

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

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

Decision No. 8

Decided: March 27, 2008

On December 27, 2007, the Board issued Decision No. 4, which accepted for consideration the application filed by Canadian Pacific Railway Corporation (CPRC), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation (IC&E), seeking approval for the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPRC). CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as “applicants.”

Decision No. 4 authorized parties to begin discovery immediately, and it set a procedural schedule requiring interested parties to file requests for conditions, evidence, and arguments regarding the proposed acquisition on or before March 4, 2008. By motion filed on February 28, 2008, The Kansas City Southern Railway Company (KCS) seeks to compel full and complete responses to its February 6, 2008 first set of discovery requests. On March 3, 2008, applicants filed a reply in opposition to KCS’s motion to compel. The motion to compel will be granted in part and denied in part.

DISCUSSION AND CONCLUSIONS

Parties generally may seek discovery regarding any matter, not privileged, if the matter is relevant to the subject matter involved in a proceeding. See 49 CFR 1114.21(a)(1). It is not grounds for objection that the information sought will be inadmissible if it appears reasonably calculated to lead to the discovery of admissible evidence. See 49 CFR 1114.21(a)(2). The requirement of relevance means that the information might be able to affect the outcome of a proceeding. Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company In Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2) (STB served Nov. 14, 2003). Under 49 CFR 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

KCS requests that the Board compel DM&E and CPRC to respond fully and completely to the interrogatories and requests for documents set forth in its February 6, 2008 first set of

discovery requests.¹ KCS argues that the information it seeks is directly related to its concerns about the potential anticompetitive effects of the proposed transaction on grain transportation and that the information is therefore relevant. KCS contends that the disputed interrogatories and requests for documents are not overly broad, vague, or unduly burdensome.

Applicants argue that the motion to compel is untimely and represents an attempt to delay the proceedings. In particular, applicants note that the motion was filed just days before the deadline for interested parties to submit requests for conditions, evidence, and arguments regarding the proposed transaction. Also, applicants argue that, apart from the timing of the motion to compel, KCS's motion is without merit because the disputed discovery requests are overbroad or irrelevant. Specifically, applicants argue that KCS has failed to satisfy its burden of proof that the information sought is relevant and would lead to admissible evidence.

Timeliness of Motion to Compel

KCS's motion to compel is timely. The Board's rules state that, if a party fails to answer discovery or gives incomplete answers, then the party seeking discovery may apply for an order compelling an answer within 10 days after expiration of the period allowed for submission of answers. See 49 CFR 1114.31(a). Although KCS appears to have initially requested that the applicants respond to discovery by February 6, applicants did not respond until February 21, presumably with KCS's consent to an extension. Taking at face value the applicants' own assertion that their discovery responses were timely, KCS's February 28 motion to compel was timely as well, as it was filed within the 10 days permitted under section 1114.31(a).

DM&E and CPRC Interrogatory No. 1

KCS asks DM&E and CPRC to identify any and all employees and consultants who assisted in developing marketing plans, analyses, memoranda, financial projections, or studies related to the proposed transaction, and to describe their roles in developing such materials. CPRC objected to the interrogatory on the grounds that the question is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. CPRC also objected on the grounds that the interrogatory is overbroad, unduly burdensome, vague and ambiguous. Nevertheless, CPRC's interrogatory response referenced the individuals who submitted verified statements as persons primarily responsible for the analyses and factual information set forth in the application. While DM&E objected on similar grounds, it provided the names of five employees and a brief description of their involvement in the transaction. In its interrogatory response, DM&E indicated that it did not rely on consultants.

¹ Specifically, KCS seeks full and complete responses from CPRC with regard to Interrogatory No. 1 and Document Request Nos. 5, 11, and 12. KCS seeks full and complete responses from DM&E with regard to Interrogatory No. 1 and Document Request Nos. 4, 5, 11, 12, and 16.

