. Since December 1, 2016, the Australia Region has been 51.1% owned by us and 48.9% owned by a consortium of funds and clients managed by Macquarie Infrastructure and Real Assets (MIRA).
- Our U.K./European Operations segment is led by Freightliner Group Limited (Freightliner), the United Kingdom's (U.K.) largest rail maritime intermodal operator and second-largest freight rail provider, as well as regional rail services in Continental Europe.

Our subsidiaries and joint ventures also provide rail service at more than 40 major ports, rail-ferry service between the U.S. Southeast and Mexico, transload services, contract coal loading, and industrial railcar switching and repair. As more fully described in Note 13, Segment Information, to our Consolidated Financial Statements set forth in "Part I Item 1. Financial Statements" of this quarterly report, the results of operations of the foreign entities are maintained in the respective local currency and then translated into United States dollars at the applicable exchange rates for inclusion in the consolidated financial statements. As a result, any appreciation or depreciation of these currencies against the United States dollar will impact our results of operations.