

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA,
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Decision No. 7

Decided: February 20, 2008

On December 27, 2007, the Board issued Decision No. 4, which accepted for consideration the application filed by Canadian Pacific Railway Corporation (CPRC), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation (IC&E), seeking approval for the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPRC). CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as “applicants.”

Decision No. 4 authorized parties to begin discovery immediately and set a procedural schedule requiring interested parties to file requests for conditions, evidence, and arguments regarding the proposed acquisition on or before March 4, 2008. By emergency motion filed on February 14, 2008, applicants seek a protective order to quash the notice of deposition of Kathryn McQuade, CPRC’s Executive Vice President and Chief Operating Officer, served by Kansas City Southern Railway Company (KCS) on February 11, 2008.¹ On February 15, 2008, KCS filed: (1) a reply in opposition to applicants’ emergency motion; (2) a motion to compel Ms. McQuade’s deposition; and (3) a request for clarification regarding deponents’ obligation to answer all relevant questions, including questions related to the competitive impact on the movement of grain. Applicants filed a reply to KCS’s motion to compel on February 19, 2008.

DISCUSSION AND CONCLUSIONS

Parties generally may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. See 49 CFR 1114.21(a). A party may, however, by motion seek an order to protect a party or person from annoyance, embarrassment,

¹ KCS also served on February 11, 2008, notices seeking to take the depositions of DM&E’s President, Kevin Schieffer; CPRC’s Vice President-Marketing & Sales (Merchandise), Ray Foot; and John H. Williams of The Woodside Consulting Group, Inc., an expert witness for applicants. Applicants state that they will produce these persons for deposition, each of whom submitted a verified statement as part of the application.

oppression, or undue burden or expense, or to prevent the raising of issues that are untimely or inappropriate to the proceeding. See 49 CFR 1114.22(c).

Applicants argue that KCS's deposition notice is untimely and unduly burdensome. Applicants state that, despite Decision No. 4's direction that discovery may begin immediately, KCS waited more than 6 weeks to serve the McQuade deposition notice. Applicants also argue that, while Mr. Schieffer, Mr. Foot, and Mr. Williams each submitted verified statements in connection with the application, Ms. McQuade did not submit testimony and was not personally involved in the preparation of the application. Further, applicants argue that, given Ms. McQuade's position as CPRC's Chief Operating Officer, it is unreasonable for KCS to demand her appearance on short notice for a deposition. Applicants also argue that KCS intends to question Ms. McQuade on matters that they believe fall outside the scope of the proposed transaction, and would therefore not be reasonably calculated to lead to the discovery of admissible evidence.² Finally, applicants argue that their expert witness is better suited to respond to questions regarding competition than Ms. McQuade.

KCS opposes applicants' emergency motion. KCS argues that the issuance of a protective order is not warranted here and that none of the applicants' arguments constitute valid grounds to quash the notice of deposition. KCS explains that its deposition notice was served only after discussions with DM&E (undertaken upon the advice of CPRC) designed to alleviate KCS's competition concerns reached an impasse and the possibility of a negotiated settlement became unlikely. Further, KCS states that its deposition notice was served within the time period allotted for discovery. KCS also argues that the Board's rules do not exempt Ms. McQuade from being deposed merely because she did not submit a verified statement or because of her high-level management position at CPRC. Finally, KCS argues that it is premature to limit the scope of the depositions.

In their reply to KCS's motion to compel the deposition of Ms. McQuade, applicants argue that KCS has the burden of showing that the information sought is relevant. They also argue that KCS's allegations of unlawful control are baseless, that Ms. McQuade is neither the best nor only witness who can testify regarding the likely competitive effect the proposed transaction may have on grain movements, and that KCS has not justified its late request to depose Ms. McQuade.

We will deny CPRC's motion for a protective order and grant KCS's motion to compel the deposition of Ms. McQuade. Although Ms. McQuade did not submit a verified statement in connection with the application, her position with CPRC makes it reasonable to conclude that she would have relevant information regarding the proposed transaction, including issues related

² Specifically, applicants believe that questions regarding KCS's proposed extension of agreements with IC&E covering grain shipments and movements between Kansas City, MO, and Chicago, IL, would have no nexus to the proposed control transaction.

to how the transaction could affect competition. Ms. McQuade is not entitled to a de facto exemption from the discovery process by virtue of her status as a non-witness. See 49 CFR 1114.22 (allowing for the deposition testimony “of any person, including a party.”). Neither is Ms. McQuade exempt because she, as Executive Vice President and Chief Operating Officer, undoubtedly has a very busy schedule. Further, applicants’ contention that the data produced in discovery and the upcoming deposition of its expert witness will be sufficient ignores the possibility that an in-house business person may have information and perspectives on competition that are different from or more detailed than those of an expert witness.

Further, although the notices of deposition were served after the commencement of discovery, the notices were served well within the time period allowed under the Board’s procedural schedule adopted in Decision No. 4 and only after KCS pursued a settlement that might have obviated the need for the depositions. In short, applicants have failed to demonstrate that deposition of Ms. McQuade would be oppressive, or unduly burdensome or expensive. Accordingly, applicants will be directed to make Ms. McQuade available for deposition in the city or municipality where the deponent is located unless otherwise agreed, at a mutually convenient time, consistent with 49 CFR 1114.23(a).

KCS’s deposition notice, which lists information regarding the application and discoverable matters related to it, provides sufficient notice that it seeks to discover information regarding the transaction and its effect on competition in grain transportation (and other sectors). This information is clearly relevant to the proceeding. Likewise, inquiry into whether there has been unlawful control is relevant in merger proceedings, subject to the Board’s ability to issue a protective order where necessary to protect a party from annoyance, embarrassment, oppression or undue burden. See 49 CFR 1114.21(c). With respect to the other potential issues, it would be premature for the Board to define precisely every subject matter that could be a legitimate focus of Ms. McQuade’s deposition. We do not know the full scope of questions KCS intends to pursue nor whether CPRC will object to its witnesses addressing all, a subset, or none of KCS’s questions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Applicants’ emergency motion for a protective order to quash KCS’s notice of deposition of Kathryn McQuade is denied.
2. KCS’s motion to compel Kathryn McQuade’s deposition is granted to the extent described above.

3. This decision is effective on the service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary