

SERVICE DATE – OCTOBER 29, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36326

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

Digest:¹ This decision permits an exemption for the control of Genesee and Wyoming Inc., a noncarrier holding company of 106 rail carriers, by Brookfield Asset Management, Inc. and DJP XX, LLC.

Decided: October 28, 2019

Brookfield Asset Management, Inc. (Brookfield), and DJP XX, LLC (DJP) (collectively, Applicants),² filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to allow Applicants to control Genesee & Wyoming Inc. (GWI) and the 106 rail carriers controlled by GWI that are subject to the jurisdiction of the Board (GWI Railroads).³ As discussed further below, the Board will allow the exemption to become effective. However, Applicants will remain subject to the Board's July 22, 2019 direction to provide periodic updates regarding the status and outcome of the review being conducted by the Committee on Foreign Investment in the United States (CFIUS).

BACKGROUND

On July 9, 2019, Applicants filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to control GWI, a publicly traded noncarrier holding company that controls, through direct or indirect equity ownership, the GWI Railroads. (Verified Notice 2.) As a result of the proposed transaction, GWI would become a privately held company and a wholly owned subsidiary of DJP. (*Id.*) According to the verified notice, DJP would indirectly control the GWI Railroads through DJP's direct control of GWI, and Brookfield would indirectly control the GWI Railroads through Brookfield's control of DJP and DJP's control of GWI. (*Id.*) Applicants state that Brookfield and DJP are not rail carriers and do not own or control any rail carriers in the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Brookfield controls DJP within the meaning of 49 U.S.C. § 10102(3).

³ Two of the GWI Railroads are Class II carriers, and the remainder are Class III carriers. (Verified Notice, Ex. 1.)

United States. (Id.) Applicants further state that they each require Board authority pursuant to 49 U.S.C. § 11323(a)(4) to consummate the transaction. (Id.)

Applicants represent that, pursuant to 49 C.F.R. § 1180.2(d)(2): (i) the GWI Railroads do not connect with any rail line owned or controlled by DJP or Brookfield; (ii) the proposed transaction is not part of a series of anticipated transactions that would connect any railroad owned or controlled by DJP or Brookfield with any GWI Railroad, or that would connect any of the GWI Railroads with each other; and (iii) the proposed transaction does not involve a Class I carrier. (Id. at 2-3.) Applicants acknowledge that, under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. (Id. at 5.) Applicants further acknowledge that because the transaction involves the control of two Class II carriers and more than one Class III carrier, the transaction is subject to the labor protection requirements of 49 U.S.C. § 11326(a) and New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979). (Verified Notice 5.)

By decision served on July 22, 2019, and published in the Federal Register on July 26, 2019 (84 Fed. Reg. 36,157), the effectiveness of the exemption was postponed until further order of the Board to allow sufficient time to consider the issues presented. The decision also directed Brookfield and DJP to provide updates regarding CFIUS review and the outcome of such review, and it invited comments from the Applicants and the public.

In response to its July decision, the Board received numerous comments, including opening and reply comments from the Applicants. Most of the comments relate to the Providence and Worcester Railroad Company (P&W), a Class III railroad controlled by GWI⁴ that operates passenger and excursion services between Rhode Island and Massachusetts.⁵ The main interests of the P&W Commenters are the continuation of excursion service, completion of a multi-use path, and the need for strong communication and collaboration with Applicants as the prospective new owners of P&W. Some of the P&W Commenters request that the Board condition authorization of the transaction on the Applicants working cooperatively to accommodate completion of the multi-use path. (See BHC Comments 3; City of Woonsocket Comments 1-2; National Park Service Comments 1; Honorable Michael O. Moore Comments 1; Town of Grafton Comments 1; Town of Uxbridge Comments 1.)

⁴ Genesee & Wyoming Inc.—Acquis. of Control Exemption—Providence & Worcester R.R., FD 36064 (STB served December 16, 2016).

