

EXPEDITED CONSIDERATION REQUESTED

241060

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
July 8, 2016
Part of
Public Record

STB FINANCE DOCKET NO. 36028

KANAWHA RIVER RAILROAD, L.L.C.
- LEASE EXEMPTION CONTAINING INTERCHANGE COMMITMENT -
NORFOLK SOUTHERN RAILWAY COMPANY

MOTION FOR ACCESS TO CONFIDENTIAL DOCUMENTS

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July 7, 2016

 GRANTED Office of Proceedings	DECISION ID NO.: <u>45316</u>
	DECIDED DATE: <u>7-8-2016</u>
	SERVICE DATE: <u>7-8-2016</u>
	APPROVED: <u>Joseph H. Bettinucci</u> Acting Director
	<input checked="" type="checkbox"/> <u>Protective Order</u>

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36028

**KANAWHA RIVER RAILROAD, L.L.C.
-- LEASE EXEMPTION CONTAINING INTERCHANGE COMMITMENT --
NORFOLK SOUTHERN RAILWAY COMPANY**

MOTION FOR ACCESS TO CONFIDENTIAL DOCUMENTS

Pursuant to 49 C.F.R. § 1150.33(h)(2), M&G Polymers USA, LLC (“M&G”) hereby requests that the Surface Transportation Board (“Board” or “STB”) grant it access to confidential documents and information included in the Notice of Exemption (“Notice”) filed by Kanawha River Railroad, L.L.C. (“KNWA”) in this docket on July 1, 2016. KNWA has agreed to grant such access to M&G once a Protective Order is in place in this proceeding. Therefore, M&G also seeks issuance of a Protective Order in the format included at Attachment A to this Motion.

Depending on the date the Protective Order is issued, M&G also seeks a housekeeping stay so there are at least twenty (20) days between the date of the Protective Order and the effective date of the Notice, which is July 31st. If the Protective Order is issued on or before July 11th, then no housekeeping stay would be needed. Given that KNWA consents to the relief requested herein, M&G respectfully requests expedited consideration of this Motion. In support hereof, M&G states as follows:

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I. Background.

In the Notice, KNWA sought regulatory authorization for a lease of approximately 308.85 miles of track owned by Norfolk Southern Railway Company (“NS”) in Ohio and West Virginia. The Notice reveals that an interchange commitment would apply to the relevant lease between KNWA and NS. See Notice at 5. The terms of the interchange commitment are described in a lease agreement (“Lease Agreement”) that was filed under seal. See Notice at 5. KNWA also submitted other information under seal. See Notice at 7. Barring further action of the Board, regulatory authorization for the transaction will exist as of July 31, 2016. See 49 C.F.R. § 1150.32(b).

II. Identity and Interest of M&G.

M&G owns and operates a manufacturing facility in Apple Grove, West Virginia (the “Apple Grove Facility”) that is served by CSX Transportation, Inc. (“CSXT”). The Apple Grove Facility manufactures Polyethylene Terephthalate (“PET”) for sale throughout the United States. The PET marketplace is extremely competitive; domestic producers must compete not just with each other, but also with foreign producers importing PET into the U.S. Given this PET market environment, transportation service and cost are extremely important to the competitiveness of the Apple Grove Facility. M&G is seeking access to the relevant Lease Agreement and other redacted information in order to evaluate the possible impacts they may have on its Apple Grove Facility operations.

The Apple Grove Facility is approximately 14 miles south of Point Pleasant, West Virginia, where the NS line proposed for lease by KNWA intersects with the CSXT line which

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serves the Apple Grove Facility.¹ KNWA has stated that Point Pleasant is one of the locations where the interchange commitment would be in effect. See Notice at 5.

III. KNWA Has Agreed to Release Redacted Information to M&G.

Pursuant to the Board's regulations, shippers or other affected parties may seek access to confidential material filed with a notice of exemption when an interchange commitment exists or is proposed. See 49 C.F.R. § 1150.33(h)(2). After learning of the interchange commitment proposed in this proceeding, counsel for M&G contacted counsel for KNWA to discuss access to the confidential materials. KNWA agreed to voluntarily grant such access to M&G as long as a Protective Order is in place. Therefore, M&G hereby requests that the Board issue a Protective Order in the format included as Attachment A to this Motion. M&G seeks entry of this Protective Order pursuant to the Board's authority in 49 C.F.R. § 1150.33(h)(2)(ii). The order proposed as Attachment A generally follows the format of the protective orders that have been utilized by the Board in recent document access proceedings, such as Finance Docket No. 35972 (decision served Nov. 20, 2015) and Finance Docket No. 35729 (decision served July 30, 2013).

