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August 9, 2012

VIA ELECTRONIC FILING

232703

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

ENTERED
Office of Proceedings
August 9, 2012
Part of
Public Record

re: Docket No. FD 35654, Genesee & Wyoming Inc
--Control--RailAmerica, Inc., et al.

Dear Ms. Brown:

Enclosed for filing in the subject proceeding is the Reply of Napa Valley Railroad Company to Applicants' Motion to Establish a Procedural Schedule, filed August 6, 2012.

As shown on the Certificate of Service, copies of the Reply this day were served by me upon each party of record.

I note that applicants' Motion to Establish a Procedural Schedule failed to have attached to it a certificate of service, as required by 49 C.F.R. §1104.12(a).

If you have a question concerning the Reply of if I otherwise can be of assistance, please let me know.

Sincerely yours,



Fritz R. Kahn

SURFACE TRANSPORTATION BOARD

Docket No. FD 35654

GENESEE & WYOMING, INC.
-- CONTROL --
RAILAMERICA, INC., *et al.*

REPLY
OF
NAPA VALLEY RAILROAD COMPANY

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Attorney for

NAPA VALLEY RAILROAD COMPANY

Dated: August 9, 2012

SURFACE TRANSPORTATION BOARD

Docket No. FD 35654

GENESEE & WYOMING, INC.
-- CONTROL --
RAILAMERICA, INC., *et al.*

REPLY
OF
NAPA VALLEY RAILROAD COMPANY

Napa Valley Railroad Company of Napa, CA ("NVRR"), a Class III rail carrier subject to the jurisdiction of the Board, pursuant to 49 C.F.R. §1104.13(a), replies to the Applicants' Motion to Establish Procedural Schedule, filed August 6, 2012, as follows:

1. The Motion assumes that the proposed acquisition by Genesee & Wyoming, Inc. ("GWI") of RailAmerica, Inc. ("RailAmerica") is a minor transaction, within the meaning of 49 C.F.R. §1180.2(c). That the transaction is a minor remains uncertain. Certainly the Applicants' Motion fails to establish that it is.

2. 49 C.F.R. §1180.2 (b) declares a transaction to be significant, rather than minor, if it is of regional or national transportation significance. It adds, "A transaction not involving the control or merger of two or more Class I railroads is not significant if a determination can be made either: (1) That the transaction clearly will not have any anticompetitive effects, or (2) That any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs."

3. Competition may take many forms. The Board hardly needs reminding that for many years it considered product and geographic competition in determining whether a rail carrier was market dominant.¹ While 49 C.F.R. §180.6(a)(2)(i) requires the application to discuss the effect of the transaction on inter- and intramodal competition, there is nothing in 49 U.S.C. §11324(d) to indicate that the substantial lessening of competition resulting from the merger of two holding companies which the Board must take into account is limited to its consideration of the intramodal or intermodal competition for the freight shipments on the lines of the local or regional railroads which they own or control.

4. The competition which is relevant in the instant proceeding is the competition between the holding companies which own or control the Class III or local and Class II or regional railroads of this country. There only are a handful: Patriot Rail, LLC, which owns or controls 14 local railroads², OmniTrax, Inc, which, together with BNS Holdings, owns or controls 15 local railroads³, Watco Holdings, Inc., which owns or controls 27 local railroads.⁴, RailAmerica, Inc., which owns or controls 36 local railroads⁵ and Genesee & Wyoming Inc, which owns or controls 61 regional and local railroads.⁶

¹ *Market Dominance Determination*, 365 I.C.C.2d 118, 131-135 (1981), *aff'd*, *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983).

² See Docket No. 35619, *Tennessee southern Railroad Company, Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.--Continuance in Control Exemption--Kingman Terminal Railroad, LLC*, served May 11, 2012.

³ See Docket No. FD 35525, *Patrick Broe and STE Holdings, Inc.--Acquisition of Control Exemption--Stockton Terminal & Eastern Railroad Company*, served July 15, 2011.

⁴ See Docket No. FD 35604, *Watco Holdings, Inc.--Continuance in Control Exemption--San Antonio Central Railroad, L.L.C.*, served June 25, 2012.

⁵ See Docket No. FD 35592, *RailAmerica, Inc., Palm Beach Holdings, Inc., RailAmerica Transportation Corp., Railtex, Inc, Fortress Investment Group, LLC and RR Acquisition Holdings, LLC--Control Exemption--Marquette Rail, LLC*, served April 13, 2012.

