

Peter W. Denton
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November 12, 2019
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VIA E-FILING

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: **Docket No. FD 36326, Brookfield Asset Management, Inc. and DJP XX, LLC—Control Exemption—Genesee & Wyoming Inc., et al.**

Dear Ms. Brown:

Brookfield Asset Management, Inc. and DJP XX, LLC (“Applicants”) hereby respond to the letter submitted by Victoria Dalrymple on November 5, 2019 to the Surface Transportation Board (“STB” or “Board”) in this proceeding (the “November 5 Request”). Ms. Dalrymple requests that the Board make available to Ms. Dalrymple all materials designated as “Highly Confidential” (“HC”) by Applicants and submitted by Applicants to the Board subject to the Protective Order entered by the Board in the above-referenced proceeding.

As discussed below, Applicants urge the Board to deny Ms. Dalrymple’s request. The Board’s Protective Order is clear that HC material may be reviewed only by a party’s outside counsel or outside consultant that has agreed to the Protective Order terms, and there is no basis for modifying the Protective Order in this case.

However, in response to Ms. Dalrymple’s request, Applicants have reviewed the materials previously designated as HC and have decided to re-designate certain materials related to the CFIUS review process as Confidential.¹ Since Ms. Dalrymple has provided Applicants with her executed Confidential undertaking, Applicants will provide Ms. Dalrymple with the material redesignated as Confidential, subject to compliance with the terms of the Confidential undertaking in the Protective Order.

¹ Specifically, Applicants have re-designated as Confidential: (1) in the September 24 filing, the entire second paragraph, and the first designated portion in the third paragraph, (2) all designated portions of the September 26 filing.

1. Background

On September 27, 2019, the Board entered the Protective Order in this proceeding, which generally follows the format of protective orders the Board has entered in other recent proceedings. Paragraph 2 provides that material designated as HC “may be disclosed only to outside counsel or outside consultants of the party requesting such materials,” and only in certain circumstances. The remainder of the Protective Order, including Paragraph 1, places certain limitations on the use by other parties of material designated as Confidential or HC and disclosed to those parties. The undertakings that parties seeking access to Confidential or HC material would execute pursuant to the Protective Order acknowledge that Applicants would be entitled to specific performance or injunctive relief if the party seeking access breached the Protective Order.

On September 24 and September 26, 2019, Applicants submitted to the Board two filings under seal and designated marked portions as HC pursuant to the terms of the Protective Order. Applicants also included a Public version of each filing with appropriate redactions that the Board placed in its docket. Applicants explained in their cover letters that the material designated as HC contained highly confidential, competitively sensitive, and commercially sensitive information regarding the CFIUS review process and the financing arrangements associated with the transaction at issue in this proceeding.

Enclosed as Exhibit A to this letter is all correspondence between me and Ms. Dalrymple on this subject. On October 9, 2019, Ms. Dalrymple sent me an email enclosing executed Confidential and HC undertakings and requesting that I forward Ms. Dalrymple the materials that we had designated as HC. On October 11, 2019, I replied to Ms. Dalrymple and explained that the terms of the Protective Order do not permit us to disclose material submitted in pleadings and designated as HC to any person other than outside counsel or outside consultants of the party requesting such materials. I also explained that Applicants had not designated any material as “Confidential.”

On October 15, 2019, Ms. Dalrymple replied to me and stated that “[a]s a Genesee & Wyoming shareholder and a party to the proceedings, I have the right to view the documents associated with the case in their entirety.” On October 16, 2019, I replied to Ms. Dalrymple and explained again that the Protective Order entered by the Board in this proceeding does not permit us to disclose to Ms. Dalrymple the material that Applicants designated as HC. I also explained that, while the STB has modified protective orders in certain limited circumstances to allow in-house counsel for non-commercial parties not represented by outside counsel to review material designated as HC, such a circumstance does not exist here given Ms. Dalrymple’s stated commercial interest in the proposed transaction as a GWI stockholder.