⁵ The following commenters focused on issues pertaining to P&W: Blackstone Valley Tourism Council; the Honorable Donald R. Grebien, Mayor of Pawtucket, R.I.; Northern Rhode Island Chamber of Commerce; Blackstone River Valley National Heritage Corridor, Inc. (BHC); Town of North Smithfield, R.I.; City of Woonsocket, R.I.; U.S. Department of the Interior, National Park Service (National Park Service); the Honorable Michael O. Moore, Massachusetts State Senator; the Honorable James A. Diossa, Mayor of City of Central Falls, R.I.; Town of Grafton, Mass.; and Town of Uxbridge, Mass. (collectively, P&W Commenters).

A comment in opposition to the proposed transaction was received on August 20, 2019, from Victoria Dalrymple, who states that she is a shareholder of GWI. (Dalrymple Comments 1.) Dalrymple argues that the exemption at 49 C.F.R. § 1180.2(d)(2) is not applicable to the proposed transaction because Brookfield's management of railroads in other countries, its pyramid-controlled corporate structure, and evidence of its past decapitalization of rail assets suggest the possibility of anticompetitive outcomes. (*Id.* at 1-4, 6-7.) Dalrymple also raises concerns over the possibility of foreign entities—a “Singapore sovereign wealth fund”⁶ and Qatar, both of which have relationships with Brookfield—controlling key domestic infrastructure assets. (*Id.* at 6.)

The Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART/TD) filed a notice of intent to participate, and on September 5, 2019, Samuel J. Nasca, for and on behalf of SMART/TD, New York State Legislative Board (SMART/TD-NY), filed reply comments asserting that the notice of exemption should be rejected or the exemption revoked because of, among other things, the magnitude and nature of the transportation involved. (SMART/TD-NY Reply 3-4.) SMART/TD-NY expresses concern regarding the role of GIC, which it argues is required to be an applicant in addition to Brookfield and DJP, (*id.* at 4-5); asserts that Brookfield controls rail investments in Brazil, a country that produces soybeans that compete globally with U.S. soybeans, (*id.* at 5); and states that GWI controls rail carriers that are located in other countries and are not subject to Board jurisdiction, (*id.* at 8). SMART/TD-NY further comments that SMART/TD employees may be adversely affected by Applicants' prospective management of GWI. (*Id.* at 6)

On September 5, 2019, Applicants filed reply comments. Applicants respond to the P&W Comments and state that they intend to continue to work with GWI, P&W, and the communities and reiterate that they do not plan to change the operations of GWI or the GWI Railroads after consummation of the proposed transaction. (Applicants Reply 3, Sept. 5, 2019.) They further respond that the imposition of conditions on the transaction unrelated to competition would be inappropriate in this case. (*Id.* at 4.) Applicants assert that Dalrymple's comments are inaccurate and argue, among other things, that the proposed transaction will not have anticompetitive impacts because there will be no change in relationships with carriers outside the GWI corporate family, or in patterns or types of service by the GWI Railroads. (*Id.* at 5-6.) Applicants argue that Dalrymple mischaracterized Brookfield's ownership of an Australian railroad company and that those claims have no relevance to the applicability of the class exemption process. (*Id.* at 7.) Applicants also respond that no investor in Brookfield's private institutional funds has the ability to exercise control over those funds, no foreign government has any influence over any Brookfield-controlled funds, and such concerns are outside the Board's purview in any event. (*Id.* at 7-8.)

⁶ Dalrymple appears to be referring to GIC Pte. Ltd. (GIC). According to Applicants, GIC is a global investment firm that manages Singapore's foreign reserves and, at closing of the proposed transaction, GIC would have an approximately 27% equity interest in DJP and the same percentage vote on the DJP board of directors. (*See* Applicants Response 2 n.3; 2 n.4 & Verification, Sept. 9, 2019.)

