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BEFORE THE SURFACE TRANSPORTATION BOARD

Re: **Docket No. FD36326**

Invitation for Comments on a Proposed Exemption under 49 C.F.R. § 1180.2 (d)(2)

BROOKFIELD ASSET MANAGEMENT, INC. AND DJP XX, LLC – CONTROL EXEMPTION – GENESEE & WYOMING, Inc., ET AL.

ATTN: Chairwoman Ann D. Begeman;
Vice Chairman Patrick J. Fuchs;
Office of Proceedings Allison C. Davis;

Dear STB Leadership,

We are a shareholder of Genesee & Wyoming Inc. GWI (indirect owner of GWI Railroads) writing in response to your invitation for public comments on the proposed exemption of Brookfield Asset Management (BAM) affiliates transaction involving a potential change in control (Docket No. FD36326).

The 49 C.F.R. § 1180.2 (d)(2) exemption is not applicable to the transaction. As our submission details there is ample and specific evidence that adverse competitive impacts are both likely and substantial as a direct result of the proposed transaction. Moreover, the negative safety, environmental and decapitalization outcomes will impact over 106 rail carriers and the communities in which they operate.

There are multiple grounds for concern regarding the suitability of the acquiror to operate almost 30% of the short line last mile critical railroad infrastructure in the United States. Any potential benefits that the applicants might claim (e.g. access to capital) are directly contradicted by documented evidence of decapitalizing rail assets thus creating anticompetitive pressures and significant safety and efficiency costs and damages.

The management and the Board of directors of GWI have expressly stated that they have initiated discussions with large financial buyers like Brookfield rather than strategic rail operators in part because “the likelihood that a potential sale involving such investors would have fewer regulatory or commercial challenges”¹. The acquiror has filed misleading statements with STB in order to avoid regulatory scrutiny.

We support the STB in its detailed and thorough approach in investigating the transaction prior to making an exemption decision. Brookfield Asset Management is a pyramid-controlled structure that is illegal in the United States and should not be allowed to operate critical rail and port access.

¹ Form PREM14A, Preliminary proxy statement relating to a merger or acquisition, filed by GWR with the Securities and Exchange Commission August 5, 2019, page 38

1. Railroad operator history of Brookfield resulting in anticompetitive outcomes

Brookfield states in its July 9th, 2019 filing with STB that “DJP and Brookfield are not rail carriers. They do not control any rail carriers in the United States, and are not commonly controlled by or with any rail carrier.”² The statement is incorrect. According to SEC filings, Brookfield is acquiring GWI through an infrastructure fund that is commonly controlled and co-invested with its publicly-traded Bermuda-based partnership Brookfield Infrastructure Partners (BIP). BIP, in turn, controls 100% of the major Western Australian below track operator and leaseholder Arc Infrastructure WA Pty Ltd. (formerly Brookfield WA Rail Pty Ltd, Westnet WA Rail Pty Ltd., Babcock&Brown WA Rail Pty Ltd.)

It has controlled and managed the railroad according to public filings in the US and Australia since 2010 following its acquisition and merger with Prime Infrastructure (Babcock&Brown). GWI Australia JV has sold the asset to Babcock & Brown in 2006 allowing for direct comparisons of the way the rail was operated under the different owners. Sam Pollock, CEO of BIP, has stated that “G&W represents a great addition to our existing rail platform.”³ Brookfield also has a minority stake (26.5%) in VLI Logistica, a Brazilian company operated by Vale.

Since assuming the Arc lease, Brookfield has closed 2,100 km of narrow gauge track⁴ out of total lease track of 5,500 km despite receiving local government grants to maintain the uneconomic parts of the network. There have been customer complaints about the poor and inadequate track maintenance on the remaining lines with failure to meet minimum performance standards⁵. The resulting speed and load restrictions combined with monopoly pricing has led to significant problems with some companies like WA Salt Company abandoning rail as a mode of transport and others, like the largest WA cooperative, CBH, failing to reach a long-term deal with the operator amid a contentious 5-year process. There have been a number of reports of rollovers and increasingly severe speed restrictions on the track⁶.

