

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-515 (Sub-No. 2)

CENTRAL OREGON & PACIFIC RAILROAD, INC.—ABANDONMENT AND
DISCONTINUANCE OF SERVICE—IN COOS, DOUGLAS, AND LANE COUNTIES, OR

Decided: July 31, 2008

On July 14, 2008, Central Oregon & Pacific Railroad, Inc. (CORP) filed a motion for a protective order in connection with an abandonment and discontinuance application (the Application) in the above-titled docket. CORP asserted that the order was necessary because the Application and accompanying verified statements contain certain proprietary and commercially sensitive information, which, if disclosed, could have adverse competitive and commercial impacts on CORP. By decision served on July 15, 2008, the Board's Acting Secretary granted the protective order. On July 16, 2008, the Oregon International Port of Coos Bay (the Port) filed a petition for reconsideration of that decision, and a motion to hold the procedural schedule for the abandonment and discontinuance proceeding in abeyance until the appropriate information has been provided to the public. On July 24, 2008, CORP filed a response to the Port's filing. In this decision, we will deny both the Port's petition for reconsideration and the motion to hold the procedural schedule in abeyance.

Pursuant to 49 CFR 1115.1(c), an appeal of an employee decision made under authority delegated by the Chairman will be granted only in "exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."

In support of the relief sought, the Port argues that: (1) the timing of the Board's decision granting the protective order violated due process as it made it "impossible" for the Port to challenge the motion seeking the protective order; (2) CORP is using the order to protect information that it has already made public; (3) the order is vague and overbroad; (4) CORP's motion is inconsistent with other recent abandonment applications; and (5) CORP's justification for requesting the order is "dubious."

First, we find no merit in the Port's "due process" argument. Board rules do not specifically provide for replies to protective order requests under 49 CFR 1104.14 although such replies are occasionally filed and the Board considers them. In any event, no due process concerns are implicated here because we are fully considering the Port's challenge to the protective order granted in this proceeding and explaining why that challenge is being rejected.

The Port further asserts that the order includes information to be protected that has already been made public and should be overturned on that basis. In considering opposition to a

protective order or a request to make public information that has been filed under seal, the Board focuses on whether declassification would assist the party in making its case. The Central Illinois Railroad Company—Lease and Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL, STB Finance Docket No. 33960 (STB served Mar. 2, 2001). In close cases, we will protect confidentiality unless the opposing party can show that the lifting of confidentiality is necessary for to make its case, argue an appeal adequately, or satisfy a statutory goal. Id. Here, while it may be correct that certain information designated by CORP is similar to other information that has been publicly disclosed, it is not always identical or in the same detail. Moreover, to the extent that certain information may have already been released to the public, the Port cannot argue that the public has been denied the right to view it—whether that information should have been protected or not. We do not believe that the ability of the Port to make its case will be hindered, especially where it and any other interested party may obtain the information via the protective order process and offer public interest arguments to the Board.¹

The Port also maintains that the order is vague and overbroad in the way it defines “Confidential Information.”² In support, the Port relies on Camas Prairie Railnet, Inc.—Abandonment—in Lewis, Nez Perce, and Idaho Counties, ID (between Spalding and

¹ We remind CORP, however, that the purpose of a protective order is not to protect information that has previously been made public. Reasonable efforts should be made to ensure that information already made public is not placed under the coverage of a protective order. Moreover, pursuant to Paragraph 10 of the Protective Order issued on July 15, 2008, in this proceeding, the Board can address, on a case-by-case basis, arguments that information that has been classified as confidential or highly confidential should be made public. On July 30, 2008, the Port filed a motion for Board order to re-designate certain information currently designated highly confidential by the applicant in its abandonment application. The Board will rule on this motion at a later date.

² In defining terms, the order here states:

‘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; confidential information regarding the appraised value of CORP-owned land; and other confidential or proprietary business or personal information.

Grangeville, ID), STB Docket No. AB-564 (STB served June 7, 2000) (Camas Prairie), and Central Railroad Company of Indiana—Abandonment Exemption—in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN, STB Docket No. AB-459 (Sub-No. 2X) (STB served Feb. 2, 1998) (Central Railroad), for the proposition that any protection of income statements and balance sheets concerning the overall financial condition of an abandonment applicant should be narrowly tailored.

The cases cited by the Port do not support its position here. In Camas Prairie, the abandonment applicant did not submit a proposed protective order. Accordingly, the Board issued a protective order that was limited to the information that the applicant specifically identified in its motion. Thus, nothing in Camas Prairie suggests that the Board would not have granted a broader protective order had one been submitted. In Central Railroad, the proposed protective order lacked specificity because it designated as “Confidential” information any document simply labeled as such.³ That is not the case here as the protective order clearly delineates documents by category. See Central Oregon & Pacific Railroad, Inc.—Abandonment and Discontinuance of Service—in Coos, Douglas, and Lane Counties, OR, STB Docket No. AB-515 (Sub-No. 2), slip op. at 3 (STB served July 15, 2008).

Moreover, we note that the Board has recently issued protective orders containing language almost identical to that used in this order. See, e.g., Norfolk Southern Railway Company, Pan Am Railways, Inc., et al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern, LLC, STB Finance Docket No. 35147 (STB served May 30, 2008) (Norfolk Southern);⁴ Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081 (STB served Sept. 21, 2007) (Canadian

³ The proposed protective order in Central Railroad stated: “For purposes of this Protective Order, information designated as ‘Confidential,’ as used herein, includes all such designated documentary or other material, and all information contained in such documentary or other material.”

⁴ The protective order in Norfolk Southern stated:

‘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, and other confidential or proprietary business or personal information.

Pacific).⁵ Thus, recent Board precedent does not support rejecting the language used in the order.

The Port also argues that this order should be overturned because other recent abandonment applicants did not seek one. Again, we disagree. CORP was entitled to seek protection for information it deemed appropriate, its motion conformed to the Board's rules at 49 CFR 1104.14, and good cause was found to grant the motion. Other abandonment applicants have done so in the past and the fact that some did not is not relevant for our purposes here.

Lastly, as noted, the Port claims that the order should be withdrawn because CORP's competitive harm justification is "dubious." While the Port may be skeptical of CORP's motives for a protective order, we have long allowed companies to protect from public disclosure certain proprietary and commercially sensitive detailed information because of the risk that release of such information could have both commercial and competitive consequences. As stated above, CORP's motion satisfied the Board's requirements and good cause was found to grant the motion.

The Port has not provided any argument showing either "a clear error of judgment" or injustice that would result from the order. The Port's petition does not allege that the Port will be harmed, prejudiced, or unduly burdened by the order. The Port has retained the services of outside counsel and expert consultants who have access to the confidential material protected by the order if they sign the undertaking. In fact, counsel for the Port has already signed the undertaking and has access to the protected material. Additionally, the Port has not argued that it has lost the ability to fully participate in this proceeding. Therefore, the petition for reconsideration of the order is denied. Accordingly, the Port's motion to hold the procedural schedule in abeyance is also denied.

⁵ The protective order in Canadian Pacific stated:

'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.

It is ordered:

1. The Port's petition for reconsideration of the protective order is denied.
2. The Port's motion to hold the procedural schedule in abeyance is denied.
3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey commented with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

While I vote to deny the Port's petition because the Port has not satisfied its burden of proof here, I would like the Board to scrutinize seriously any future motions for protective order in abandonment cases.