Applicants also filed a response to SMART/TD-NY's September 5 reply comments on September 9, 2019, asserting that its claims are without merit.⁷ (Applicants Response 2, Sept. 9, 2019.) Applicants argue that GIC need not obtain the Board's control authority because the proposed transaction will not result in GIC controlling any of the Applicants or GWI Railroads and that GWI's control of carriers in other countries is not relevant to whether Applicants qualify for the § 1180.2(d)(2) exemption. (*Id.*) They also generally assert that no valid competitive concerns have been raised that would warrant rejection of the notice or revocation of the exemption. (*Id.*)

On September 24, 2019, Applicants filed an update regarding the status of the CFIUS review and a motion for protective order.⁸ On September 26, 2019, Applicants filed a further update regarding the status of the CFIUS review.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323(a)(4), the Board's approval and authorization is required for a transaction involving the acquisition of control of at least two rail carriers by a noncarrier. The class exemption set forth at 49 C.F.R. § 1180.2(d)(2) provides an expedited means of obtaining Board approval and authorization provided that certain required information is submitted and three criteria are met: (i) the railroads would not connect with each other or any railroads in their corporate family, (ii) the acquisition or continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family, and (iii) the transaction does not involve a Class I carrier.

After considering the comments and other information submitted into the record, the Board will allow the exemption to take effect. The comments submitted do not undermine the applicability of the 49 C.F.R. § 1180.2(d)(2) class exemption process.

The P&W Commenters express concerns regarding the excursion services,⁹ and four of the P&W Commenters request that the Board impose a condition relating to development of the multi-use path, but none of the P&W Commenters oppose the proposed transaction. Nor do the P&W Commenters suggest that the proposed transaction is not appropriate for a notice of

⁷ Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept into the record Applicants' September 9 response, as well as a September 10, 2019 petition for leave to reply and reply to Applicants' response filed by SMART/TD-NY, and an October 2, 2019 petition for leave to reply and reply to Applicants' September 5, 2019 response filed by Dalrymple, regarding Brookfield's corporate structure.

⁸ By decision served September 27, 2019, Applicants' motion for protective order was granted.

⁹ The City of Woonsocket expressed interest in the return of commuter rail service on P&W lines but did not oppose the proposed transaction.

exemption or that it would have anticompetitive effects. The Board appreciates the information and perspective of the P&W Commenters. However, the P&W Comments have not described how the requested condition is relevant to the considerations under 49 C.F.R. § 1180.2(d)(2) nor have they provided any legal basis for imposing such a condition. The Board concludes that the requested condition is not warranted and, further, Applicants' September 5 reply comments have sufficiently addressed the concerns expressed by the P&W Commenters. (See Applicants Reply 2-4.)

Dalrymple asserts that § 1180.2(d)(2) is inapplicable and suggests that the proposed transaction would result in anticompetitive outcomes, but she does not explain how the assertions raised in her comments (e.g., past decapitalization of an Australian railroad controlled by Brookfield and various negative financial impacts in that country, and concerns about Brookfield's corporate structure) demonstrate that the class exemption criteria are not met, or how the assertions would support a finding of anticompetitive effects. The proposed transaction would change the ownership of GWI, as opposed to changing relationships with carriers outside the GWI corporate family or increasing common control of railroads subject to the Board's jurisdiction.¹⁰

Similarly, 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. SMART/TD-NY asserts that the proposed transaction "raises competitive questions," (SMART/TD-NY Reply 8-9), but does not otherwise explain this claim aside from a reference to transportation of soybeans in Brazil for sale in international markets. But see 49 U.S.C. § 10501(a) (Board jurisdiction applies to transportation in the United States). Finally, except for an assertion that "GIC is important" to the proposed transaction, SMART/TD-NY does not state why GIC should be required to be an applicant.¹¹ (SMART/TD-NY Reply 4-5.)

Accordingly, Applicants' notice of exemption will become effective on the service date of this decision. Because the overall transaction is also subject to CFIUS approval,¹² Applicants will remain subject to the Board's previous direction to provide updates regarding the status of CFIUS review and to provide an update within seven days after they are notified of the outcome of such review.

¹⁰ Regarding the applicability of § 1180.2(d)(2), the control of another rail carrier outside the United States is not within the Board's jurisdiction and does not make an entity a rail carrier. See 49 U.S.C. § 10501(a); 49 U.S.C. § 11323(a).

¹¹ As noted above, Applicants included in their September 9 response a verification from James Rickert, President of DJP, that, at closing of the proposed transaction, GIC would have an approximately 27% equity interest in DJP and same percentage vote on the DJP board of directors. (Applicants Response 2 n.4 & Verification, Sept. 9, 2019.)

¹² (See Applicants Comment 12, Aug. 16, 2019.)

It is ordered:

1. The exemption will become effective on the service date of this decision.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Oberman commented with a separate expression.

BOARD MEMBER OBERMAN, commenting:

Because this transaction meets the requirements of 49 C.F.R. § 1180.2(d), and because, as stated in the decision, the comments submitted have not undermined the applicability of the class exemption process, I join in approving the transaction's going forward as a class exemption. Nevertheless, I write separately to express my concerns with the use of the class exemption process for transactions of this magnitude.

GWI's North American operations, which will be acquired pursuant to the proposed transaction, include 106 short line and regional railroads subject to Board jurisdiction, (Verified Notice 1), and operations in 41 states with over 13,000 track miles. See Genesee & Wyoming Inc., About Us, https://www.gwrr.com/about_us (last visited Oct. 28, 2019). GWI's 2018 North American operating revenues totaled \$1.36 billion. Genesee & Wyoming, Inc., 2018 Annual Report 7 (2019). GWI's railroads are essential to serving a large number of shippers and receivers and constitute essential links in the national rail network. Most or all of the country's Class I railroads could not serve many of their customers without the service provided by GWI's railroads. Indeed, if GWI were itself a rail carrier, its North American operations would clearly make it a Class I carrier.¹ As it is, GWI is a widespread presence throughout the national rail network, in which it plays an integral role. Thus, this is by far the largest and most geographically diverse collection of railroads impacting the U.S. freight network ever to be processed as a class exemption under the Board's existing regulations.²

¹ See Indexing the Annual Operating Revenues of R.R.s, EP 748 (STB served June 14, 2019) (calculating Class I revenue threshold at \$489,935,956).

² Cf. Fortress Inv. Grp. LLC—Control Exemption—RailAmerica, Inc., FD 34972 (STB served Dec. 22, 2006) (publishing notice for the acquisition of 30 rail carriers); Mont. Rail Link, Inc.—Exemption Acquis. & Operation—Certain Lines of Burlington N. R.R., FD 31089 (ICC served May 26, 1988) (denying petitions for revocation of notice of exemption permitting acquisition of two non-contiguous segments of rail line totaling 830.62 miles in length in Montana and Idaho); Wisc. Cent. Ltd.—Exemption Acquis. & Operation—Certain Lines of Soo

(Continued . . .)

For these reasons, in my opinion, this proceeding raises significant questions regarding whether transactions of this magnitude were contemplated when the class exemption regulations were adopted, and therefore raises questions as to whether it is appropriate for such major transactions to be eligible under those regulations in the first place. While I agree that, under existing regulations, this transaction may proceed as a class exemption, I do think the Board should consider in the future whether the exemption process should be applicable to transactions of such scale.

(. . . continued)

Line R.R., FD 31102 (ICC served Oct. 8, 1987) (vacating stay and permitting consummation of a class exemption for the acquisition of 1,801 miles of rail line in Wisconsin and parts of Michigan, Minnesota, and Illinois; acquisition of 173.6 miles of trackage rights in Wisconsin and parts of Minnesota and Illinois; and assignment of 27.7 miles of trackage rights on third-party carriers in Wisconsin).