

41217
DO

SERVICE DATE – LATE RELEASE APRIL 7, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35407

GNP RLY, INC.—ACQUISITION AND OPERATION EXEMPTION—REDMOND SPUR AND
WOODINVILLE SUBDIVISION

Docket No. AB 6 (Sub No. 463X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING
COUNTY, WASH.

Docket No. AB 6 (Sub No. 465X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN KING
COUNTY, WASH.

MOTION FOR PROTECTIVE ORDER

Decided: April 7, 2011

By motions filed on October 27, 2010 and December 15, 2010, GNP Rly, Inc. (GNP) seeks a protective order under 49 C.F.R. § 1114.21 to protect the confidential and commercially sensitive terms of GNP's unredacted Railroad Rehabilitation and Improvement Financing Program Loan Application to the Federal Railroad Administration (Loan Application) and the Investor-GNP Memorandum of Understanding (Investor-GNP MOU), as well as various comments and exhibits.¹ The protective order pertains to GNP's petition in GNP RLY, INC.- Acquisition and Operation Exemption-Redmond Spur and Woodinville Subdivision, Docket No. FD 35407, to acquire the right to restore and resume service over 2 segments of rail-banked railroad right-of-way (ROW) and GNP's petition to vacate notices of interim trail use issued in BNSF Railway Company-Abandonment Exemption-in King County, Wash., Docket No. AB 6 (Sub-No. 463X) and BNSF Railway Company-Abandonment Exemption-in King County, Wash., Docket No. AB 6 (Sub-No. 465X), pertaining to the same 2 segments of railroad ROW. "Highly Confidential" copies of the Loan Application and Investor-GNP MOU were submitted under seal. GNP submitted public versions of the Loan Application, reply comments, and

¹ On December 16, 2010, GNP filed the following reply comments and corresponding exhibits under seal: Exhibit H, Investor-GNP MOU; Reply comments pp. 40-41, rail cost estimates; Exhibit K, Verified Statement of Rob Finley and supporting materials; Exhibit N, railworks estimate; and Exhibit O, Harmer Steel Products estimate.

Exhibits K, N, and O, but did not file a public version of Exhibit H, Investor-GNP MOU, because it asserts that redacting all of the confidential proprietary information is not feasible.

On November 9, 2010, King County, Wash. (King County) filed a reply arguing that the proposed protective order is overbroad and that, because King County is a public entity, it has no competitive or commercial interest in the transaction at issue. In its proposed protective order, King County allows for “Highly Confidential” documents to be disclosed to employees of the parties. On November 12, 2010, the City of Redmond (Redmond) also filed a reply similarly arguing that the protective order should not prohibit disclosure of “Highly Confidential” documents to employees of public agencies. Redmond states that it has executed a mutual nondisclosure agreement with GNP and proposes to modify the protective order to take into account information obtained outside of this proceeding under the mutual nondisclosure agreement. On January 3, 2011, King County filed a reply to GNP’s December 16, 2010 filing.² King County restates its arguments and adopts Redmond’s arguments and its proposed protective order.

On January 10, 2011, GNP responded to King County’s January 3 filing, stating that while it agrees with the argument that employees of the County may have access to confidential materials, it opposes the disclosure of the Investor-GNP MOU. In its January 10 filing, GNP also requested a waiver of the requirement to file a redacted version of the Investor-GNP MOU. GNP states that the Investor-GNP MOU contains sensitive, highly confidential commercial information, including the identities of the investors who may have potentially adverse business interests to King County.

On March 22, 2011, Redmond submitted a filing stating that GNP’s motions for protective orders have been materially affected by the recent petition of creditors to place GNP in bankruptcy.³ Redmond states that a complete copy of the Investor-GNP MOU was filed in the bankruptcy proceeding and thereafter has been available in a variety of public forums, including the website of the Seattle Times. Therefore, Redmond argues that access to the Investor-GNP MOU should not be restricted and that it does not require any protection.

Because of the public availability of the Investor-GNP MOU, there is no reason to restrict access to it or to protect it as “Highly Confidential.” Information that is lawfully in the public domain that has been labeled “Highly Confidential” shall be redesignated as “Public.”⁴ Therefore, GNP is directed to redesignate the Investor-GNP MOU as a public document. Further, GNP’s request for waiver of the requirement to file a redacted version of the Investor-GNP MOU is moot.

² A proposed protective order was attached to King County and Redmond’s filings.

³ See In re GNP Rly, Inc., Case No. 11-40829-BDL (W.D. Wash.).

⁴ See Cent. Or. & Pac. R.R.—Aban. and Discontinuance of Service—in Coos, Douglas, and Lane Counties, Or., Docket No. AB 515 (Sub-No. 2) (served Aug. 15, 2008).

Employees of Redmond and King County will be granted access to the only remaining “Highly Confidential” document, the Loan Application. The Loan Application includes financing information that has already been disclosed to employees of Redmond pursuant to the mutual nondisclosure agreement. In its January 10 filing, GNP also acknowledges that rail cost estimates need not be protected as “Highly Confidential.” Accordingly, we will permit employees of Redmond and King County to have access to this “Highly Confidential” document. Should other documents be designated as “Highly Confidential,” the Board will address any other requests for access on a document-by-document basis. Finally, the Board will modify the protective order to take into account information obtained outside of these proceedings.

In all other respects, GNP’s motions conform with the Board’s rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes. Accordingly, the motions for protective order will be granted, and any confidential information shall be subject to the Protective Order and Undertakings proposed by GNP as modified in the Appendix to this decision.⁵

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

It is ordered:

1. The motions for a protective order are granted, and the Protective Order and Undertakings in the Appendix to this decision are adopted.
2. The unredacted Investor-GNP MOU submitted by GNP in Docket Nos. FD 35407, AB 6 (Sub-No. 463X), and AB 6 (Sub-No. 465X) is redesignated as “Public.”
3. GNP’s request for waiver of the requirement to file a redacted version of the Investor-GNP MOU is moot.
4. Redmond and King County employees will be granted access to the “Highly Confidential” version of the Loan Application.
5. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁵ Proposed protective orders and undertakings were included with both of GNP’s motions. GNP’s January 10, 2011 filing also included a revised proposed protective order and undertakings.

APPENDIX

PROTECTIVE ORDER

1. For the 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 movements 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, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” consist of Docket Nos. FD 35407, AB 6 (Sub-No. 463X), and AB 6 (Sub-No. 465X) and any related proceedings before the Surface Transportation Board (the Board) and any judicial review proceedings arising from the aforementioned proceedings or any related proceedings before the Board.

2. 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 of 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 or Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

3. 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 submitted, filed or served in these Proceedings contains commercial agreements of any kind; shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carrier; 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.

4. 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.

5. 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 of a party to these Proceedings 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 Order. Notwithstanding the foregoing, employees of King County and the City of Redmond shall have access to the “HIGHLY CONFIDENTIAL” version of the Railroad Rehabilitation and Improvement Financing Program Loan Application to the Federal Railroad Administration under the terms set forth in this paragraph.

6. 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.

7. 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 or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

8. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purposes, other than the preparation and presentation of evidence and argument in Docket Nos. FD 35407, AB 6 (Sub-No. 463X), and AB 6 (Sub-No. 465X), and/or any judicial review proceedings in connection with the aforementioned proceedings.

9. 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.

10. 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 or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

11. No party may include Designated Material in any pleadings, brief, discovery request or response, or other document submitted to any forum other than the 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 that 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.

12. 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, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (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.

13. 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 Materials shall be filed under seal and be otherwise handled as provided in paragraph 10 of this Protective Order.

14. 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 paragraphs 1, 2, or 3 above, 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. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.

15. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

16. 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.

17. Information that is publicly available or obtained outside of these Proceedings from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in these Proceedings.

EXHIBIT A

UNDERTAKING

CONFIDENTIAL INFORMATION

I, _____, have read the Protective Order served on April 7, 2011, governing the production and use of Confidential Information and Confidential Documents in Docket Nos. FD 35407, AB 6 (Sub-No. 463X), and AB 6 (Sub-No. 465X), 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 the aforementioned proceedings, in any related Board proceedings, or any judicial review proceedings arising therefrom. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained under this Protective Order to any person who is not also bound by the terms of the Protective Order and who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy all copies of any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL” provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. 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: _____

Position: _____

Affiliation: _____

Dated: _____

EXHIBIT B

UNDERTAKING

HIGHLY CONFIDENTIAL INFORMATION

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on April 7, 2011, governing the production and use of Confidential Information and Confidential Documents in Docket Nos. FD 35407, AB 6 (Sub-No. 463X), and AB 6 (Sub-No. 465X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Highly Confidential Information or Highly Confidential Documents obtained pursuant to that Protective Order, or to use or 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 the aforementioned proceedings, any related Board proceedings, or any judicial review proceedings arising therefrom, and/or with any related proceedings. I further agree not to disclose any Highly Confidential Information, Highly 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 Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents or information designated "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents 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 materials or information by employees of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that, at the conclusion of these proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any copies of all documents containing or reflecting documents or information stamped or designated 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 a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. 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: _____