KCS argues that Interrogatory No. 1 seeks a limited amount of information regarding a select group of individuals. KCS cites our reasoning in Decision No. 7, served on February 20, 2008, compelling the deposition of a non-witness, to argue that persons beyond those who submitted verified statements may have information relevant to the proposed transaction. Applicants argue that they appropriately responded by providing the names of those persons primarily responsible for the analyses contained in the application. Applicants also state that the workpapers furnished to KCS identify non-witnesses who assisted in preparing CPRC's marketing plans and projections.

The responses provided by applicants are sufficient, with one modification discussed below. The applicants have provided the names of those individuals primarily responsible for preparing the analytical documents that supported the application. They have also produced documents containing the names of others who had a role in creating other documents relating to the transaction. To require the name of all persons who "assisted" in the preparation of such documents, regardless of how minor their role was, is overbroad and would be unduly burdensome. However, to the extent that the workpapers do not fully describe the job titles and roles of the individuals identified on those documents, applicants should supplement their interrogatory response with that information. This information, combined with the individuals named by applicants, or those persons named in related workpapers, should be sufficient to identify those persons having a significant role in the analysis of the transaction.

DM&E Document Request No. 4 / CPRC Document Request No. 5

KCS originally asked DM&E and CPRC to produce all documents reflecting communications between its employees and/or consultants and any trustee regarding the operation of DM&E either before or after the proposed transaction. DM&E and CPRC objected to the request because (1) the reference to the "operation of DM[&]E" is vague; (2) the request is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; and (3) the request is overly broad and burdensome. In its motion to compel, KCS narrows the scope of the request to communications involving the transport of grain and the manner in which DM&E works with other railroads. KCS argues that the communications are relevant to the transaction's potential impact on grain transportation, KCS's haulage rights agreement with DM&E, and North American Free Trade Agreement (NAFTA) traffic flows.

Applicants assert that they have already produced documents related to communications about operations relevant to the claimed competitive concerns raised by KCS under other document requests. Applicants also argue that KCS's request, even as narrowed in the motion to compel, still encompasses a category of communications that is overbroad. In their reply, however, applicants provide additional information and state that CPRC and DM&E have not communicated with each other at all about the "manner" of DM&E's pre-transaction grain transportation. Applicants state that DM&E interchanges grain traffic with both Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) pursuant to normal interline

arrangements but does not have agreements like the IC&E/KCS agreement with any other carriers. As for communications concerning DM&E's post-transaction grain transportation, applicants reference CPRC's response to KCS Interrogatory No. 5, which states that CPRC had not communicated or indicated any views regarding the existing agreements between KCS and IC&E.

Based on the information provided in response to this KCS document request, and given the statements made by applicants in their reply, no further production is necessary. KCS indicated that it needed to determine the existence of strategic alternatives with other railroads, and the duties and obligations the applicants have undertaken with respect to traffic routing. The information contained in the applicants' response to the document request, as well as in the reply to the motion, should satisfy KCS's needs. Moreover, applicants state that they have produced all documents, to the extent there are any, related to communications between each other that discuss DM&E's pre- and post-transaction grain transportation as it pertains to the KCS contract.

DM&E Document Request Nos. 5(c) and (d)

KCS asks DM&E to produce all marketing plans, strategic plans, diversion studies, market analyses, financial projections, memoranda, e-mails, letters, meeting notes, meeting summaries, and/or studies related to the transportation of grain on DM&E lines regarding any contemplated increase or decrease in the volume of grain traffic originating on DM&E lines that would be: (1) interchanged with other rail carriers for final delivery to points geographically south of Kansas City, MO; or (2) delivered to points on the current CPRC system. DM&E's response objects on the grounds that a request for all documents regarding the transportation of grain is overly broad, burdensome, oppressive and virtually limitless in scope.

KCS argues that any documents related to the transportation of grain originating on DM&E's lines are vital to the evaluation of the competitive aspects of the transaction. In their reply, applicants state that DM&E did not conduct, and therefore does not have, any marketing plans or analyses related to KCS's request. Applicants further state that DM&E only forecasts grain traffic by origination, and that those forecasts do not contain information relevant to potential increases or decreases in the amount of grain traffic destined for particular connecting carriers.

It is possible that DM&E might have business documents regarding its grain traffic that would shed light on the issue of with whom and where it expects to interchange such traffic. However, KCS's request is so broad that it would require DM&E to review and potentially submit all of its documents that pertain to grain in order to determine whether such documents exist. That would be an undue burden on DM&E, and it would likely result in the collection of many documents that have no relevance to the issue of the transaction's effect on competition in the transportation of grain. Given that the applicants have indicated that DM&E does not have arrangements with other carriers akin to the KCS/IC&E agreement, we will not impose such a considerable burden on the applicants by compelling a complete response to this request for

documents. However, we will require that the applicants submit all documents *prepared in connection with this transaction* that otherwise meet the criteria of these requests.

CPRC Document Request No. 11

KCS asks CPRC to produce all marketing plans, strategic plans, diversion studies, market analyses, financial projections, memoranda, e-mails, letters, meeting notes, meetings summaries, and/or studies related to: (1) CPRC's anticipated post-transaction revenue from the transportation of grain originating on DM&E's lines; and (2) the impact and/or importance of this revenue to CPRC's ability to finance its acquisition of DM&E. CPRC's response incorporates its objection in Document Request No. 10 that the requested information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, excessively overbroad, and includes vague and ambiguous language.

KCS's motion urges the Board to compel CPRC to respond individually to this request and supply all responsive documents. Applicants state that CPRC has already produced documents related to CPRC's projected post-transaction revenue from DM&E-originated grain traffic, including the workpapers of CPRC witness Ray Foot and a traffic study performed by consultant John Williams. CPRC further states that it has not conducted any study or analysis related to projected grain revenue and the ability to finance the acquisition of DM&E.

The information provided by applicants' witnesses is responsive to this KCS document request. KCS does not articulate why further production under this request is necessary, except to say that it is "vital" that KCS understand the extent of the applicants' arrangements with other carriers in order to determine how traffic flows would be impacted. It is unclear from KCS's motion why the information already provided, along with the traffic data, and the explanation that DM&E does not have contractual arrangements with other carriers similar to that between KCS/IC&E does not meet that goal. Therefore, we will not compel a further response from CPRC.

DM&E Document Request No. 11 / CPRC Document Request No. 12

KCS asks DM&E and CPRC to provide a list of all joint marketing agreements, haulage agreements, joint rate agreements, divisions agreements, joint ventures, division of revenue agreements, volume incentive agreements, voluntary coordination agreements or other existing contracts between DM&E and another rail carrier involving the transportation of grain originating on DM&E's lines to destinations not located on DM&E's lines. CPRC objected to the relevance of the request because CPRC is not a party to the existing agreements between DM&E and rail carriers other than CPRC itself. DM&E objected to the request as irrelevant to the pending control application and overly broad.

In its motion, KCS argues that such agreements are essential to assuage its concerns that the proposed transaction would alter traffic flows in a way that negatively impacts competition.

KCS claims that the information is clearly within the applicants' possession and should be provided, as appropriate, under the terms of the Board's protective order. Applicants respond that the request is overbroad and requires DM&E to disclose every agreement that it may have with other railroads, including KCS's competitors. Applicants view the request as potentially anticompetitive. Applicants argue that this request demonstrates that KCS's competition concerns are merely focused on the potential diversion of its own grain traffic and not geared toward the scope of the transaction overall. Applicants believe such a "parochial" concern is therefore irrelevant to the Board's determination of the proposed transaction.

We agree that this document request is overbroad and not particularly relevant to the theories of competitive harm advanced by KCS. KCS has indicated that it has two related theories of potential competitive harm related to this transaction, both of which stem from DM&E's perceived role as providing neutral access to certain gateways for the transportation of grain. First, KCS essentially suggests that the transaction might reduce the incentive of the combined CPRC/DM&E to continue to interchange with KCS, thus foreclosing KCS's ability to compete. Second, KCS suggests that some grain shippers served by KCS would lose access to the shipments that originate on DM&E if the combined company were to choose to favor routing over non-KCS-served lines.

Regardless of the merits of KCS's concerns regarding potential competitive harm, not all of the information sought by KCS is relevant to its argument. To make an argument regarding the transaction's effect on its own ability to compete, or the ability of its shippers to gain access to DM&E-originated grain, KCS would need to understand its own contractual relationship with DM&E and how that was affected by the transaction. KCS certainly has access to the agreement itself (which does not expire for another 10 years), its own traffic data, and traffic data obtained from the applicants. Moreover, KCS has sought, through more focused document requests, information regarding CPRC's and DM&E's intentions regarding the KCS/IC&E contract.

Whether DM&E has arrangements with other carriers for interchange at certain gateways also used by KCS or its customers might also be relevant. The applicants have already stated that DM&E has only normal interline relationships with other carriers but does not have an agreement with any other carrier akin to IC&E's relationship with KCS. The particular terms of any DM&E interline arrangements are not relevant to whether the combined carrier is likely to foreclose competition with regard to KCS. We do not think it appropriate to compel DM&E to turn over the details of agreements with rail carriers that are potential competitors with KCS where such information is not likely to lead to the discovery of admissible evidence relevant to this control application.

For its part, CPRC states that it does not have any documents responsive to these requests. Thus, there is no need to compel further production of documents.

DM&E Document Request No. 12

KCS asks DM&E, in reference to the agreements sought in DM&E Document Request No. 11, to produce all documents created by employees or consultants evaluating or discussing whether DM&E would or should seek to terminate, honor, or extend any such agreements. DM&E objects on the grounds that the request is irrelevant and overbroad. KCS argues that the request is limited in scope and paramount in the evaluation of the proposed transaction's potential effects on competition. Applicants state that DM&E has no responsive documents. In light of the fact that DM&E has answered the request by stating there are no documents matching the criteria of the request, there is no need to compel an additional response.

DM&E Document Request No. 16

KCS asks DM&E to produce all documents relating to communications between or among any employees or consultants regarding marketing the transportation of grain originating on DM&E lines to destinations on railroads other than KCS. DM&E objects, claiming the request is irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, overly broad, burdensome and oppressive because it seeks essentially every DM&E internal document involving grain.

KCS disagrees with the characterization that the request is overbroad or burdensome, but offers no other argument for compelling a response. Applicants argue that the burden is substantial to produce all communications regarding grain transportation for destinations on rail carriers other than KCS. Applicants state that the production of such a high volume of internal correspondence would be overwhelming and would seriously inhibit DM&E's ability to carry out its business.

KCS has offered no justification for such a broad request. The scope of the request would clearly constitute a burden to DM&E. We must balance that burden against the facts that the information is not relevant to the particular foreclosure theories advanced by KCS, and that the applicants have stated that DM&E has no contractual relationships with other carriers regarding grain transportation akin to the KCS/IC&E agreement.

In conclusion, after reviewing each of the interrogatories and document requests in KCS's motion to compel, the motion will be granted in part and denied in part. KCS has already submitted its comments in accordance with the procedural schedule's March 4, 2008 deadline. KCS may submit a brief supplement to its comments to discuss only any newly received information, no later than April 7, 2008.

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

It is ordered:

1. KCS's motion to compel responses to interrogatories and document requests is granted in part and denied in part. CPRC and DM&E must produce any documents and information required by this decision within 5 days. KCS may submit a brief supplement to its March 4, 2008 comments to discuss only any newly received information, no later than April 7, 2008.
2. This decision is effective on the service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary