

300138

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
December 9, 2019
Part of
Public Record

DOCKET NO. FD 36326

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

REPLY IN OPPOSITION TO PETITION FOR
RECONSIDERATION AND/OR PETITION TO REVOKE

Anthony J. LaRocca
Peter W. Denton
Sarah B. Nural
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

*Attorneys for Brookfield Asset
Management, Inc. and DJP XX,
LLC*

Dated: December 9, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36326

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

REPLY IN OPPOSITION TO PETITION FOR
RECONSIDERATION AND/OR PETITION TO REVOKE

Pursuant to 49 C.F.R. § 1115.3, Applicants¹ submit this reply in opposition to the petition for reconsideration and/or petition to revoke (“Petition”) filed by Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (“SMART/TD-NY” or “Petitioner”). SMART/TD-NY requests that the STB reconsider its decision served in this proceeding on October 29, 2019 (the “October 29 Decision”). In that decision, the Board allowed the class exemption at issue in this proceeding to take effect immediately, thereby authorizing Applicants to acquire control of GWI and the GWI Railroads. The Petition is also styled as a petition to revoke and requests in the alternative that if the Board does not grant reconsideration the Board should initiate a proceeding to revoke the exemption.

The Board should deny the Petition. As explained below, SMART/TD-NY has not identified a valid basis for either reconsideration or revocation. As to Petitioner’s request for reconsideration, the Petition points to no material error in the October 29 Decision but instead misreads the Board’s decisions in this proceeding, quibbles over semantics that have no legal significance, and rehashes arguments that the Board has already addressed. As to Petitioner’s request for revocation, the Petition sets forth no grounds to seek

¹ Unless otherwise defined herein, the acronyms and defined terms used in this Reply are the same as those used in Comments of Applicants filed in this proceeding on August 16, 2019 (“Applicants Comments”).

revocation of the exemption that is the subject of the October 29 Decision that were not already presented to the Board and rejected by it.

ARGUMENT

The Board will grant a petition for reconsideration only upon a showing that (1) new evidence or changed circumstances will materially affect the case, or (2) the case involves material error. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Although the Petition does not explain the supposed legal bases for Petitioner’s varied arguments, it appears that SMART/TD-NY is claiming that reconsideration is justified by alleged material error in the October 29 Decision. A party alleging material error must substantiate its allegation and must do more than simply make a general claim in its petition. *See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, the alleged error “must be sufficient to convince the Board that [it] would lead [the Board] to materially alter its prior decision in this case.” *See Canadian Nat’l Ry. and Grand Trunk Corp.—Control—EJ&E W. Co.*, FD 35087 (Sub-No. 8), slip op. at 8 (STB served Nov. 8, 2012).

On the question of revocation, the Board may revoke an exemption only if regulation is necessary to carry out the rail transportation policy (“RTP”) under 49 U.S.C. § 10101. *See* 49 U.S.C. § 10502(d). Petitions to revoke “must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that regulation of the proposal is necessary.” *Progressive Rail Inc.—Continuance in Control Exemption—Montgomery Short Line LLC*, FD 35092, slip op. at 2 (STB served Feb. 13, 2008) (citations omitted).

The Petition fails to meet—or even address—either legal standard. As explained below, there is no material error in the Board’s October 29 Decision that would support reconsideration, and Petitioner has failed to point to any factual or legal grounds for revoking the exemption.

A. The Board did not commit material error in finding that the class exemption was applicable to the proposed transaction.

SMART/TD-NY's first challenge is to the Board's finding in the October 29 Decision that the class exemption was *applicable* to the proposed acquisition of GWI and the GWI Railroads by Applicants. Pet. at 8-9. It appears that SMART/TD-NY contends that it was an error for the Board to address the *applicability* of the class exemption to the proposed transaction instead of determining whether the class exemption was *appropriate* for the proposed transaction. Indeed, the Petition asserts that the *applicability* of the class exemption is "an unintended issue," as though the Board had no reason even to consider whether the class exemption was *applicable*. Pet. at 9. The legal significance for Petitioner of the supposed distinction between the words "applicable" and "appropriate" is never explained.

