

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36326

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

REPLY COMMENTS OF APPLICANTS

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

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

Dated: September 5, 2019

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INTRODUCTION AND SUMMARY

Pursuant to the Board’s order in its July 22 Decision,¹ Brookfield and DJP hereby reply to the 15 comments submitted to the Board in this proceeding by parties other than the Applicants.

The vast majority of the comments – 13 of 15 – relate to a single railroad, the Providence and Worcester Railroad Company (“P&W”), one of the 106 GWI Railroads that the Applicants seek to control through the Proposed Transaction. These 13 comments basically seek an assurance that P&W will continue to cooperate on various matters relating to passenger and excursion services and the construction of a multi-use pathway, but they do not oppose the Proposed Transaction or object to Applicants’ use of a class exemption to obtain necessary Board authorization. One additional comment is a non-substantive “Notice of Intent to Participate” filed by a labor union representing employees of certain of the GWI Railroads. The final comment, from an individual who purports to be a GWI shareholder, opposes the Proposed Transaction based on claims that are patently invalid.

The comments provide no basis for preventing Applicants from using the class exemption that plainly applies to this proceeding to obtain authorization for a transaction that will have no anti-competitive effects. Any further delay would create unnecessary regulatory uncertainties and costs. Therefore, Applicants respectfully renew their request

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

made in Applicants Comments that the Board allow the exemption to take effect no later than September 15, 2019.

REPLY COMMENTS

1. **The P&W commenters do not oppose the Proposed Transaction and simply seek continued cooperation from P&W.**

As noted above, 13 of the 15 comments submitted in this proceeding relate to the P&W, a Class III railroad that GWI acquired in 2016 and one of the 106 GWI Railroads that Applicants seek to control through this proceeding.² *See Genesee & Wyoming Inc.—Acquisition of Control Exemption—Providence & Worcester R.R. Co.*, FD 36064 (STB served Dec. 16, 2016) (“*GWI-P&W*”). Importantly, none of these comments suggests that the Board should not allow the Proposed Transaction to proceed or that the Section 1180.2(d)(2) class exemption is not appropriate for the Proposed Transaction. Applicants understand that, since GWI has owned P&W, GWI and P&W have continued to work with these communities to address their concerns. Applicants intend to continue this approach once Applicants obtain control of GWI and P&W.

The comments are focused on three matters that involve the P&W.

Commuter Service: One of the P&W commenters expresses an interest in establishing a new commuter rail service on P&W lines.³ But the comment does not go beyond expressing a desire for commuter service and it does not indicate why the Proposed Transaction has any bearing on the commenter’s interest in commuter service. The

² These include comments from: (1) Robert Billington, President, Blackstone Valley Tourism Council Inc. (“BVTC”) (July 31, 2019); (2) Donald R. Grebien, Mayor of Pawtucket, RI (Aug. 12, 2019); (3) Robert Billington, President, BVTC (Aug. 13, 2019); (4) John C. Gregory, President/CEO, Northern Rhode Island Chamber of Commerce (Aug. 16, 2019); (5) Richard H. Gregory III, Chair, Blackstone River Valley National Heritage Corridor, Inc. (“BHC”) (Aug. 19, 2019); (6) Devon R. Kurtz, Executive Director, BHC (Aug. 20, 2019); (7) Kevin Proft, City Planner, City of Woonsocket RI (Aug. 20, 2019); (8) Thomas J. Kravitz, Town Planner, Town of North Smithfield, RI (Aug. 20, 2019); (9) Mass. State Sen. Michael O. Moore, Second Worcester District (Aug. 21, 2019); (10) James A. Diossa, Mayor, City of Central Falls, RI (Aug. 21, 2019); (11) Joseph Laydon, Town Planner, Town of Grafton, MA (Aug. 21, 2019); (12) Michael Gallerani, Town of Uxbridge, MA (Aug. 21, 2019); and (13) Jennifer Smith, Acting Superintendent, Blackstone River Valley National Historical Park, Nat’l Park Serv., U.S. Dep’t of the Interior (Aug. 21, 2019).

³ Comment (7) listed in note 2.

comment does not object to the Proposed Transaction or ask that the Board place a specific condition on the Proposed Transaction.

Excursion Service: Four of the P&W commenters⁴ express an interest in continuing an existing excursion service operated by BVTC on P&W lines and explain the importance of the service to their respective communities. Again, however, the comments express no opposition to the Proposed Transaction and do not ask that the Board place a specific condition on the Proposed Transaction.

When GWI obtained Board authority to acquire control of P&W in 2016, commenters in that proceeding also expressed support for BVTC's excursion service on the P&W lines. Commenters in the 2016 proceeding requested that the Board require GWI to continue servicing BVTC. *See GWI-P&W*, slip op. at 3-5. The Board declined to impose a condition relating to this excursion service, noting that GWI "has stated that it will continue to negotiate in good faith with . . . BVTC." *Id.*, slip op. at 5. Notably, the excursion service still operates today. As Applicants have already stated, "Applicants have no current plans to change the day-to-day operations of GWI or the GWI Railroads after consummation of the proposed transaction." Verified Notice at 4; Applicants Comments at 10. Consistent with this statement, Applicants have no intention to cause GWI or P&W to change their practices with respect to negotiations with BVTC once Applicants obtain control of GWI, P&W, and the other 105 GWI Railroads.

Multi-Use Path: Nine of the P&W commenters⁵ express an interest in completing the Blackstone River Valley Greenway (the "Greenway"), a multi-use path that apparently will parallel and potentially cross certain P&W lines. Four of these nine Greenway commenters request that the Board require Applicants, as a condition to authorization of the Proposed Transaction, to "work cooperatively" with Greenway stakeholders "to accommodate the completion" of the Greenway.⁶ One of the nine Greenway commenters suggests that "Brookfield appoint a full-time staff member to work with the cities and towns to implement the land transfers and easements needed to complete the Greenway

⁴ Comments (1), (2), (3), and (4) listed in note 2.

⁵ Comments (5), (6), (7), (8), (9), (10), (11), (12), and (13) listed in note 2.

⁶ Comments (5), (6), (11), and (12) listed in note 2.

project,” although this commenter does not request that the Board condition the Proposed Transaction on this action.⁷

Like the other P&W commenters, the Greenway commenters do not oppose the Proposed Transaction. But they do expressly ask that conditions be imposed on Applicants. The Board has authority pursuant to 49 U.S.C. § 11324(c) to impose conditions on a transaction in order to ameliorate competitive harm that would result from the transaction. *See Genesee & Wyoming Inc.—Control—RailAmerica, Inc., et al.*, FD 35654, Decision No. 5, slip op. at 4 (STB served Dec. 20, 2012) (“*GWI-RailAmerica*”). However, the Board has previously refused to grant requested conditions that “relate to pre-existing collaboration and contracts . . . and, therefore, do not relate to any competitive harm that would result from the proposed Transaction.” *Id.*, slip op. at 5.

Similarly, the Board should not impose any conditions here. Development of the Greenway could not result in any competitive harm and is not even within the scope of the Board’s authority. Issues related to the development of the multi-use path are better left to private negotiations. It would not be appropriate for the Board to condition its control authority here on conduct relating to a non-jurisdictional project that has nothing to do with rail competition. In any event, the commenters note that P&W has been helpful in the planning of the multi-use path in the past, and, consistent with Applicants’ statements in the Notice, Applicants have no plans to cause GWI or P&W to change their approach to the Greenway Project once Applicants obtain control of GWI and P&W.

2. The Dalrymple Comments contain inaccurate and irrelevant claims that should have no effect on Applicants’ use of the class exemption here.

The only comments opposing the Proposed Transaction were submitted by Victoria Dalrymple (the “Dalrymple Comments”). It is unclear what interest (financial or otherwise) Ms. Dalrymple would have in opposing the Proposed Transaction. Ms. Dalrymple identifies herself as a GWI shareholder, but GWI shareholders stand to benefit from consummation of the Proposed Transaction.⁸ Moreover, to the extent that Ms. Dalrymple’s interest is based

⁷ Comment (10) listed in note 2.

⁸ “The Transaction price of \$112 per share of [GWI] common stock represents a 39.5% premium to the unaffected per share price of \$80.28 on March 8, 2019, the day prior to initial media

on her GWI shareholder status, she has ample opportunity under the U.S. securities laws to exercise her shareholder rights. These include a right, held by all shareholders, to vote on the Proposed Transaction.

More important, Ms. Dalrymple's comments are inaccurate, invalid, or irrelevant to this proceeding. First, Ms. Dalrymple falsely claims that the following statement made by Applicants in the Verified Notice is incorrect:

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.

Dalrymple Comments at 2 (emphasis added) (quoting Verified Notice at 2). In support, Ms. Dalrymple points to Brookfield's control of an Australian rail entity. But Applicants made it clear in the statement contested by Ms. Dalrymple that they were referring to rail carriers "in the United States," which, in any event, is the extent of the Board's jurisdiction. *See* 49 U.S.C. § 10502(a)(2). Moreover, Applicants clearly intended the statement to establish the factual bases for the Board's statutory authority over the Proposed Transaction, which extends only to "transactions involving rail carriers providing transportation **subject to the jurisdiction of the Board.**" 49 U.S.C. § 11323(a) (emphasis added). The statute does not apply to non-U.S. rail carriers, and Applicants did not purport to make any representations about any non-U.S. operations. The statement made by Applicants is true and correct for all relevant purposes.

Second, Ms. Dalrymple asserts that a class exemption is not applicable to the Proposed Transaction due to "adverse competitive impacts." Dalrymple Comments at 1. But the claim is completely unsupported and without any explanation. Ms. Dalrymple focuses almost exclusively on Brookfield's operations in Australia and does not discuss a single market in the United States that will supposedly see "adverse competitive impacts." As established in the Verified Notice and Applicants Comments, the Proposed Transaction – by virtue of its very nature – will have no anti-competitive effects. The Proposed Transaction will simply change the ownership of GWI and there will be no change in competitive

speculation of a potential transaction." *Genesee & Wyoming Inc. to Be Acquired by Brookfield Infrastructure and GIC in \$8.4 Billion Transaction* (July 1, 2019), <https://ir.gwrr.com/press-release/acquisitions-investments/genesee-wyoming-inc-be-acquired-brookfield-infrastructure>.

conditions, in relationships with other carriers outside the GWI corporate family, or in patterns or types of service by the GWI Railroads. *See* Applicants Comments at 10-11.

Third, Ms. Dalrymple states – with no support whatsoever – that Brookfield “is a pyramid-controlled structure that is illegal in the United States.” Dalrymple Comments at 1, 7. Brookfield is not a pyramid of any sort. Brookfield, one of Canada’s largest and most successful companies, is a leading publicly-traded global asset management company incorporated in Ontario, Canada with over \$365 billion of assets under management. Brookfield is a foreign private issuer under U.S. law, and Brookfield complies with all applicable U.S. public reporting requirements by filing its periodic disclosure documents with the U.S. Securities and Exchange Commission. Brookfield owns and operates one of the largest infrastructure portfolios in the world.⁹

Fourth, Ms. Dalrymple makes several claims about Brookfield’s ownership of Arc Infrastructure WA Pty Ltd. (“Arc,” an Australian railroad company), including allegations about a “decapitalization” of rail assets, and claims about maintenance and safety issues. Dalrymple Comments at 2-6. These assertions are false and misleading.

Since Brookfield acquired Arc in 2010, Brookfield has invested over AU\$2 billion to improve its Australian freight rail network, with total capital expenditures exceeding the amounts distributed to shareholders over this period.¹⁰ Arc has successfully maintained a stand-alone investment grade credit rating from Standard & Poor’s since 2012. Furthermore, since Brookfield acquired Arc in 2010, Arc has substantially increased shipments on the network.¹¹ Arc has not just focused on maintaining the network, but has made many investments to upgrade and improve the network.¹² The Western Australian

⁹ For additional background information regarding Brookfield’s long-term infrastructure investment strategy, see *How a Canadian firm has taken on Wall Street’s private-equity titans*, The Economist (Aug. 29, 2019), <https://www.economist.com/finance-and-economics/2019/08/29/how-a-canadian-firm-has-taken-on-wall-streets-private-equity-titans>; *Brookfield’s Bruce Flatt*, Forbes Magazine (May 16, 2017), <https://www.forbes.com/sites/antoinegara/2017/05/02/brookfields-bruce-flatt-billionaire-toll-collector-of-the-21st-century/#4695595a792d>.

¹⁰ Compare Arc Infrastructure, Issues Paper Submission, at 15 ¶ 67 (Nov. 17, 2017), https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/Rail_Access_Review/ARC_Infrastructure%20.pdf (“Arc Issues Paper”), with Dalrymple Comments at 3.

¹¹ Arc Issues Paper at 15, ¶ 65, fig. 9.

¹² *Id.* at 15-16, ¶ 68.