Rail Access review was undertaken in Western Australia in 2017, however the process is yet to conclude with any meaningful success. The comments from other network operators, above rail operators and

² STB E-Filing Brookfield Asset Management Inc. and DJP XX, LLC Control Exemption Filing, July 9, 2019, pg.2

³ Brookfield Infrastructure Partners, Q2 2019 Conference call transcript
<https://bip.brookfield.com/~media/Files/B/Brookfield-BIP-IR-V2/Q2%202019/BIP-Q2-19-Earnings-Call-Transcript.pdf>

⁴ <https://www.dianevers.com.au/time-to-reactivate-closed-rail-lines/>

⁵ <https://thewest.com.au/news/kalgoorlie-miner/train-delays-running-joke-ng-b881033173z>

⁶ <https://thewest.com.au/news/regional/no-injuries-reported-in-train-derailment-on-toodyay-to-miling-freight-line-ng-b881243003z>
<https://www.mining-technology.com/mining-safety/mineral-resources-train-derailed-western-australia-following-flooding>
<https://thewest.com.au/countryman/news/man-in-hospital-after-grain-train-accident-ng-b881067343z>

customers of Arc's network are unanimous in their criticism of the maintenance standard of the network and the monopoly rents (25% to 70% higher access fees).⁷ We encourage the STB to review all of the submissions that are summed up by the Wheatbelt Railway Retention Alliance (representing 100,000 people, 26-member Local Governments) as "IT IS VITAL THAT THE PRESENT RAIL ACCESS PROBLEMS ARE NOT ALLOWED TO CONTINUE".

In 2015, the *national* Australian rail regulator ACCC (Australian Competition and Consumer Commission) effectively prevented a Brookfield consortium from purchasing Pacific National, a major rail operator citing a number of concerns thereby blocking the company from operating an asset under national regime⁸. Arc WA Infrastructure Pty. is regulated by a *local* Western Australian agency ERAWA through its network owner PTA under a "light touch" regional regulatory regime. Brookfield has extensive interests in Western Australia that include real estate and major construction projects.

Given the hazardous nature of some of the GWI cargo, it is imperative to make sure that the operator of the rolling stock and track is committed to safety and has the environmental issues of the communities in which it operates as its number one priority. Otherwise, the short line US business can revisit an accident-prone history that, thanks to operators, STB and Congress, has been confined to the past.

2. Decapitalization of rail assets

/Use of debt, offshore structures and misuse of government funds and tax subsidies to extract monopoly rents/

Arc's leverage levels far exceeding industry norms and distributions to the controlling shareholder have resulted in line closures, inadequate maintenance and adverse community outcomes. Brookfield aggressively monetized its Australian rail asset through high debt levels, management fees, related party loans and distributions. Over A\$ 1B were "upstreamed" from the rail asset from 2012 to 2016 after an initial investment of A\$ 380M in the business in 2010/11 ⁹(280% return on capital). The company **has been in non-compliance with its reporting requirements since 2016** and has not filed statements with ASIC as required.

⁷ <https://www.treasury.wa.gov.au/Economic-Policy/Rail-Access-Review/>

⁸ Australian Competition and Consumer Commission, Statement of Issues, Brookfield consortium – proposed acquisition of Asciano Limited, October 15, 2015

⁹ ASIC, SEC and other regulatory filings

Arc Infrastructure has been the recipient of generous local government grants¹⁰ despite a federal government commissioned study advising strongly against it¹¹. However, vast stretches of the network are not “fit for purpose” and can be in violation of the original lease terms, which, despite numerous calls from Parliamentary investigations remain secret. Arc still refuses to surrender the lines put into “care and maintenance” back to the government thus preventing their development by any third party.

Due to the capital intensity of the business, significant cash distributions are only possible through elevated debt levels. Arc’s debt balances (current plus long-term debt, FX hedging) have increased from A\$ 550M in 2011 to A\$ 1,670M in 2016 at the asset level. Revenues less than doubled before declining on significant customer mine closures that were well in the planning. Brookfield’s accounting choices under IFRS have allowed Arc to raise extraordinary levels of interest-only debt at pricing lower than that of some Class I operators with significantly higher credit ratings.

The debt levels are higher than stated on the asset balance sheet due to the unique structure of Brookfield entities that creates additional leverage at multiple levels. We estimate total debt including proportional amounts at holding companies and up to Brookfield Infrastructure Partners, but not above, to exceed A\$ 2,200M. Due to declining revenues from mine closures, the free cashflow (EBITDA – Maintenance) to Debt is estimated at 2% to 4% or 40x (compared to 4.8x or 20-25% current GWI level), essentially **a non-viable financial structure**.

In sum, should the asset level debt default (mostly US 144A), there are limited cross-guarantees with other holding company assets but it is likely that the asset lease should be allowed to return to the government after the extraction of substantial benefits.

There have been a number of attempts to review the lease, including a 2014 Parliamentary review on the management of the Western Australia’s freight rail network under the lease that has concluded that “The State has lost effective control of a major strategic asset; there is a very low level of transparency about the lease provisions and lease management, which generates significant anxiety and mistrust; the regulatory regime is largely ineffective in ensuring state development and the return condition of the network is far from certain... It is clear that the lease needs to be reviewed and renegotiated.”¹²

¹⁰ Project Transport Authority of Western Australia, Project Agreement for Capital Works Dedicated Narrow Gauge Grain Lines

¹¹ Department of Infrastructure, Transport, Regional Development and Local Government, WA Grain Freight Review, Independent Review of Grain Freight Infrastructure, KPMG & SAHA

¹² The Management of Western Australia’s Freight Rail Network, Economics and Industry Standing Committee, Parliament of Western Australia, October 2014

Brookfield Infrastructure Partners management refers to its Australian rail asset as “our best investment” while its customers and communities have suffered and government tax and subsidy assistance has been misdirected toward shareholder returns.

In a Senate testimony in 2017, CBH indicated that in addition to having an impact on the competitiveness of the Western Australian grain industry, “these types of situations” reflect poorly on the “reputation of rail as an effective and efficient mode of transport”¹³. The current efforts to extend and make permanent the US 45G tax credit can be in jeopardy given the risk of an offshore financial entity controlling significant short rail line operations. Such an outcome will cause direct damage not only to the Class II and III but through network effects to the main Class I operators.

Lastly, due to its multiple levels of offshore corporate structures as well as extensive use of qualifying intercompany loans, the Australian asset has not paid any taxes in the country¹⁴. In the final analysis, all the additional costs associated with the Brookfield investment model will have to be absorbed either by the taxpayer or will lead to a direct increase in shipping rates and declining profitability of the short line industry at a time when capital investments are most needed.

3. Troubled maintenance and safety record across multiple assets

The safety record of the acquiror allows conclusions about the likelihood of safe operation of the GWI assets. Unlike a strategic rail operator, a financial buyer faces short-term incentives to maximize return on the assets especially when operating from a monopoly position. Brookfield investment structures exacerbate those incentives resulting in a consistently low safety standards as shown in the sample of examples below.

An egregious safety case is the operation of Cross-Sound Cable, an asset acquired in the same transaction as the Australian rail. Its maintenance expense was cut to zero per company’s financial disclosures. An explosion and fire from storage of fuel near transmission in 2014 caused extensive damage ¹⁵ and subsequent sale.

Multiplex construction is a significant Brookfield company. It has faced numerous quality of work and safety issues for projects in Australia and the Middle East. A troubling recent example comes from a children’s hospital construction in Glasgow, Scotland where a number of patient deaths have been

¹³ Cooperative Bulk Handling Group, Submission 8, Rural and Regional Affairs and Transport References Committee Australia's rail industry, October 2017, The Senate

¹⁴ BPIH Pty ASIC filings, <https://www.michaelwest.com.au/companies/tax-dodgers/bpih-pty-ltd/>

¹⁵ <https://www.youtube.com/watch?v=XOgg7OQnfHo>

reported due to inappropriate insulation¹⁶. The recent acquisition of Westinghouse by a Brookfield entity has also received a number of safety/maintenance questions¹⁷. There have been reports related to low quality construction and use of slave labor in Brazil^{18 19} as well as inadequate maintenance expenditures in hydro assets controlled by the firm.

The above examples illustrate the different operating priorities of Brookfield as a financial operator of assets. Absent operational improvements and synergies, enhanced performance can often be executed as a simple extrapolation of cost cutting that impacts the safety and quality of the asset.

