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SERVICE DATE – FEBRUARY 13, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35799

RAPID CITY, PIERRE & EASTERN RAILROAD, INC.—ACQUISITION AND OPERATION
EXEMPTION—DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

Docket No. FD 35800

GENESEE & WYOMING INC.—CONTINUANCE IN CONTROL EXEMPTION—RAPID
CITY, PIERRE & EASTERN RAILROAD, INC.

MOTION FOR PROTECTIVE ORDER

Digest:¹ The Board is imposing a protective order to safeguard sensitive material that will be submitted as part of these proceedings.

Decided: February 12, 2014

On January 2, 2014, Rapid City, Pierre & Eastern Railroad, Inc. (RCP&E), a noncarrier, and Dakota, Minnesota & Eastern Railroad Corporation d/b/a Canadian Pacific (DM&E)² announced that they had entered into an agreement under which RCP&E would purchase certain DM&E lines and operating rights west of Tracy, Minn. (DM&E West Lines).³ The Board must approve the purchase before RCP&E can consummate it. Additionally, RCP&E's parent,

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 30, 2008), the Board approved an application allowing Canadian Pacific Railway Company (CP) to acquire indirect control of DM&E and DM&E's wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation.

³ The DM&E West Lines are already the subject of an ongoing proceeding that began last year. The State of South Dakota, by and through its Department of Transportation (State), filed a petition asking the Board to enforce three representations regarding investments in the lines allegedly made by CP during its 2008 acquisition proceeding. The Board served a decision allowing the State to engage in discovery concerning those claims. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081 (Sub-No. 2) (STB served December 20, 2013) (Canadian Pacific).

Genesee & Wyoming Inc. (GWI), will need Board approval before GWI can control RCP&E together with the other railroads in its corporate family when RCP&E becomes a carrier.

In preparation for seeking the necessary approval, GWI and RCP&E jointly filed a motion under 49 C.F.R. § 1104.14 for a protective order on January 13, 2014.⁴ They ask that the single order cover both proceedings in the above-referenced dockets. RCP&E and GWI seek a protective order to safeguard what they characterize as highly confidential information that might be disclosed in connection with the FD 35799 and FD 35800 proceedings. According to the movants, the highly confidential information might include the Transaction Agreement, including its associated exhibits and schedules (collectively, the Transaction Agreement), that has been entered into between RCP&E and DM&E with respect to the proposed acquisition of the DM&E West Lines. GWI and RCP&E assert that, although they might want to file the Transaction Agreement with the Board during the acquisition proceeding and/or control proceeding, it is not required to be filed under the Board's regulations.⁵

RCP&E and GWI contend that the Transaction Agreement contains proprietary and commercial information that could be competitively damaging if disclosed or used for purposes outside of these proceedings. They further claim that, given the nature and amount of commercially sensitive material throughout the Transaction Agreement, it would be impractical to provide a redacted public version of the document. Therefore, the movants state that they have used a form that is substantially the same as the form approved by the Board in Genesee & Wyoming, Inc.—Control—RailAmerica, Inc., FD 35654 (STB served Sept. 5, 2012) (GWI/RailAmerica), modified as follows: (a) the confidential information may only be used in the acquisition proceeding and/or control proceeding, and not in any other proceedings that might be considered related by some persons; (b) clarification that the entire Transaction Agreement is “highly confidential;” and (c) clarification that no public version of the Transaction Agreement will be available or “can be” filed with the Board.

These modifications and clarifications proposed by GWI and RCP&E will not be adopted. Their proposed protective order includes provisions that are both unusual and unnecessary to adequately protect the legitimate interests of RCP&E, DM&E, and GWI. First, the movants have not shown why the Board should preclude use of any confidential and highly confidential material in related proceedings. In the cases cited by GWI and RCP&E,⁶ there was

⁴ A proposed Protective Order and Undertakings were included with the motion.

⁵ GWI and RCP&E are directed to 49 C.F.R. § 1180.6(a)(7)(ii), which requires that those seeking approval for a control proceeding must submit "... a copy of any contract...pertaining to the proposed transaction." Furthermore, should an application be filed for the acquisition proceeding, GWI and RCP&E are directed to § 1150.4(a), which requires an applicant to submit "copies of all relevant agreements."

⁶ See Dynergy—Acquis. of Control Exemption—The Coffeen and W. R.R., FD 35780 (STB served Nov. 15, 2013) (Dynergy); Koch Indus.—Acquis. of Control Exemption—Tex. S.-E. R.R., FD 35708 (STB served Jan. 8, 2013) (Koch); Iowa Pac. Holdings—Control Exemption—Cape Rail, FD 35684 (STB served Oct. 26, 2012); GWI/RailAmerica; CSXT

(continued...)

no prohibition on using sensitive information in related proceedings so long as the proper procedures were followed. The movants have acknowledged⁷ another proceeding pending before the Board, Canadian Pacific, in which the Transaction Agreement's relevance could be an issue raised by parties. The Board will not prejudge any attempt to use the Transaction Agreement in that case by including such a restrictive clause here.

Second, the movants have failed to demonstrate why a public version of the Transaction Agreement cannot be prepared. Parties typically file a public version of confidential documents, and the Board has ordered parties to provide one when they have failed to do so. Del Grosso—Petition for Declaratory Order, FD 35652 (STB served Jan. 24, 2013) (Del Grosso). While there have been a few cases in which the Board has permitted a party not to provide a public version of the subject agreement with confidential material redacted, such as Koch and Dynergy, such instances have been limited to uncontroversial proceedings of limited scope. That is not the case here. The pending Canadian Pacific proceeding regarding the DM&E West Lines, which span the length of South Dakota, has generated comments from numerous government agencies and representatives, individuals, and entities, including the U.S. Department of Transportation and the Federal Railroad Administration. It is not unreasonable to anticipate that parties to that proceeding might assert that access to a public version of the Transaction Agreement could facilitate the adjudication of issues there. Therefore, a public version of the Transaction Agreement with sensitive material redacted would need to be filed.

Finally, RCP&E and GWI have not demonstrated why the entire Transaction Agreement should be considered “highly confidential.” The Board will not permit all material to be considered “highly confidential” before the Transaction Agreement is submitted to the agency. The movants will need to make their designations based upon the standards set forth in the Protective Order.

Although GWI and RCP&E have not yet submitted their Transaction Agreement, it is reasonable to assume that the Transaction Agreement contains some proprietary and commercially sensitive information. Likewise, other sensitive material might also arise as part of these proceedings. Unrestricted disclosure of such information could cause serious competitive injury to these parties. Consequently, good cause exists to grant the motion and issue a protective order here in a form similar to the one entered in GWI/RailAmerica.⁸

(...continued)

Transp., Inc.—Joint Use Agreement, FD 35348 (STB served May 21, 2010); and Norfolk S. Ry.—Joint Control and Oper.—Pan Am S., LLC, FD 35147 (STB served May 30, 2008).

⁷ Motion for Protective Order 4.

⁸ In Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 21, 2007), the Board imposed a protective order concerning CP's 2008 acquisition of DM&E, and CP filed its August 28, 2013 confidential reply in FD 35081 (Sub-No. 2) pursuant to that order. That 2007 order is substantially similar to the one imposed in GWI/RailAmerica, and, as discussed, to be imposed here.

Accordingly, the Protective Order and Undertakings contained in the Appendix to this decision, in a form similar to the one entered in GW/RailAmerica, will be adopted.

It is ordered:

1. The motion for a protective order is granted as discussed above, and the Protective Order and Undertakings in the Appendix to this decision are adopted.
2. This decision is effective on the service date.

By the Board, Chairman Elliott and Vice Chairman Begeman. Vice Chairman Begeman concurred with a separate expression.

VICE CHAIRMAN BEGEMAN, concurring:

The line at issue in these proceedings is already the subject of a pending matter at the Board that is currently in the discovery stage (see Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081 (Sub-No. 2) (STB served December 20, 2013)). Given the significant interest in that proceeding as indicated by the record, I would have considered postponing action on this motion until that proceeding is resolved. However, because neither the State nor any other interested party requested a postponement, I will instead support a modified protective order here, which will allow all pertinent information regarding this transaction to be available in the related proceeding.

APPENDIX

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; divisions of rates, trackage rights compensation levels and other compensation between carriers; 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 6 or 7 of this Protective Order and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (Board) concerning the transaction in Docket No. FD 35799, Docket No. FD 35800 and any related proceedings before the Board, and any judicial review proceedings arising from Docket No. FD 35799 or FD 35800 or from any related proceedings before the Board.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to Genesee and Wyoming Inc. (GWI) and Rapid City, Pierre & Eastern Railroad, Inc. (RCP&E) of the applicable Undertaking, forms of which are attached as Exhibits A and B to this Protective Order. Confidential Information shall be used solely for the purpose of the Proceedings, and not for any other business, commercial, or competitive purpose.

3. Personnel of GWI and RCP&E and their affiliates, including outside consultants and attorneys for any of them (representatives), may exchange Confidential Information for the purpose of participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, unless and until the transactions in the Proceedings are approved.

4. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of GWI and RCP&E or their affiliates are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such Proceedings and will not be deemed a violation of 49 U.S.C. §§ 10901, 11323, 11904, or any other relevant provision of the ICC Termination Act of 1995.

5. If approval is denied by the Board, then all Confidential Documents (other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings) that are exchanged between GWI, RCP&E, and their affiliates but which are not otherwise available to them as a result of their existing affiliation and pursuant to their reporting responsibilities for securities, tax and other purposes, must be destroyed, with certification that such destruction has been completed, or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents. With respect to parties other than GWI, RCP&E, and their affiliates, if approval is denied by the Board, or if approval is granted by the Board but the parties do not consummate the transaction, or if no approval is sought, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

6. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or 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 for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

7. 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 pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carriers; 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, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

8. 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 Protective Order.

9. 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 Protective Order.

10. 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.

11. 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.

12. 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 Docket No. FD 35799, Docket No. FD 35800, any related proceedings before the Board, and/or any judicial review proceedings in connection with Docket No. FD 35799, Docket No. FD 35800 and/or with any related proceedings.

13. 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.

14. 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.

15. 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.

16. 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 and has accompanied such submission with a written request that the Board: (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.

17. 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 14 of this Protective Order.

18. 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 this Protective Order, 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. §§ 10901, 11323, 11904, or of any other relevant provision of the ICC Termination Act of 1995.

19. All parties must comply with all of the provisions of this Protective Order unless the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

20. 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.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on February 13, 2014, governing the production and use of Confidential Information and Confidential Documents concerning Docket Nos. FD 35799 and 35800, 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 Docket Nos. FD 35799 and 35800, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with Docket Nos. FD 35799 and 35800 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 these proceedings (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.

Signed: _____

Affiliation: _____

Dated: _____

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 February 13, 2014, governing the production and use of Confidential Information and Confidential Documents concerning Docket Nos. FD 35799 and 35800, 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 Docket Nos. FD 35799 and 35800, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with Docket Nos. FD 35799 and 35800 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 ensure 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 these proceedings (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 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.

Signed: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____