⁶ See Docket No. 35621, *Genesee & Wyoming--Continuance in Control Exemption--Columbus & Chattahoochee Railroad, Inc.*, served June 11, 2012.

5. GWI clearly has been the most aggressive of the holding companies. Just eight years ago it owned or controlled but 26 regional and local railroads.⁷

6. The proposed transaction will increase the number of local and regional railroads which GWI owns or controls from 63, or approximately 11 percent of the country's total number of local and regional railroads, to 108, or approximately 20 percent of the country's total number of local and regional railroads. It will increase the number of miles GWI's owned or controlled local and regional railroads operate from 7,600, or approximately 15 percent of the total number of miles the country's local and regional railroads operate, to 12,900, or, more than 25 percent of the total number of miles the country's local and regional railroads operate, and it will increase the number of carloads handled annually by the local and regional railroads owned or controlled by GWI from 995,000, or approximately 11 percent of the total number of carloads handled annually by the country's local and regional railroads, to 1,600,000 or approximately 18 percent of the total number of carloads handled annually by the country's local and regional railroads.⁸

7. Such a large increase in the role which GWI will play among the holding companies owning or controlling the country's local and regional railroads renders the transaction one of national transportation significance. It cannot be said that the transaction clearly will not to have any anticompetitive effects.

8. Beyond asserting that GWI has a highly successful safety program which should be applied to the RailAmerica owned or controlled railroads, Applicants' Motion

⁷ See STB Finance Docket No. 34453, *Genesee & Wyoming Inc.--Control Exemption--Arkansas, Louisiana & Mississippi Railroad Company and Fordyce & Princeton Railroad Company*, served February 5, 2004.

⁸ See GWI's press release of July 23, 2012, and the data contained in the talks by President Richard F. Timmons of the American Short Line and Regional Railroad Association..

fails to discuss the transaction's anticipated contribution to the public interest in meeting significant transportation needs which will outweigh the anticompetitive effects of the transaction.

9. Applicants' Motion fails to offer any reason why an expedited procedural schedule should be adopted by the Board beyond the self-serving declaration that integration of the management of GWI and RailAmerica is in their best long term interest and, if that were done before the end of 2012, it would allow for simpler and more transparent financial reporting. The Agreement and Plan of Merger, however, was drawn up by GWI and RailAmerica, or their counsel, and the document should have taken into account that the Board need not render its decision before 180 days from the date of the application's filing, if the transaction were a minor one, as Applicants assume, and 300 days from the date of the application's filing, if the transaction were a significant one, as the facts indicate.

10. Finally, the Applicants' Motion asks for the promulgation of an expedited schedule to reduce the burdens on the Voting Trustee managing RailAmerica and its railroads and other businesses. Evidently the Applicants plan to place the RailAmerica stock in a Voting Trust so that the Applicants can go to closing without violating 49 U.S.C. §11323. A copy of the Voting Trust Agreement, however, does not appear to have been filed with the Applicants' Railroad Control Application, as is required by 49 C.F.R. §1013.3(b). In any event, a Voting Trustee does little more than retain the outstanding stock of the company to be acquired pending the Board's action on the merger or acquisition. The industry practice is for the management and operating personnel of the company to be acquired to retain their positions and to continue to

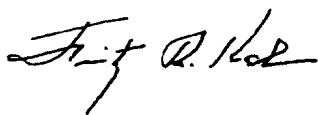
conduct the affairs of the company. The Voting Trustee will not be expected to manage RailAmerica and its railroads and other businesses, and, accordingly, no expedited procedural schedule needs to be promulgated.

WHEREFORE, Napa Valley Railroad Company asks that Applicants' Motion to Establish a Procedural Schedule be denied.

Respectfully submitted,

NAPA VALLEY RAILROAD COMPANY

By its attorney,

A handwritten signature in black ink, appearing to read "Fritz R. Kahn".

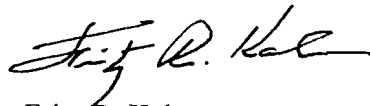
Fritz R. Kahn
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1919 M Street, NW (7th fl.)
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Tel.: (202) 263-4152

Dated: August 9, 2012

CERTIFICATE OF SERVICE

I certify that I served the foregoing Reply of Napa Valley Railroad Company upon the Applicants by e-mailing a copy to David H. Coburn, Esq., at dcoburn@step toe.com and by mailing a copy to each party of record by prepaid first-class mail.

Dated at Washington, DC, this 9th day of August 2012.


Fritz R. Kahn