4. Foreign influence in controlling key infrastructure assets should be a cause for concern

/Deregulation and “light touch” regulatory enforcement regime in the US is incompatible with numerous foreign influences within the Brookfield complex/

The acquiror faces significant influence of foreign governments through sovereign fund investments in the Brookfield structures and/or direct co-investment in deals. The current example with the Singapore sovereign wealth fund is an apparent case, however, there are potentially more powerful sovereign influences within the investment structure.

Brookfield Asset Management (BAM), a Canadian registered corporation trading on the NYSE, is the sponsor of private funds that are co-managed with publicly-raised funds from four different Bermuda partnerships. BAM controls all the funds and partnerships and has different ownership stakes in each of them. While the public partnerships are required to disclose some ownership information (as non-US filers), the investors in the private funds are not a matter of public record.

Recent articles draw attention to Brookfield’s ties (and deep economic interdependence of key projects within the Brookfield complex) with Qatar and highlight the potential influence of the Gulf state in investment and operational decisions^{20 21}. As Brookfield raises larger and larger infrastructure funds (latest Brookfield Infrastructure Fund IV raised \$20B USD and is the investor behind the GWI acquisition) with undisclosed investor concentrations and terms, the influence of foreign investors on key US infrastructure is, in essence, unknown and subject to significant changes.

¹⁶ <https://stv.tv/news/west-central/1437949-super-hospital-concerns-raised-after-patient-deaths/>

¹⁷ https://www.postandcourier.com/business/waste-drum-at-westinghouse-nuclear-fuel-factory-exploded-caught-fire/article_a0052bf8-a726-11e9-8bc5-b3f9366e8ad3.html
<https://www.thestate.com/news/local/environment/article233129261.html>

¹⁸ <https://reporterbrasil.org.br/2013/12/fiscalizacao-flagra-trabalho-escravo-em-obra-de-brookfield-e-emccamp-do-minha-casa-minha-vida/>

¹⁹ https://reporterbrasil.org.br/wp-content/uploads/2016/12/listadetransparencia_fevereiro2016.pdf

²⁰ <https://www.nytimes.com/2018/05/17/nyregion/kushner-deal-qatar-666-5th.html>
<https://www.vanityfair.com/news/2018/05/kushner-cos-brookfield-qatar>

²¹ <https://www.railexpress.com.au/report-qatar-keen-to-get-in-on-asciano-action/>

In summary, Brookfield management has filed misleading statements with the STB to avoid appropriate regulatory review of the proposed transaction. Further, they have taken no steps to contradict current market reports that the oversight of the deal is a superfluous action with analysts describing it as “a CYA [cover your ass] exercise for the agency.”²²

The Board has continually stated its commitment to safety, efficiency and railroad investment as well as its intention to be vigilant towards changes in the industry and to ensure that it retains the authority to grant relief where it is necessary to avoid unfair results.

The conflicts of interest and governance issues outlined in this submission are a direct result of Brookfield’s pyramid control structure, an arrangement that is illegal for US-domiciled companies. STB should follow the ACCC lead and not allow an illegal structure to operate critical short rail line US infrastructure.

Respectfully Yours,

/s/ Victoria Dalrymple

Genesee & Wyoming 2017 Investor Presentation

Why we are successful

1. Cost saves:

- Operations, equipment, administrative overhead, purchasing
- Tax benefits (NOLs, asset deal)

2. Reputation:

- Seller focus on business going to a “good” owner
- Customer seller requiring solid rail service post sale
- Class I need for seamless execution
- Government support often critical

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²² <https://www.freightwaves.com/news/surface-transportation-board-seeks-comments-on-genesee-wyoming-deal>

August 20, 2019

I certify that I have this day served copies of the comment letter submitted to the STB regarding FD 36326_0 to Peter Denton, attorney for Brookfield Asset Management via email at pdenton@steptoe.com as well as all parties of record below.

/s/ Victoria Dalrymple

Docket #: **FD_36326_0**

Case Title: **BROOKFIELD ASSET MANAGEMENT, INC. AND DJP XX, LLC —CONTROL EXEMPTION— GENESEE & WYOMING INC., ET AL.**
8 Service List entries found.

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