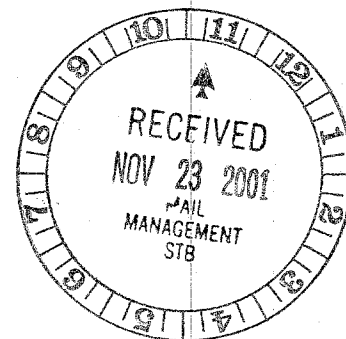


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BEFORE THE
SURFACE TRANSPORTATION BOARD
STB EX PARTE NO. 586



ARBITRATION - VARIOUS MATTERS RELATING TO
ITS USE AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBJECT TO THE BOARD'S JURISDICTION

COMMENTS
OF
GENESEE & WYOMING INC.

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Dated: November 21, 2001

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and its Subsidiary Railroads

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The Board commenced this proceeding by decision served September 20, 2001 (the "Decision"). The Board set forth three purposes for the proceeding: (1) to update the Board's list of arbitrators, (2) to remind and encourage users to take advantage of the Board's existing voluntary arbitration procedures, and (3) to explore issues relating to binding arbitration of "small rail rate disputes." Decision at 2. Genesee & Wyoming Inc. ("GWI") is filing these comments on behalf of itself and its subsidiary railroads to express its view that the adoption of binding arbitration requirements is unnecessary and would adversely affect GWI and its shortline subsidiaries (and other shortlines) by imposing additional costs and litigation burdens on them.¹

¹ GWI does not have any issues with the first two purposes of the Board's proceeding.

Description of GWI

GWI is a publicly traded, noncarrier holding company that controls one Class II railroad (BPRR)² and 16 Class III railroads, as listed on the attached Exhibit A, that are subject to the jurisdiction of the Board.³ The annual revenues of GWI's U.S. railroads varies greatly, from a low of less than \$50,000 to a high of less than \$22,000,000.⁴

The subsidiary railroads currently operate in 10 states. In two regions, certain of the carriers connect with each other – in Oregon, PNWR and WPRR connect, and in New York and Pennsylvania, BPRR, PSRR, ALY, BR, RSR, GNWR, and DMM each connect with at least one of the other carriers.⁵ The subsidiaries are run as separate corporations. They are in different regions and serve different markets and largely different customers. They connect with different Class Is. They have different labor relationships – nonunion, single union and multiple union – even where they connect with one another.

² GWI's railroad subsidiaries are referred to herein by their respective marks as shown on Exhibit A.

³ GWI's petition to acquire control of an additional Class III railroad, South Buffalo Railway Company ("SB"), was approved in a decision issued today (effective December 6, 2001). *Genesee & Wyoming Inc. – Control Exemption –South Buffalo Railway Company*, STB Finance Docket No. 34107 (served November 21, 2001). GWI also has subsidiary railroad operations in Canada and Mexico, and affiliated rail operations in Australia and Bolivia. Further, as also noted on Exhibit A, GWI controls several companies that are related to rail transportation, including Rail Link which performs contract switching services that are not subject to the Board's jurisdiction, Genesee & Wyoming Rail Services, Inc. which performs administrative services for GWI's U.S. and foreign railroads and its non-railroad subsidiaries, and two equipment leasing companies.

⁴ Operating revenues for the year 2000 for each of the U.S. railroads controlled by GWI are set forth on Exhibit B.

⁵ SB will connect with these railroads as well, once the control of SB by GWI is approved.

The shippers served by the various railroads range in size from very small companies to very large ones. Some ship as little as a single car per year.

The Board's Proposal

The Board proposes that "small rate disputes" be made legislatively subject to mandatory binding arbitration. The purpose is to address the complaints of "smaller rail customers" that the Board's formal procedures are impractical for the amount of traffic they ship. Decision at 3. The Board's belief is that low-volume shippers do not have sufficient pricing leverage with their serving railroads to protect themselves, and presumably that they need a lower cost litigation forum to obtain that leverage. *See* Decision at 4.