Auditor General, in its review of the management of the Arc network, stated that “the mineral and general freight carrying lines are in better condition now than when they were leased.”¹³ Ms. Dalrymple’s claims about safety are also completely misplaced. Safety is a top priority at Brookfield, and Brookfield aims to have zero serious safety incidents within its businesses by implementing consistent health and safety principles across its organization.¹⁴

More important, Ms. Dalrymple’s allegations also have no relevance to the applicability of the class exemption to the Proposed Transaction, or to the otherwise applicable statutory review standard, which is very narrow.¹⁵ First, Brookfield’s experience outside the United States relates to circumstances that are inapplicable here. Second, to the extent that Ms. Dalrymple’s allegations are intended to predict future actions by Applicants, the Board has rejected arguments regarding post-transaction performance as “speculative,” noting the availability of legal redress relating to any future implementation of unreasonable rates or practices. *See GWI-RailAmerica*, slip op. at 7. Moreover, a number of investment firms have acquired U.S. rail carriers in recent years. The Board routinely authorizes such transactions without analyzing the performance of other companies controlled by the applicants, and the Board should act no differently here. *See Applicants Comments* at 6, note 1 (listing five recent transactions involving the control of short-line railroad families authorized under the Section 1180.2(d)(2) class exemption).

Finally, Ms. Dalrymple alleges that “[f]oreign influence in controlling key infrastructure assets should be a cause for concern.” Dalrymple Comments at 6-7. Ms. Dalrymple proceeds to make a number of unsubstantiated claims about the influence of certain foreign governments on Brookfield. In fact, no investor in any of Brookfield’s private institutional funds has the ability to exercise any control over those funds, and no foreign government has any influence over any Brookfield-controlled funds. Regardless, as

¹³ *Id.* at 16, ¶ 72 (quoting Western Australian Auditor General’s Report, Management of the Rail Freight Network Lease: 12 Years Down the Track, Report No. 1 (2013)).

¹⁴ *See* Environmental, Social and Governance at Brookfield (2018), https://www.brookfield.com/sites/default/files/2019-02/bam_esg_brochure_2018.pdf.

¹⁵ *See Applicants Comments* at 9-12 (discussing the limited scope of the Board’s review under 49 U.S.C. § 11324(c) of transactions of the type at issue here).

described fully in Applicants Comments at 12-14, CFIUS will fully assess the “foreign investment” aspects of the Proposed Transaction, and the CFIUS review should have no bearing on the STB’s review process or the appropriateness of the Section 1180.2(d)(2) class exemption. As stated in Applicants Comments at 12-14, Applicants will provide updates to the STB regarding the status and outcome of CFIUS’s review of the Proposed Transaction by notifying the STB upon the commencement and conclusion of the CFIUS review and any related investigation.

In short, nothing in the Dalrymple Comments provides any basis for the Board to determine that the applicable class exemption is inappropriate here, or to further delay the effectiveness of the exemption.

CONCLUSION

With the exception of a single party – whose interest in the Proposed Transaction is unclear, whose comments are riddled with false and misleading statements, and whose arguments are not credible – there is no opposition to the Proposed Transaction or to the use of a class exemption to obtain Board authorization for the Proposed Transaction. None of the comments offers any reason to further delay the effectiveness of the exemption, or to impose any conditions other than standard labor protective conditions. Therefore, for the reasons stated above and in the Applicants Comments, Applicants respectfully renew their request that the Board allow the exemption to take effect no later than September 15, 2019, ten days after the record has closed in this proceeding. Any delay beyond September 15, 2019, would create unnecessary regulatory uncertainties and costs.

Respectfully submitted,

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

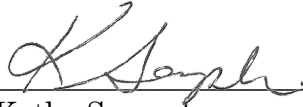
Anthony J. LaRocca
Linda S. Stein
Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Ave. NW
Washington, DC 20036
(202) 429-3000

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

Dated: September 5, 2019

VERIFICATION

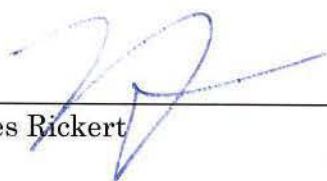
I, Kathy Sarpash, Vice President, Legal & Regulatory, of Brookfield Asset Management, Inc., declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file these comments. Executed on September 5, 2019.



Kathy Sarpash

VERIFICATION

I, James Rickert, President of DJP XX, LLC, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file these comments. Executed on September 5, 2019.



James Rickert

CERTIFICATE OF SERVICE

I certify that I have, on September 5, 2019, served copies of this Reply Comments of Applicants by first-class mail on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton

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