2. The Board should not allow Ms. Dalrymple to access the HC material.

A. The plain language of the Protective Order does not permit Ms. Dalrymple to view the HC material.

Ms. Dalrymple makes a number of erroneous or unclear statements in her November 5 Request. First, Ms. Dalrymple claims that “as a party to the proceedings, I am entitled to view all documentation associated with the case.” This is incorrect. As discussed

above, the plain language of the Protective Order entered by the Board in this proceeding does not permit or require Applicants to disclose materials designated as HC to Ms. Dalrymple.

Ms. Dalrymple also claims that “the protective order indicates that outside counsel can show material to others if they agree to and execute an undertaking form.” November 5 Request at 1. While it is not clear what Ms. Dalrymple means by this, the Protective Order itself is clear. Material designated as HC can only be disclosed to outside counsel or outside consultants of the party requesting such materials under certain circumstances, and such outside counsel or consultants must only use the materials “for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.” Protective Order, Paragraph 1. Ms. Dalrymple is apparently not represented by outside counsel or consultants in this proceeding. Even if she were, any such outside counsel or consultants to Ms. Dalrymple may not “show [HC] material to others” (including Ms. Dalrymple), as Ms. Dalrymple apparently suggests. November 5 Request at 1.

The Board should therefore deny Ms. Dalrymple’s “request that the STB make the [HC] information available to me for review,” November 5 Request at 1, because the request is contrary to the Protective Order that the Board entered in this proceeding.

B. The Board should not modify the Protective Order or to allow Ms. Dalrymple to access the HC material.

Additionally, the Board should not modify the terms of the Protective Order to allow parties to the proceeding not represented by outside counsel (such as Ms. Dalrymple) to review HC material. In certain circumstances, the Board has modified an existing protective order to allow **in-house counsel** for **non-commercial** parties not represented by outside counsel to review HC material, provided that the in-house counsel execute the appropriate undertaking and otherwise abide by the terms of the protective order. *See, e.g., Great Lakes Basin Transp., Inc.—Rail Construction & Operation—In Rock County, Wisc., Winnebago, Ogle, Lee, LaSalle, Grundy, and Kankakee Counties, Ill., and Lake and Porter Counties, Ind.*, FD 35952, slip op. at 5-6 (STB served June 2, 2017). These “non-commercial” parties have included public interest organizations and labor organizations. *See id.*, slip op. at 5-6, note 7.

These circumstances don’t apply here. First, Ms. Dalrymple apparently has no in-house counsel. We have found no precedent for the Board modifying a protective order to allow parties not represented by in-house or outside counsel to directly view HC material. For parties not represented by outside counsel, in-house counsel serve as a buffer for their clients, using HC material in connection with an STB proceeding but not sharing that material with the actual party to the proceeding.

Second, Ms. Dalrymple is unlike the “non-commercial parties” for whom the Board has previously modified its protective orders. Ms. Dalrymple’s interest as a GWI shareholder who appears to be opposed to the transaction is a decidedly “commercial” interest. The fundamental purpose of the Board’s Protective Order is to ensure the sensitive business information will not be disclosed to persons like Ms. Dalrymple with a commercial

interest in the underlying matter, but only to an outside counsel or consultant for exclusive use in the STB proceeding.

C. Applicants have re-designated certain HC material as Confidential.

Finally, in response to Ms. Dalrymple's letter, Applicants reviewed the materials submitted under seal on September 24 and September 26, and have determined that the procedural discussion of the CFIUS review, while non-public, is not competitively sensitive and therefore Applicants have re-designated that material as Confidential. However, the materials related to the financing arrangements associated with the transaction are competitively and commercially sensitive and need to remain designated as HC. Disclosure of these details could negatively impact Applicants' (and, by extension, GWI's) negotiation of the financing arrangements associated with the transaction and the terms of any future financing arrangements that Applicants or GWI may seek. Furthermore, Applicants are required by the agreements between Applicants and the banks described in the HC material to keep the terms of such agreements confidential. In short, the material designated by Applicants as HC is exactly the type of material that the Board contemplated when entering the Protective Order in this proceeding and other similar protective orders.

3. Conclusion

For the reasons stated herein, Applicants request that the Board deny Ms. Dalrymple's request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter W. Denton', with a long horizontal flourish extending to the right.

Peter W. Denton
*Attorney for Brookfield Asset Management, Inc. and
DJP XX, LLC*

Enclosures

EXHIBIT A

From: [Denton, Peter](#)
To: [Victoria Dalrymple](#)
Subject: RE: FD 36326 STB Executed Confidentiality
Date: Wednesday, October 16, 2019 11:52:42 AM

Ms. Dalrymple,

The protective order directs us to disclose material designated as Highly Confidential **only** to “outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding.” Therefore, the protective order does not permit us to disclose to you the material we have designated as Highly Confidential.

In certain limited circumstances, the STB has modified protective orders to allow in-house counsel for non-commercial parties not represented by outside counsel to review material designated as Highly Confidential. *See, e.g., Great Lakes Basin Transp., Inc.—Rail Construction & Operation—In Rock County, Wisc., Winnebago, Ogle, Lee, LaSalle, Grundy, and Kankakee Counties, Ill., and Lake and Porter Counties, Ind.,* FD 35952 (STB served June 2, 2017). Given your commercial interest in the proposed transaction as a GWI stockholder, such a circumstance does not exist here.

Regards,
Peter Denton

Peter W. Denton
Partner
pdenton@Step toe.com

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From: Victoria Dalrymple <victoria@dalrymplefinance.com>
Sent: Tuesday, October 15, 2019 9:38 AM
To: Denton, Peter <pdenton@Step toe.com>
Subject: Re: FD 36326 STB Executed Confidentiality

Mr. Denton;

EXHIBIT A

I respectfully disagree with the above interpretation of the protective order regarding highly confidential material. As a Genesee & Wyoming shareholder and a party to the proceedings, I have the right to view the documents associated with the case in their entirety.

Further, Mr. MacDougal, an experienced STB rail counsel and a party to the proceedings for Mr. Nasca has concurred that this is the correct interpretation based on previous STB proceedings.

I would like to invite you to reconsider your position regarding the protective order of highly confidential material for your client. I would also welcome the opportunity for the STB to clarify this matter if necessary.

Best regards,

On Fri, Oct 11, 2019 at 3:36 PM Denton, Peter <pdenton@steptoe.com> wrote:

Ms. Dalrymple,

The terms of the protective order entered by the STB in this proceeding do not permit us to disclose material submitted in pleadings and designated as "Highly Confidential" to any person other than outside counsel or outside consultants of the party requesting such materials. We have not designated any material as "Confidential."

Regards,
Peter Denton

Peter W. Denton
Partner
pdenton@steptoe.com

Steptoe

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EXHIBIT A

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From: Victoria Dalrymple <victoria@dalrymplefinance.com>

Sent: Wednesday, October 9, 2019 11:26 AM

To: Denton, Peter <pdenton@Step toe.com>

Subject: FD 36326 STB Executed Confidentiality

Dear Mr. Denton;

Please find attached the executed confidentiality agreement to the proposed terms required to view the information designed as confidential and highly confidential within Docket FD 36326 with the STB.

Please forward the material to
victoria@dalrymplefinance.com

Best regards,

--

Victoria Dalrymple

Founder, Responsible Governance & Investment Council

Principal, Dalrymple Finance

(1) 917 435 6546

(1) 617 642 9823

<https://www.rgicouncil.com/>

EXHIBIT A

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Victoria Dalrymple

Founder, Responsible Governance & Investment Council

Principal, Dalrymple Finance

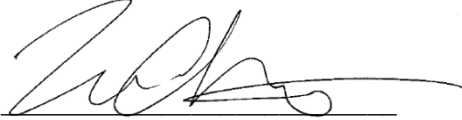
(1) 917 435 6546

(1) 617 642 9823

<https://www.rgicouncil.com/>

CERTIFICATE OF SERVICE

I certify that I have, on November 12, 2019, served copies of this letter on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton

Attorney for Brookfield Asset Management, Inc. and DJP XX, LLC