Discussion

The Board's arbitration proposal does not adequately address the perceived problems. The criticisms about the current system for resolving rate complaints come largely from captive shippers that have attempted to challenge the rates of Class I railroads, and about the legal maneuvering the large railroads use. Class I railroads may have pricing leverage with respect to certain commodities over shippers of almost any size, that ship almost any number of cars. However, the Board in suggesting mandatory arbitration in all cases with a limited number of shipments has not considered whether arbitration is necessary to protect shippers from shortlines, nor has it considered the adverse impacts on shortlines that will result.⁶

⁶ For the purposes of these comments, "shortlines" refers to both Class III and Class II railroads.

Making rate challenges less burdensome will mean that there will be more challenges that shortlines will need to defend, and more expenses that they will need to incur. The threat of litigation will give shippers, many of which are larger than the shortlines that serve them, the same type of unfair leverage over smaller railroads that the Board claims small shippers suffer from now at the hands of large shippers. Further, while the Board's suggested definition of a small rate dispute might be appropriate for Class I railroads, it is not for shortlines. GWI also believes that the Board's proposal is lacking in sufficient details to make arbitration workable.

A. The Board's proposal will result in increased litigation costs and have an adverse impact on shortlines.

To the extent the Board's proposal would make it easier for shippers to challenge rates, it can be expected there will be additional litigation against shortlines.⁷ Rate challenges will be expensive for shortlines, even if done through arbitration. They will need to retain counsel (few have in-house counsel to handle such disputes).

Shortlines will also need to incur substantial accounting costs to determine variable costs. For example, the statute creates a defense if rates are less than 180% of variable costs, and that determination is initially based on UCRS. 49 U.S.C. §§10707(d)(1)(a) and (b). However, UCRS (and the USOA on which it is based) has not been required of, or used by shortlines since 1982. *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company* ("MPI"), STB Docket No. 42038, 2000 STB LEXIS 126, *7 (served March 6, 2000). Accordingly, shortlines may have to re-classify their existing accounting records. Where that was not possible,

⁷ GWI believes that very few complaints are filed against shortlines under the current system; none have been filed against GWI's subsidiary railroads.

the Board has ordered a shortline to change its accounting system and to keep its records in accordance with USOA. *See MPI* (ordering DMIR to conform its records to USOA and to report cost data for a 12-month period).

Finally, if the rate were found to be in excess of 180% of variable costs (*see* the discussion in Section B below), then shortlines would need to retain experts to present evidence in support of the reasonableness of the rate. All of this is complicated by the fact that the Board has not suggested what the standards will be for determining reasonableness. GWI's fear is that shippers will use the threat of additional arbitration costs to gain leverage on small carriers, similar to the perceived leverage that larger carriers now have over shippers.

B. The Board's proposal does not adequately define the issues to be arbitrated.

Under current law, for the reasonableness of rates to be challenged, the Board must first determine whether the rail carrier has market dominance over the transportation to which the rate applies, and then must determine if the rate is reasonable. 49 USC §§ 10701(d), 10707. The Decision makes it clear that it is *not* suggesting elimination of the need to demonstrate market dominance:

Nor does it seem to us that arbitration should be prescribed for shippers who have readily available inter- or intramodal competitive alternatives or who are paying less than what Congress has already identified as the floor for regulatory intervention (180% of variable costs). Therefore, logically it would seem that *arbitration should be limited to those shippers whose traffic would meet our market dominance test* (i.e., shippers paying more than 180% of variable costs and lacking feasible inter- or intramodal alternatives) and who neither originate nor receive more than a certain number of cars per year via the railroad involved.

Decision at 4 (emphasis added). However, it is unclear from the Decision whether the Board is suggesting arbitration of both market dominance and reasonableness, or only reasonableness.

In the Decision, the Board assumes that the arbitration will not apply to rates unless the railroad is market dominant, and a small shipper is involved. Decision at page 4. While the counting of cars may be a "straightforward mechanical task" (Decision at 4), the determination of market dominance will not be as simple. The Board has recognized the complexity of the determination and has taken some steps to try to simplify the inquiry by eliminating consideration of product and geographic competition. *See Market Dominance Determination - Product and Geographic Competition*, STB Ex Parte No. 627, 1998 STB LEXIS 1003 (served December 21, 1998), and its progeny. However, the Board does not specify how the determination of market dominance will be made (will there be a separate Board proceeding on this issue, or will it be left to the arbitrator?), or what factors will be considered.

Shortlines rarely have the market power to be market dominant. The transportation they handle, individually or together with affiliates or other short lines, is typically short haul, carload business. It is almost always truck competitive. The Board's regulations and the governing statute seem to use the size of a carrier (its classification) as a short hand for the carrier's market power – the larger the carrier, the more regulation that is needed to make sure that it does not abuse that market power. The class exemptions adopted by the Board with respect to the control of noncontiguous small carriers recognize that each individual carrier is but a small cog in its market and that there is little if any chance of abuse of market power. *See, e.g., Rail Consolidation, supra*, 2 ICC 2d at 680 ("Continuance in control of nonconnecting lines has little, if any, impact on market power.") Thus, there is little likelihood of shortlines having sufficient

market power to be considered "market dominant," and no justification for exposing such carriers to arbitration challenges to their rates.⁸

Further, before the Board recommends arbitration (or the legislature adopts it), a decision must be made about how the reasonableness of the rate will be determined by the arbitrator. The statute provides general criteria that must be considered. 49 USC §10701(d)(2). However, the Decision does not suggest what methodology would be required to establish what the reasonable rate would be. Decision at 6. The arbitrator should not be determining what is in his mind the "fairest" rate, or the "fair" rate of return. The statute lets the market decide the prices except where there is market dominance. To the extent there is, the standard for reasonableness must be specified. It would not be appropriate in such cases to use "baseball style" or "high/low" types of arbitration which do not consider "reasonableness," but which merely give shippers the ability to get a lower price when the railroad's rate is otherwise lawful.

C. Any definition of a "small shipper" must take into account the size of the railroad whose rates are being challenged.

GWJ disagrees with the Board's suggestion that it should look only at the number of rail cars shipped over a particular carrier to determine whether the shipment qualifies as a "small rate dispute." Rather, GWJ believes the size of the shipper must also be considered. A shipper's leverage relates both to the relative amount of freight shipped over a particular shortline, as well as to the shipper's size. Many shortlines serve facilities of very large companies. The size of the

⁸ Not only are shippers not captive to shortlines, but in fact, the reverse is often true. Many shortlines have a handful (or less) shippers on their respective lines, and may have fewer alternatives than their shippers.

shipper will certainly affect its willingness and ability to afford challenging a shortline's rates, either under the current system or under arbitration. Even if these shippers only ship a limited number of cars, they will still have significant pricing leverage over the shortline.

Even if the Board were to determine that it is appropriate to look at the number of car shipped, it is clear that the number should vary based on the size of the carrier. A small rate dispute for a shortline is much different than a small rate dispute for a Class I carrier. The number of shipments suggested by the Board (200 to 500 cars) is problematic for many shortlines. Class I railroads often do not want to even deal with shippers that ship less than 500 carloads per year. But for shortlines that often rely on loose carload business, a 500 car (or even a 200 car) per year shipper can be a significant one.

D. The use of arbitration in other situations does not support the Board's proposed requirement for arbitration in rate matters.

As the Board notes, "[a]rbitration is offered increasingly to resolve rail-related disputes." Decision at 5. However, arbitration is currently available where the parties agree to proceed in that manner. The Board's current regulations allow for *voluntary* arbitration (or other alternative dispute resolution). See 49 CFR §1108.4(a) and Part 1109. Further, the fact that National Grain and Feed Association and the Class I railroads have *voluntarily* agreed to arbitrate certain rate disputes between their members, does not mean arbitration is an appropriate solution for all rate disputes. Grain generally moves over Class I railroads in unit trains for long distances. The situation on shortlines is often much different given the carload business they handle and given that the shippers are often larger companies than the railroads that serve them.

However, in this proceeding the Board is not suggesting voluntary arbitration -- it is suggesting mandatory binding arbitration. GWI believes that this would give too much power to shippers vis-a-vis shortlines, by making it too easy for the shippers to bring such actions. GWI believes the current voluntary system is sufficient.⁹

Conclusion

For all the foregoing reasons, GWI and its subsidiary railroads believe that the Board should not recommend mandatory arbitration of rates as a general rule. Even if the Board continues to believe that arbitration should be required in certain situations where there is the potential for shippers to be prejudiced, arbitration should not be mandated for rate complaints against Class II or Class III carriers.

Respectfully submitted,



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Dated: November 21, 2001

Attorneys for Genesee & Wyoming Inc.
and its Subsidiary Railroads

⁹ GWI does not oppose the Board's suggested requirement that the parties certify that arbitration has been considered.

Exhibit A

**U.S. RAILROADS
AND
U.S. RAILROAD-RELATED AFFILIATES**

A. GWI directly controls the following U.S. railroads through stock ownership:

Railroad	Marking	Class	States of Operation
Buffalo & Pittsburgh Railroad, Inc.	BPRR	II	New York, Pennsylvania
Bradford Industrial Rail, Inc.	BR	III	Pennsylvania, New York
Genesee & Wyoming Railroad Company	GNWR	III	New York
Dansville and Mount Morris Railroad Company	DMM	III	New York
Rochester & Southern Railroad, Inc.	RSR	III	New York
Louisiana & Delta Railroad, Inc.	LDRR	III	Louisiana
Allegheny & Eastern Railroad, Inc.	ALY	III	Pennsylvania
Willamette & Pacific Railroad, Inc.	WPRR	III	Oregon
Illinois & Midland Railroad, Inc.	IMRR	III	Illinois
Pittsburg & Shawmut Railroad, Inc.	PSR	III	Pennsylvania
Portland & Western Railroad, Inc.	PNWR	III	Oregon
Corpus Christi Terminal Railroad, Inc.	CCPN	III	Texas
Savannah Port Terminal Railroad, Inc.	SAPT	III	Georgia
Golden Isles Terminal Railroad, Inc.	GITM	III	Georgia
South Buffalo Railway Company (pending)	SB	III	New York

B. GWI indirectly controls the following U.S. railroads through its ownership of Rail Link, Inc.:

Railroad	Marking	Class	States of Operation
Carolina Coastal Railway, Inc.	CLNA	III	North Carolina
Commonwealth Railway, Inc.	CWRY	III	Virginia
Talleyrand Terminal Railroad, Inc.	TRR	III	Florida

C. GWI directly controls the following companies which might qualify as U.S. railroad-related affiliates:

Rail Link, Inc.

Genesee & Wyoming Railroad Services, Inc.

GWI Leasing Corporation

Kitanning Equipment Leasing Company

EXHIBIT B
OPERATING REVENUES
(2000)

Railroads	Marking	
Buffalo & Pittsburgh Railroad, Inc.	BPRR	21,519,718
Bradford Industrial Rail, Inc.	BR	— ¹⁰
Genesee & Wyoming Railroad Company	GNWR	33,979
Dansville and Mount Morris Railroad Company	DMM	— ¹¹
Rochester & Southern Railroad, Inc.	RSR	3,375,402
Louisiana & Delta Railroad, Inc.	LDRR	4,828,079
Allegheny & Eastern Railroad, Inc.	ALY	1,726,200
Willamette & Pacific Railroad, Inc.	WPRR	13,834,185
Illinois & Midland Railroad, Inc.	IMRR	20,210,520
Pittsburg & Shawmut Railroad, Inc.	PSR	2,446,650
Portland & Western Railroad, Inc.	PNWR	5,873,576
Corpus Christi Terminal Railroad, Inc.	CCPN	1,459,297
Savannah Port Terminal Railroad, Inc.	SAPT	2,105,197
Golden Isles Terminal Railroad, Inc.	GITM	904,069
Carolina Coastal Railway, Inc.	CLNA	177,615
Commonwealth Railway, Inc.	CWRY	739,522
Talleyrand Terminal Railroad, Inc.	TRR	2,087,580
South Buffalo Railway Company (pending)	SB	n.a. ¹²

¹⁰ Revenues are reported together with BPRR.

¹¹ Revenues are reported together with GNWR.

¹² GWI did not control SB in the year 2000. SB is a Class III railroad.