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EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 8, 2021
Part of
Public Record

DOCKET NO. FD 36471

**COLORADO, MIDLAND & PACIFIC RAILWAY COMPANY
– LEASE AND OPERATION EXEMPTION CONTAINING INTERCHANGE
COMMITMENT – UNION PACIFIC RAILROAD COMPANY**

MOTION FOR ACCESS TO CONFIDENTIAL DOCUMENTS

Pursuant to 49 C.F.R §1150.33(h)(2), Colorado Pacific Railroad, LLC (“Colorado Pacific”) and KCVN, LLC (“KCVN”) hereby request that the Surface Transportation Board (“Board” or “STB”) grant them access to the confidential lease agreement included with the Notice of Exemption (“Notice”) filed by Colorado, Midland & Pacific Railway Company (“CMPR”) in this docket on December 31, 2020. In accordance with §1150.33(h)(2)(ii), Colorado Pacific and KCVN have included with this Motion a draft Protective Order consistent with Board procedural practices as Attachment A to this Motion. Counsel for Colorado Pacific and KCVN contacted counsel for CMPR to inquire whether it would consent to provide access to the confidential lease document pursuant to an appropriate Protective Order. Counsel for CMPR informed counsel for Colorado Pacific and KCVN that CMPR would not consider consenting to such access unless it could first review Colorado Pacific’s and KCVN’s motion, at which point Colorado Pacific elected to withdraw its request for CMPR’s consent.

This Motion is being filed in conjunction with a Motion to Reject Notice of Exemption (“Motion to Reject”), which is hereby incorporated by reference to avoid repetition of applicable factual information and argument common to both motions. That Motion includes a request that the Board postpone the effective date of the proposed exemption pending resolution of this Motion and the Motion to Reject, and/or the parties providing any additional information desired and requested by the Board. Postponing the effective date will also allow time for the confidential lease agreement to be produced and reviewed by Colorado Pacific and KCVN to (1) ascertain the impacts of the interchange commitment contained therein and any other restrictive provisions of the subject lease agreement on the business of Colorado Pacific and/or KCVN; and (2) the extent to which the interchange commitment is consistent with the Board’s policies concerning rail competition and its past decisions concerning the Tennessee Pass Line.

I. FACTUAL BACKGROUND

Colorado Pacific and KCVN refer the Board to the factual background of the rail line at issue and their identities and interest set forth in the Motion to Reject, all of which is incorporated by reference. For purposes of this Motion, the Notice very generally describes a transaction whereby UP would lease its discontinued and out of service track from Parkdale, CO to Sage, CO to CMPR, which is a railroad entity apparently being created by the Rio Grande Pacific Corporation for this purpose.¹ However, the Notice also describes how the lease agreement between UP and CMPR contains an interchange commitment in the form of “a provision that will require CMPR to pay UP additional charges if CMPR interchanges certain traffic with a rail carrier other than UP,” and that “the affected interchange points are Parkdale, CO and Dotsero, CO.”²

¹ Docket No. FD 36470, *Rio Grande Pacific Corporation – Continuance and Control Exemption – Colorado, Midland & Pacific Railway Company*.

² Notice at 4.

The Notice also indicates that the interchange commitment inserted by UP into the lease will adversely affect CMPR's ability to interchange with BNSF, which the Notice erroneously identifies as the only railroad that could physically interchange with the segment of the Tennessee Pass Line proposed to be acquired.³ Under the Board's rules, the transaction will be authorized 30 days from its filing date of December 31, 2020 absent further action by the Board.

II. GROUNDS FOR GRANTING COLORADO PACIFIC AND KCVN ACCESS TO THE LEASE AGREEMENT

The accompanying Motion to Reject describes in detail how Colorado Pacific and KCVN have a very real interest in the proposed transaction given their substantial investment in the development of the Towner Line and in reinstating competitive and reliable rail service on it for grain shippers and shippers of other commodities. The interests of Colorado Pacific and KCVN would therefore be directly and adversely affected by an interchange commitment in the lease between UP and CMPR that unlawfully restricted or prevented the ability of BNSF or any other railroad to freely interchange with the CMPR by making it uneconomical for the CMPR to do so because it must pay undisclosed "additional charges to UP" if it desires to interchange "certain traffic."

Moreover, the Tennessee Pass Line was an important and controversial aspect of the UP/SP Merger proceeding,⁴ namely the desire of the State of Colorado and other rail shippers and the STB to maintain the Tennessee Pass Line as a viable through route alternative to the Moffat Tunnel Line. This decision was made in the greater context of ensuring adequate competition and rail

³ *Id.*

⁴ STB Finance Docket No. 32760, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -Control and Merger- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company*, (Decision No. 44 served August 12, 1996). 1 STB 233.

service to all western shippers after the merger was approved. Accordingly, any interchange commitment proposed by UP that would restrict competition and service over the Tennessee Pass Line must be subjected to scrutiny for compliance with not only the rules governing interchange commitments, but also for consistency with the decisions and policies embodied in the UP/SP Merger decisions.

For all the foregoing reasons just cause exists for the Board to grant Colorado Pacific and KCVN access to the lease agreement that was submitted with the Notice pursuant to the terms of the attached Protective Order.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas W. Wilcox
Kristine O. Little
GKG Law, P.C.
1055 Thomas Jefferson Street NW
Suite 500
Washington, D.C. 20007
(202) 342-5248

*Attorneys for Colorado Pacific Railroad and
KCVN, LLC*

January 8, 2021

ATTACHMENT A

PROTECTIVE ORDER

1. Any party producing information, data, documents or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material, prior to receiving access to such materials.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel and consultants for a party are permitted to retain file copies of all pleadings filed with the Board.
 - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.”
See 49 C.F.R. § 1104.14.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated 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, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached

Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as

“CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents produced pursuant to this Section 7 shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific data, traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding 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 as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as Highly Confidential by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing the filing party’s Highly Confidential material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party’s Highly Confidential material has been redacted. The Confidential Version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). 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.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____ 2021, governing the production of confidential documents in STB Docket No. FD 36471, 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 permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket FD 36471 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. 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 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.

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 _____ 2021, governing the production of confidential documents in STB Docket No. FD 36471, 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:

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of January 2021, a copy of the foregoing Motion For Access to Confidential Documents was served by email on all parties on the official Service List for Docket No. FD 36471.


Thomas W. Wilcox