SMART/TD-NY points out that the Board used the word "appropriate" in its decision served in this proceeding on July 22, 2019 ("July 22 Decision"), when it asked for comments "on the issues presented [by the Verified Notice], including whether the class exemption is appropriate for this transaction." July 22 Decision, slip op. at 1. Such a request by the Board for comments on a notice for exemption is not typical in class exemption proceedings. But by requesting comments, the Board went out of its way to ensure that it had an opportunity to address any concerns regarding the use of the class exemption for this transaction. And the Board made it clear it was not restricting the scope of any comments by broadly inviting comments on the proposed transaction "including whether the class exemption is appropriate for this transaction." *Id.*

Once it asked for comments, the Board had no obligation beyond addressing any significant comments that it received, and it clearly did so in the October 29 Decision. In fact, the Board received a number of responsive comments, including comments from SMART/TD-NY arguing (without any support) that the class exemption should not be used in this transaction. And the Board, in its October 29 Decision, specifically addressed those comments, finding that "SMART/TD-NY's comments about the magnitude and nature of the

transportation at issue do not support rejection of the notice or revocation of the exemption.” October 29 Decision, slip op. at 5. Nothing further was required.²

Because the Board had no obligation to use the word “appropriate” in the October 29 Decision, it committed no error in failing to do so. The Board properly concluded that the class exemption should be allowed to go into effect because the proposed transaction met the applicable criteria, and it further found that no party (including SMART/TD-NY) had offered a valid reason not to allow the class exemption to go into effect.

B. The Petition’s claims regarding CFIUS are misplaced.

SMART-TD/NY makes two inter-related arguments regarding CFIUS’s review of the proposed transaction—neither of which meet the applicable legal standard for reconsideration or support a request for revocation. First, SMART-TD/NY presents yet another semantic quibble, claiming that the Board erred in stating that the proposed transaction was subject to CFIUS “approval.” Pet. at 10. Petitioner claims that CFIUS merely “reviews” proposed transactions, and does not affirmatively “approve” them. *See* Pet. at 9-10. Again, Petitioner fails to explain why the Board’s reference to CFIUS “approval,” even if that reference were procedurally inaccurate, would constitute a material error when the Board’s discussion of CFIUS related only to Applicants’ on-going obligation to “provide updates regarding the status of CFIUS review,” which SMART/TD-NY does not even appear to challenge. *See* October 29 Decision, slip op. at 5. In any event, while Petitioner quibbles with the Board’s use of the word “approve,” it does not suggest, nor could it, that CFIUS, in its “review” of proposed transactions, is without legal tools to block transactions deemed to raise national security concerns.

Second, SMART/TD-NY argues that the Board impermissibly delegated the review of potential national security and defense issues to CFIUS. Pet. at 10-11. In support of its argument, Petitioner points to the RTP that, “[i]n regulating the railroad industry, it is the

² In a reply to the Petition filed on December 6, 2019, Victoria Dalrymple repeats the claim she made in her prior comments that the Board should consider whether the class exemption “is appropriate” given the corporate structure of Applicants. Her comments on corporate structure are unfounded and the Board also specifically addressed and rejected Ms. Dalrymple’s concerns, stating that she had failed to “demonstrate that the class exemption criteria are not met, or how the assertions would support a finding of anticompetitive effects.” October 29 Decision, slip op. at 5.

policy of the United States Government . . . to meet the needs of the public and the national defense.” 49 U.S.C. § 10101(4). But that policy is only one of several RTPs, and the Board does not examine each RTP when presented with a notice of a class exemption. Indeed, such an approach would defy the entire purpose of a class exemption, where the Board has presumptively determined that certain classes of transactions are exempt from further Board review.³

SMART/TD-NY did not seek rejection or revocation of the class exemption based on national security or defense grounds.⁴ SMART/TD-NY noted the participation of GIC in the transaction, but the Board explained in the October 29 Decision that GIC’s participation had no impact on the validity of the class exemption. In addition, as the Board noted in the October 29 Decision, slip op. at 3, Ms. Dalrymple made allegations of “unknown” influence by other foreign entities. *See* Dalrymple Comments at 6 (filed Aug. 20, 2019). But her claims were completely without substance.⁵ The Board committed no error—material or otherwise—in concluding that the comments submitted in response to the July 22 Decision “do not undermine the applicability of the 49 CFR §1180.2(d)(2) class exemption process.” October 29 Decision, slip op. at 4.

³ Nor is there any precedent supporting Petitioner’s claim that the Board should have examined national security interests here. In a similar control class exemption proceeding involving a foreign entity and a transaction subject to CFIUS review, the Board did not consider the transaction’s potential impacts on national defense. *See* Applicants’ Comments (Aug. 16, 2019) at 12-13 (citing *Grupo México, S.A.B. de C.V. and GMéxico Transportes, S.A. de C.V.—Control Exemption—Fla. E. Coast Holdings Corp.*, FD 36109 (STB served May 22, 2017)). And the decision in *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), cited by Petitioner at pages 10-11 of the Petition, dealt with the development of class exemption criteria (in an abandonment), not the application of a class exemption in an individual case.

⁴ It is not necessary to consider here whether the Board would have had legal grounds to reject or revoke a class exemption based on national security concerns given that no plausible national security concerns were ever raised or ever existed. As Applicants previously noted, however, rejection or revocation of a class exemption would only be appropriate if it were based on concerns that could be addressed in a full application proceeding. But the Board’s approval criteria under 49 U.S.C. §11324(d) for a transaction such as the one at issue here would limit the Board’s review to competitive issues. *See* Applicants’ Comments (Aug. 16, 2019) at 10.

⁵ Ms. Dalrymple belatedly expands upon her allegations of foreign influence in her December 6 Reply, but again she provides no reasonable basis for the Board to consider her allegations and no explanation (aside from an oblique reference to the Rail Transportation Policy) as to why her speculation would have any bearing on the Board’s consideration of the class exemption.

C. The Petition erroneously claims that the Board was required to consider foreign transportation interests.

Finally, SMART-TD/NY complains about the Board's failure to examine the Applicants' "world-wide interests as part of the overall transaction." Pet. at 11-12. This argument is clearly meritless based on the plain wording of the Board's jurisdictional statute. See October 29 Decision, slip op. at 5 (rejecting similar SMART-TD/NY arguments by noting that, under 49 U.S.C. § 10501(a), "Board jurisdiction applies to transportation in the United States").⁶ The Board regularly authorizes the control of U.S. rail carriers by non-U.S. persons through the class exemption process without considering the "world-wide interests" of those applicants.⁷

In any event, the Board addressed in the October 29 Decision the comments it received that discussed Applicants' "world-wide interests" and determined that none of the claims in those comments affected the validity of the class exemption. See October 29 Decision, slip op. at 5 (addressing comments by Victoria Dalrymple regarding Australia and comments of SMART/TD-NY regarding Brazil). The Board clearly committed no error here.

CONCLUSION

For the reasons state above, this petition for reconsideration and/or petition to revoke is without merit. Therefore, Applicants respectfully request that the Board deny the Petition.

⁶ The rate reasonableness cases involving transborder movements cited in the Petition in fact demonstrate that the Board's jurisdiction is limited to the impact of transborder movements in the United States.

⁷ See, e.g., *First State Infrastructure Managers (Int'l) Ltd., Global Diversified Infrastructure Fund (N. Am.) LP, and Mitsubishi UFJ Fin. Grp., Inc.—Acquisition of Control Exemption—SteelRiver Transp. Ventures LLC and Patriot Rail Co. LLC*, FD 36345 (STB served Sept. 27, 2019) (entity domiciled in Japan acquiring control of 14 U.S. rail carriers); *Grupo México, S.A.B. de C.V. and GMéxico Transportes, S.A. de C.V.—Control Exemption—Fla. E. Coast Holdings Corp.*, FD 36109 (STB served May 22, 2017) (two entities domiciled in Mexico acquiring control of a U.S. rail carrier).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. LaRocca', with a long horizontal flourish extending to the right.

Anthony J. LaRocca
Peter W. Denton
Sarah B. Nural
Steptoe & Johnson LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000

*Attorneys for Brookfield Asset Management, Inc.
and DJP XX, LLC*

Dated: December 9, 2019

CERTIFICATE OF SERVICE

I certify that I have, on December 9, 2019, served copies of this Reply on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton

Attorney for Brookfield Asset Management, Inc. and DJP XX, LLC