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SERVICE DATE – OCTOBER 19, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36441

COMMONWEALTH OF VIRGINIA—ACQUISITION EXEMPTION—CERTAIN ASSETS
OF CSX TRANSPORTATION, INC.

MOTION FOR PROTECTIVE ORDER

Decided: October 19, 2020

On September 29, 2020, the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit (DRPT), filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 for the acquisition by DRPT of certain real property and trackage owned by CSX Transportation, Inc. (CSXT), located in the Commonwealth of Virginia and Washington, D.C. Concurrently, DRPT filed a motion to dismiss the petition, contending that the acquisition does not require Board authorization under Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C. 2d 835 (1991).

Also on September 29, 2020, DRPT filed a motion requesting that the Board issue a protective order allowing DRPT to file under seal: (1) a draft Joint Operating and Maintenance Agreement and a draft Comprehensive Rail Agreement (collectively, Draft Agreements) between DRPT and CSXT; and (2) the list of shippers served by CSXT on the relevant lines (Shipper List). (DRPT Mot. for Protective Order 2.) According to DRPT, the Draft Agreements are the subject of continuing negotiations and contain commercially sensitive and confidential terms and information, the public release of which could cause competitive or other injury to DRPT and CSXT, and the Shipper List contains commercially sensitive information, the public release of which could cause competitive or other injury to CSXT. (*Id.* at 2-3.)

Good cause exists to grant the motion for protective order. The motion conforms 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 motion for a protective order will be granted and the documents will be made subject to the protective order and the undertakings, as modified in the Appendix to this decision.

It is ordered:

1. The motion for a protective order is granted, and the modified protective order and undertakings in the Appendix to this decision are adopted.
2. The unredacted documents submitted in Docket No. FD 36441 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached undertakings are executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.
3. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “Confidential Information” means the Joint Operating and Maintenance Agreement and the Comprehensive Rail Agreement submitted by the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit (DRPT) in Docket No. FD 36441.
2. For purposes of this Protective Order, “Highly Confidential Information” means the list of shippers (Shipper List) served by CSX Transportation, Inc. (CSXT) on the relevant lines submitted by DRPT in Docket No. FD 36441.
3. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to DRPT of the attached Undertaking for Confidential Material. Confidential Information shall be used solely for the purpose of this and any related Board proceeding, or any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
4. Highly Confidential Information may be disclosed 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 and any judicial review proceeding arising herefrom, and only upon execution and delivery to DRPT of the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “Highly Confidential Information” shall be subject to all of the other provisions of this Protective Order.
5. Confidential Information and/or Highly Confidential Information shall not be disclosed in any way or to any person without the written consent of DRPT or an order of the Board, solely for use in connection with this and related Board proceedings, or any judicial review proceeding arising therefrom, provided that such person has been given and has read a copy of this Protective Order and agrees to be bound by its terms by executing the attached Undertaking prior to receiving access to this information.
6. If the Board retains the Confidential Information and/or Highly Confidential Information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 C.F.R. § 1104.14.
7. If any party intends to use Confidential Information and/or Highly Confidential Information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written

request to the Board or the court to (i) restrict attendance at the hearing during discussion of such Confidential Information and/or Highly Confidential Information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such Confidential Information and/or Highly Confidential Information in accordance with the Protective Order.

8. Any party that files with the Board a document containing Confidential Information or Highly Confidential Information must simultaneously file with the Board a public version of that document.
9. 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 provisions herein.

UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on October 19, 2020, governing the filing of the Joint Operating and Maintenance Agreement and the Comprehensive Rail Agreement (Confidential Information) by the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transit (DRPT) in Docket No. FD 36441, 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 to permit the use of any 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 Docket No. FD 36441 or any judicial review proceeding taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not bound by the terms of this Protective Order and has not executed an Undertaking in the form hereof.

Signed: _____

Position: _____

Affiliation: _____

Dated: _____

UNDERTAKING—HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on October 19, 2020, governing the production of confidential documents in Docket No. FD 36441, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to HIGHLY CONFIDENTIAL material under the terms of the Protective Order, or (ii) has not executed a HIGHLY CONFIDENTIAL undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information 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 documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that 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.

Outside [Counsel] [Consultant]: _____

Dated: _____