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SEC

SERVICE DATE – SEPTEMBER 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION CONSTRUCTION  
INTO THE POWDER RIVER BASIN

Decided: September 20, 2006

By application filed February 20, 1998, Dakota, Minnesota & Eastern Railroad Corporation (DM&E) sought authority under 49 U.S.C. 10901 to construct and operate some 280 miles of new rail line so that it could reach the coal mines in Wyoming's Powder River Basin. In Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003), the court vacated and partially remanded the Board's prior decision, issued in January 2002, granting this construction authority to DM&E.<sup>1</sup> In a decision served February 15, 2006, the Board addressed the issues remanded by the court and again approved the railroad's application, subject to 147 environmental mitigation conditions, in Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), pet. for judicial review pending sub nom. Mayo Foundation v. STB, No. 06-2031 et al. (8th Cir. filed Apr. 14, 2006).

After DM&E filed its application, Mid States Coalition for Progress (MSC) sought extensive discovery from DM&E, including commercially sensitive information about DM&E's business. The railroad provided over 16,000 pages of documents to MSC pursuant to a protective order that DM&E and MSC had proposed together, which was issued on August 5, 1998, by Administrative Law Judge Joseph R. Nacy. DM&E also made witnesses available for deposition, and MSC deposed DM&E's president, Mr. Kevin Schieffer, on August 14, 1998. MSC used the evidence it received — including a volume, which is marked "highly confidential," containing Mr. Schieffer's deposition and related documents — in its opposition to DM&E's application filed on August 31, 1998.

On September 4, 1998, MSC filed a motion to declassify the information DM&E submitted marked "confidential" or "highly confidential," which was denied.<sup>2</sup>

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<sup>1</sup> Dakota, MN & Eastern RR—Construction—Powder River Basin, 6 S.T.B. 8 (2002).

<sup>2</sup> See Dakota, MN & Eastern RR—Construction—Powder River Basin, 3 S.T.B. 847, 860 (1998) (DM&E 1998).

On July 28, 2006, MSC filed a similar motion asking the Board to remove the “highly confidential” designation that had been attached to portions of Mr. Schieffer’s deposition and the documents attached to it. MSC explains that DM&E made public some “highly confidential” excerpts from Mr. Schieffer’s deposition in two other Board proceedings involving DM&E.<sup>3</sup> MSC argues, based on a series of cases, that a divulgence of privileged or confidential material acts as a waiver of confidentiality as to all other materials pertaining to the disclosure.<sup>4</sup> Therefore, according to MSC, DM&E’s disclosure to the public in IMRL of the deposition excerpts means that it has waived confidentiality to the entire deposition and all of the attached documents. Based on DM&E’s alleged waiver, MSC asks the Board to make public all of the materials in question. DM&E filed a reply in opposition to MSC’s motion on August 17, 2006.

MSC’s motion will be denied. The cases MSC cites are not on point. These cases involve waiver of the attorney work product privilege or the attorney-client privilege. Documents protected by these privileges are never disclosed to other parties or to the Board, unless and until the privilege is waived by a disclosure of privileged material. In contrast, protective orders and confidentiality designations in Board proceedings allow commercially sensitive data to be used in connection with the proceeding, but not for any other business or other commercial purpose. In order to encourage free and open discovery in Board proceedings, there is a right to have confidential information remain so, absent some overriding policy concern requiring that the information be divulged. MSC, however, has not shown that disclosure of the classified information (those portions of the protected materials that have not yet been made public) now is necessary to serve any overriding public policy concern.

As the Board explained in DM&E 1998 when examining MSC’s earlier request to make public commercially sensitive data that had been filed under seal, the agency’s focus in resolving an issue such as this is on whether a party needs the material classified at a less confidential level to present its case.<sup>5</sup> MSC has not even attempted to make this showing. Furthermore, the protective order governing this proceeding, which was agreed to and jointly proposed by MSC and DM&E, specifically allows parties to voluntarily disclose their own confidential material to the public so long as no other party’s confidential material will also be disclosed. MSC would

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<sup>3</sup> See Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177, and Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178 (hereinafter “IMRL”).

<sup>4</sup> See Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Company, Inc., 132 F.R.D. 204, 207-08 (N.D. Ind. 1990); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 484-86 (S.D. N.Y. 1993); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982); and Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994).

<sup>5</sup> Id.

have the Board find that, in exercising this right, a party destroys the applicability of the protective order to any other confidential or highly confidential information associated with the information so disclosed. That position, however, ignores the terms and intent of the protective order.

DM&E states that, if MSC believes a specific confidential or highly confidential passage of the transcript should be made public, DM&E would be open to discussion with MSC on that point. But DM&E is correct that a blanket motion to make the entire transcript public without a showing of why disclosure to the public of material not previously made public is necessary would jeopardize the railroad's legitimate rights and expectations in the protective order. For all of these reasons, we deny MSC's motion.

It is ordered:

1. MSC's motion is denied.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary