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SEC

SERVICE DATE - JANUARY 9, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33180

INDIANA & OHIO RAILWAY COMPANY--ACQUISITION EXEMPTION--
LINES OF THE GRAND TRUNK WESTERN RAILROAD INC.

PETITION FOR PROTECTIVE ORDER

Decided: January 6, 1997

On December 6, 1996, the Indiana & Ohio Railway Company (IORY), a Class III rail carrier, filed a notice of exemption under 49 CFR 1150, subpart E, which applies to qualifying transactions under 49 U.S.C. 10902, to acquire from the Grand Trunk Western Railroad Inc. (GTW) rail lines totaling approximately 146.1 miles between Diann, MI, and Springfield, OH. The lines are located between: (1) milepost 39.7 at Diann, MI, and milepost 107.29 at XN Station near Leipsic, OH; (2) milepost 128.3 at DT&I Junction near Lima, OH, and milepost 202.7 at Springfield, OH; and (3) the Ottawa Loop between mileposts 110.8 and 114.88, south of XN Station.

As part of the acquisition, IORY will be assigned GTW's overhead trackage rights totaling 107.6 miles over: (1) 20.7 miles of CSX Transportation, Inc. (CSXT) line between CSXT Milepost 155.2 at XN Station and CSXT Milepost 134.5 at DT&I Junction; (2) 3.5 miles of Indiana & Ohio Central Railroad, Inc. (IOCR) line between IOCR Milepost 129.1 at Maitland Junction and IOCR Milepost 132.6 at Cold Springs, OH; and (3) 83.4 miles of Consolidated Rail Corporation (Conrail) line between CR Milepost 36.3 at Springfield and CR Milepost 119.7 at Cincinnati, OH. IORY will also acquire incidental overhead trackage rights over 22.5 miles of GTW's rail line between GTW milepost 39.7 at Diann and GTW milepost 17.2 at Flat Rock, MI.

The United Transportation Union (UTU) filed a petition to stay and/or revoke the exemption claiming that the transaction is not subject to section 10902. Similar objections were filed by the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employees (BMWE), and the Transportation Communications International Union (TCU.)¹ A decision served December 20, 1996, stayed the effective date of the exemption and directed the parties to submit additional evidence and argument to enable the Board to make an informed decision on the issues in this proceeding.

On January 3, 1997, GTW petitioned for approval of a protective order pursuant to 49 CFR 1104.14 to protect confidential and proprietary information in materials sought by discovery, including the terms of contracts and shipper-specific traffic data.² GTW asserts that public disclosure of those materials is not required to dispose of the issues set forth in

¹ BLE, TCU and BMWE will be granted leave to intervene in this proceeding.

² On January 3, 1997, GTW states that it produced redacted versions of documents that BMWE had requested on December 30, 1996, subject to the execution of a Highly Confidential Undertaking form.

the Board's December 20, 1996 decision. Paragraph 2 of the protective order governs the production of material designated as highly confidential.

Good cause exists to grant the petition. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

It is ordered:

1. BLE, BMW and TCU are granted leave to intervene.
2. The petition for a protective order is granted and the parties to this proceeding must comply with the protective order in the Appendix.
3. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this or any related proceedings, or are submitted in pleadings or other documents filed with the Board, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

a. Shall be designated and stamped as "CONFIDENTIAL" and shall be used solely for the purpose of this or any related proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial or other competitive purpose.

b. Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Board or the Administrative Law Judge presiding in this or any related proceedings, except: (1) to employees, counsel or agents of the party requesting such materials, solely for use in connection with this or any related proceedings, or any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and (2) to any participant in this or any related proceedings who is not an employee, counsel or agent of the requesting party only in the course of public hearings, if any, in such proceedings.

c. If produced through discovery, must be destroyed, and notice of such destruction served on the Board and the presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials either withdraws from this or any related proceedings, or at the completion of this and any related proceedings, or any judicial review proceeding arising therefrom, whichever comes first.

d. If submitted in any pleadings or documents filed with the Board, may not be submitted 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" in accordance with the procedure set forth at 49 CFR 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 except by order of the Board.

2. Any party producing material in response to requests for discovery by a party to this or any related proceedings, or submitting such material in a pleading or other document filed with the Board, may in good faith designate and stamp particular competitively sensitive material as "HIGHLY CONFIDENTIAL: OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY." If any party wishes to challenge such designation, the party may bring such matter to

the attention of the Board or of the Administrative Law Judge presiding in this or any related proceeding. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this or any related proceedings, or any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms prior to receiving access to such materials, and are legally able to receive such materials. Material designated as "HIGHLY CONFIDENTIAL" under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings, if any, in this or in any related proceedings, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Administrative Law Judge, the Board, or the reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, the Board or the court to (i) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (ii) restrict access to the portion of the record or pleadings reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with this Protective Order.

4. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this or in any related proceedings, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and all portions of the deposition at which any "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

5. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraph 1 of this Protective Order, such production, disclosure, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this or any related proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904.

U N D E R T A K I N G

I, _____, have read the Protective Order governing the production of confidential documents in STB Finance Docket No. 33180, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33180 or any judicial review proceedings taken or filed in connection therewith ("the Proceedings"). I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the party producing confidential documents shall be entitled to specific performance and injunctive 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.

Dated: _____

U N D E R T A K I N G

[HIGHLY CONFIDENTIAL MATERIAL]

As outside counsel [outside consultant] for _____ whom I represent in [by whom I have been retained for purposes of] this proceeding, I have read the Protective Order governing the production of confidential documents in STB Finance Docket No. 33180, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY," I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, that I will take all necessary steps to assure that said documents and information will 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 documents or information by personnel of my client, its subsidiaries, affiliates, or owners, that at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all other notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL--OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" by, or disclose any information contained therein to, any persons or entities that I do not represent in [by which I have not been retained for purposes of] this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the party producing confidential documents shall be entitled to specific performance and injunctive 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.

COUNSEL [OUTSIDE CONSULTANT]

Dated: _____