IV. A Housekeeping Stay is Warranted if the Protective Order is Issued After July 11th.

Under the standard 30-day timeframe for the class exemption process, the Notice will be effective (and the lease of NS track by KNWA will be authorized) on July 31st if the Board takes no action. See 49 C.F.R. § 1150.32(b). In order to provide M&G with sufficient time to review the Lease Agreement and the interchange commitment contained therein before the effective date of the Notice, M&G hereby requests that the Board impose a housekeeping stay on the effective date if the Protective Order is issued after July 11th. The requested housekeeping stay would be

¹ The Notice referred to Point Pleasant as being in Ohio on page 5. Although there is a Point Pleasant in Ohio, it is near Cincinnati. M&G believes KNWA meant to refer to the Point Pleasant in West Virginia, where the NS and CSXT lines meet, along the Kanawha River.

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for twenty (20) days after the date the Protective Order is issued. This brief extension would enable pre-consummation review of the proposed interchange commitment. This request is made pursuant to 49 C.F.R. § 1117.1 and precedent such as the Board's decision in West Belt Railway, LLC – Lease and Operation Exemption Including Interchange Commitment – Terminal Railroad Association of St. Louis, STB Docket No. 35972, slip op. at 2 (served Nov. 20, 2015).

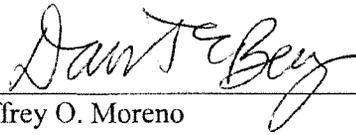
If the Protective Order is issued on or before July 11th, no housekeeping stay would be needed. Therefore, M&G respectfully requests that the Board expeditiously issue the Protective Order. Counsel for M&G has discussed the possible need for a housekeeping stay with KNWA counsel, and KNWA consents to the relief requested herein, though KNWA expressed its desire to keep any delay to a minimum.

V. Conclusion.

As described herein, M&G should be given access to the Lease Agreement and other redacted material in order to evaluate the possible impact of the interchange commitment on operations at the Apple Grove Facility. To facilitate such access, a Protective Order should be issued. If the Protective Order is issued after July 11th, M&G also requests a housekeeping stay so that there are at least twenty (20) days between issuance of the Protective Order and the effective date of the exemption sought in the Notice. KNWA consents to the relief sought herein, so M&G respectfully requests that the Board promptly issue the requested decision.

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Respectfully submitted,



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(202) 331-8800

Attorneys for M&G Polymers USA, LLC

July 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July 2016, I served a copy of the foregoing upon counsel for the entities listed below via electronic mail and U.S. first-class mail, postage prepaid.

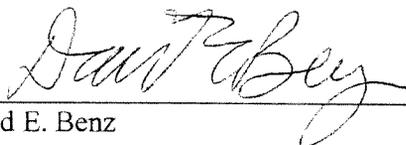
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David E. Benz

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ATTACHMENT A

PROTECTIVE ORDER

1. For purposes of this Protective Order:
 - (a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
 - (b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, and other confidential or proprietary business or personal information.
 - (c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with Paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
 - (d) “Proceedings” means those before the Surface Transportation Board (“Board”) concerning the Verified Notice of Exemption filed in Finance Docket No. 36028 and any related proceedings before the Board, and any judicial review proceedings arising from Finance Docket No. 36028 or from any related proceedings before the Board.
2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential

Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.
4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.
5. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been

given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.
7. Designated Material may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in Finance Docket No. 36028, any related proceedings before the Board, and/or any judicial review proceedings in connection with Finance Docket No. 36028 and/or with any related proceedings.
8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.
9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public

docket in these Proceedings except by order of the Board or of any administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that, if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.
11. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge, or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge, or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in Paragraph 9 of this Protective Order.
13. To the extent that materials reflecting Confidential Information are produced by a party in these proceedings, and are held and/or used by the receiving person in compliance with Paragraphs 1, 2, or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
14. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein
15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

16. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all "highly confidential" information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

EXHIBIT A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on July 8, _____, 2016, governing the production and use of Confidential Information and Confidential Documents in Finance Docket No. 36028 understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose, other than the preparation and presentation of evidence and argument in Finance Docket No. 36028, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Finance Docket No. 36028 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Name: _____

Date: _____

EXHIBIT B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____ July 8, _____, 2016, governing the production and use of Confidential Information and Confidential Documents in Finance Docket No. 36028 understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Finance Docket No. 36028, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Finance Docket No. 36028 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as ‘HIGHLY CONFIDENTIAL,’ that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as ‘HIGHLY CONFIDENTIAL’, other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party Name]

Date