

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35081 (Sub-No. 2)

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

Decided: March 26, 2014

In this decision, the Board is compelling Canadian Pacific Railway Company (CP) to answer all interrogatories and produce most of the documents sought by the State of South Dakota, acting by and through its Department of Transportation (State). As discussed below, however, the Board will not compel CP to produce documents containing communications between CP and the Federal Railroad Administration (FRA) related to the safety of train operations on the system of the Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and DM&E's wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation (IC&E) to the extent the communications are not related to CP's investment representations. The Board will require CP to prepare a privilege log.

In 2007, CP, Soo Line Holding Company (Soo Holding), DM&E and its wholly owned rail subsidiary, IC&E, sought approval under 49 U.S.C. §§ 11321-26 for CP's acquisition of indirect control of DM&E and IC&E through ownership of DM&E/IC&E stock by Soo Holding.¹ The Board approved the acquisition, subject to conditions, in Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 30, 2008).

On August 8, 2013, the State filed a petition requesting that the Board enforce three investment representations allegedly made by CP as part of the acquisition proceeding. Specifically, the State claimed that: (1) CP represented that it would invest \$300 million in the first three post-acquisition years; (2) CP, in clarification, represented that it would invest \$300 million in addition to investment dollars previously budgeted by DME² in the first few years following its acquisition of DME; and (3) FRA informed the Board that, as part of the Safety Integration Plan (SIP) process for the acquisition,³ CP had represented that it would expend \$300 million in the first four post-acquisition years to upgrade all of DME's track to FRA Class 3

¹ Hereinafter, unless otherwise noted, references to CP include affiliated corporate entities, including DM&E and IC&E.

² The State refers to DM&E and IC&E collectively as DME.

³ See 49 C.F.R. pt. 1106.

standards.

The State asked the Board to direct CP to (1) provide investment data and other information necessary to determine whether CP has adhered to the first two representations; and (2) submit a verified statement addressing CP's view on its compliance obligations. The State further requested that the Board provide the State and other interested parties an opportunity to file comments responding to CP's submissions, and then issue an appropriate enforcement order against CP.

On August 28, 2013, CP filed a reply in opposition to the State's enforcement petition in which it asserted that it has fully complied with the investment representations made in the acquisition proceeding and that there is no basis for an enforcement order against CP.

The State filed a supplement to its August petition on September 20, 2013, and CP filed a reply to the supplement on October 18, 2013. The Board also received statements and letters supporting the State's filing from a number of government agencies and representatives, individuals, and entities. Notably, in their letter of support filed September 30, 2013, the U.S. Department of Transportation and FRA provided a clarification to FRA's 2008 letter to the Board. They stated that, upon review of the record, CP did not make a representation to FRA committing an investment of approximately \$300 million over four years to upgrade all DME track to Class 3 standards and that FRA's earlier letter amounted to an overgeneralization.

In a decision served on December 20, 2013, the Board allowed the State to engage in discovery to provide it a full and fair opportunity to obtain relevant information needed to support its petition. The Board also established a procedural schedule whereby the State could file a supplement based on its discovery and CP could file a reply.⁴

In response to the Board's December decision, the State served its discovery requests on CP on January 10, 2014. At CP's request, the State extended the due date for CP's responses to February 3, 2014, and CP tendered its answers and objections to the State on that date.

On February 14, 2014, the State filed a motion to compel discovery from CP. It asks that the Board require CP to answer interrogatories and to produce documents that it asserts pertain to this proceeding. The State also asserts the need for CP to produce a log for information for which CP asserts privilege. On March 6, 2014, CP filed a reply claiming that it has already provided the material that is germane to the State's enforcement petition and that the State's motion to compel discovery seeks material that is overly burdensome and irrelevant to the State's case.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R.

⁴ In a decision served on March 10, 2014, the Board granted the State's motion to extend the due dates so that discovery must now be completed by April 4, 2014, with the State's supplement due May 5, 2014, and CP's reply due June 6, 2014.

§ 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

Investment Information. The Board will compel CP to produce documents in response to Request Nos. 9, 10, 15, 17, and 19. These requests concern CP’s investment representations. The resulting data should aid in explaining the projects on DME track toward which CP allocated funds, the status of the projects, and, in turn, whether CP has fulfilled its representations. These matters are fundamental to this proceeding. Although CP argues that it has already provided the information sought by the State in its August enforcement petition and data allegedly demonstrating CP’s investment of over \$300 million in the DME lines, the material being compelled here is relevant and should act as a means for the State to verify and analyze CP’s expenditures.

The Board is not persuaded by CP’s claims that producing the various documents would be overly burdensome. These are recent documents, and CP has already undertaken a similar search in reference to what it has produced to the State so far.

Upgrading DME Track to Class 3 Standards. The State notes that, in 2008, FRA informed the Board that CP had committed to spend \$300 million over four years to upgrade all DME track to Class 3 standards. The Board referenced this statement in its decision approving CP’s 2008 acquisition of DME. Now, according to the State, CP’s 2013 disavowal of this representation and FRA’s affirmation of CP’s position raise questions. Specifically, the State wants to know: (1) what CP said to FRA about its investment representations; and (2) if CP is correct that it did not tell FRA it would upgrade all DME track to Class 3 standards, why CP sat by while both FRA and the Board relied on this incorrect information. The State asserts that Interrogatory Nos. 3, 4, 5, and 6 ask CP to provide relevant information concerning these issues.

The Board will require CP to answer these interrogatories. Although CP has provided partial responses, the Board will require more complete answers. CP has failed to demonstrate how interviewing its current or former staff and reviewing recent documents would be unduly burdensome.

Safety. The Board will not compel CP to produce documents for Request No. 18. There, the State asks that CP produce “all documents containing communications from 2007 to the present between CP and the FRA relating to the safety of train operations on the DME System.” In support, the State claims only that CP spent a significant portion of its reply to the August 2013 petition addressing CP’s safety record. The Board finds that documents containing communications with FRA relating to the safety of train operations relevant to CP’s investment representations are duplicative of other document requests and should already be included in CP’s response. Such documents that do not pertain to CP’s investment representations are outside the scope of this proceeding.

Privilege Log. CP has objected to providing answers and producing documents to the extent the answers or documents are subject to the attorney-client privilege or the attorney work product doctrine. The State notes that CP has specifically objected to responding to Interrogatory No. 4 and Request Nos. 10 and 12 on this basis, and has ignored the State's Instruction No. 3, which requires a privilege log to be prepared. The State claims that a privilege log is necessary for it to review the merits of CP's privilege/work product assertions.

The Board will require CP to produce a privilege log for Interrogatory No. 4 and Request Nos. 10 and 12. The Board does not routinely require the production of privilege logs.⁵ Here, however, subsequent to the commencement of this proceeding, CP entered into an agreement to sell some 670 miles of DM&E lines,⁶ most of which are in the State. The State is asserting that CP, in accordance with its representations to the Board, should have invested to improve the condition of those lines. Under these circumstances, it is appropriate to require the preparation of a privilege log with respect to discovery requests that relate to CP's plans for investment in the State.

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

It is ordered:

1. The State's motion to compel discovery is granted to the extent discussed above.
2. CP is directed to produce material and answer the interrogatories to the extent discussed above.
3. CP is directed to prepare a privilege log, as discussed above.
4. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁵ See Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. 7-8 (STB served June 25, 2012).

⁶ On March 11, 2014, notices of exemption were filed in Rapid City, Pierre & Eastern Railroad, Inc.—Acquisition and Operation Exemption Including Interchange Commitment—Dakota, Minnesota & Eastern Railroad Corporation, Docket No. FD 35799, and Genesee & Wyoming Inc.—Continuance in Control Exemption—Rapid City, Pierre & Eastern Railroad, Inc., Docket No. FD 35800.