

32965
SEC

SERVICE DATE - AUGUST 14, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION AND
CEDAR AMERICAN RAIL HOLDINGS, INC. – CONTROL – IOWA, CHICAGO &
EASTERN RAILROAD CORPORATION

PETITION FOR PROTECTIVE ORDER

Decided: August 13, 2002

In a petition filed August 8, 2002, Dakota, Minnesota & Eastern Railroad Corporation (DMER), Cedar American Rail Holdings, Inc. (Holdings) (collectively, where appropriate, DME) and Iowa, Chicago & Eastern Railroad Corporation (IC&E) (collectively applicants) indicate that they will shortly file with the Board an application pursuant to 49 U.S.C. 11323-11325 and 49 CFR 1180.2(c) for DMER to control IC&E through ownership of the stock of IC&E's parent, Holdings. According to applicants, the stock of IC&E is currently held in a voting trust pending Board action on the application. In its petition, DME requests that the Board enter a protective order to govern the exchange of certain information among applicants.

Applicants state that preparation of the control application encompasses the exchange of certain information among the applicants, including traffic data and tapes, which contain shipper-specific information. Applicants indicate that, although this information in the application would assist the Board in developing an understanding and analysis of the proposed transaction, unrestricted exchange of such information between the applicants before control is authorized implicates the confidentiality provisions of 49 U.S.C. 11904 and issues of premature control. As in prior merger and control proceedings before the Board, DME seeks entry of a protective order to govern that exchange of information and to ensure compliance with 49 U.S.C. 11323 and 11904.

According to applicants, the proposed common control of DME and IC&E is a minor transaction pursuant to 49 CFR 1180.2(c). Therefore, they claim that no advance notice of intent is required under 49 CFR 1180.4(b) and applicants intend to file their application as soon as possible. Because the application cannot be completed until the attached Protective Order is in place, DME requests that the Board expedite this matter and issue a decision by August 14, 2002.

The request is similar to those for protective orders in other control cases.¹ 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, and accordingly is granted.

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

¹ See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. – Control and Merger – Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000 (STB served Feb. 5, 2001); Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company – Common Control, STB Finance Docket No. 33842, Decision No. 2 (STB served Jan. 12, 2000); Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated – Control– Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556, Decision No. 1 (STB served Feb. 26, 1998).

It is ordered:

1. The petition for a protective order is granted. The parties to this proceeding must comply with the Protective Order in the Appendix.²
2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

² This decision protects the information, materials, and data set forth in the attached Appendix whether contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “confidential information and data” 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 and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific traffic data, and the confidential terms of contracts with shippers. Personnel of Dakota, Minnesota & Eastern Railroad Corporation (DME), Cedar American Rail Holdings, Inc. (Holdings) and Iowa, Chicago & Eastern Railroad Corporation (IC&E), including outside consultants and attorneys, may exchange confidential information and data for the purpose of this or any related proceeding, but not for any other business, commercial or other competitive purpose, unless and until the application in STB Finance Docket No. 34178 is approved.

2. To the extent that any meetings, conferences, exchanges of data or other cooperative efforts between representatives of DME, Holdings and IC&E are held and carried out for purposes of this or any related proceeding, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the disposition of such proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904.

3. If the application in STB Finance Docket No. 34178 is ultimately denied, or if control is not effected, or if no application is filed, all confidential information and data, as defined in paragraph 1 of this Protective Order, exchanged by IC&E with DME or Holdings by their representatives or affiliates, in preparing the application for filing and in the course of this and any related proceeding will be returned to the originating party or destroyed.

4. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other confidential or proprietary business information is produced pursuant to a request for discovery by any party to this or any related proceeding, such material must be treated as confidential. Such material, 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 proceeding, 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, if any,

presiding in this or any related proceeding, except: (i) to employees, counsel or agents of the party requesting such material, solely for use in connection with this or any related proceeding, 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 material; and (ii) to any participant in this or any related proceeding who is not an employee, counsel or agent of the requesting party only in the course of public hearings in such proceedings.

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

d. If contained in any pleading filed with the Board, in order to be kept confidential, shall be treated in accordance with the procedure set forth at 49 CFR 1104.14. See 48 FR 44826-27 (1983).

5. If any party intends to use “CONFIDENTIAL” material at hearings in this or any related proceeding, 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” material to the Administrative Law Judge, if any, the Board, or the reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, if any, the Board or to the court to (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” material in accordance with this Protective Order.

6. If any party intends to use “CONFIDENTIAL” material in the course of any deposition in this or any related proceeding, 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” 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” material shall be kept under seal and treated as “CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other confidential or proprietary business information is produced by a party in this or any related proceeding and held and used by the receiving person in compliance with paragraphs 1, 2, and 4 of this Protective Order, such production, disclosure, and use of the material and of the data

that the material contains are deemed essential for the disposition of this and any related proceeding and will not be deemed a violation of 49 U.S.C. 11323 or 11904.

8. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING

I, _____, have read the Protective Order served on August 14, 2002, governing the production of confidential documents in STB Finance Docket No. 34178, 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. 34178 or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under the Protective Order to any person who is not also bound by the terms of the Order and who 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 applicants or other parties 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: