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SERVICE DATE – AUGUST 2, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

Decision No. 7

Digest:¹ The Board grants in part and denies in part a petition for declaratory relief relating to materials sought to be used by Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries in preparing its application in this proceeding.

Decided: August 1, 2021

On May 27, 2021, Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries (collectively, CP) filed a petition asking the Board to “issue declaratory relief confirming that (1) Kansas City Southern . . . has a continuing obligation to provide CP with the information CP needs to prepare, file, and defend its forthcoming Application for Board authorization to control [Kansas City Southern]; and (2) CP has a continuing right to access the information [Kansas City Southern] has already provided to CP under the Protective Order entered by the Board on April 2, 2021.” (Pet. 1.) For the reasons discussed below, the Board will grant in part CP’s request for declaratory relief to the extent it seeks confirmation that it may seek discovery in this proceeding.

BACKGROUND

By letter filed May 21, 2021, Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, KCS) notified the Board that KCS has terminated the merger agreement with

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Canadian Pacific Railway Limited pertaining to the control transaction proposed in this docket and has instead entered into a merger agreement with Canadian National Railway Company (CNR). (KCS Letter 1, May 21, 2021.) See Canadian Nat'l Ry.—Control—Kan. City S., FD 36514 (STB served May 17, 2021) (publishing notice of CNR's intent to file an application seeking authority to acquire control of KCS). As such, KCS states that it is withdrawing as a co-applicant in this proceeding. (KCS Letter 2, May 21, 2021.)

In its May 27, 2021 petition, CP requests that the Board confirm that KCS remains obligated to provide CP with the information it needs to complete and defend its application in this proceeding and asserts that it remains entitled to obtain information from KCS through the Board's discovery process. (Pet. 3-5.) CP also seeks confirmation that CP has a continuing right to access the information KCS has already provided to CP for purposes of preparing its application. (Id. at 6.) CP contends that such information is governed by the Protective Order issued by the Board on April 2, 2021. (Id.); see Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 1), FD 36500, slip op. at 3 (STB served Apr. 2, 2021). CP argues that its continued access to KCS's confidential information serves the public interest because a combination between CP and KCS promises unique and pro-competitive benefits for shippers and the broader public and such access would allow CP to proceed with its application in this proceeding under the rules and timetable that have already been established. (Pet. 6, 10.)²

On June 16, 2021,³ KCS replied to CP's petition. KCS asserts that there is no case or controversy that warrants the issuance of a declaratory order and argues that KCS has no obligation to produce or provide CP with any further information, given that its merger agreement with CP has terminated and KCS has withdrawn as a co-applicant in this proceeding. (KCS Reply 4-7.) Moreover, KCS notes that CP entered into a Mutual Confidentiality Agreement with KCS, which is a voluntary contract that obligates CP to return all information and materials KCS previously provided. (Id. at 5.) KCS asserts that the proper course of action for CP if it is planning to continue to seek control authority over KCS is to file an inconsistent application⁴ after CNR and KCS file their application in Docket No. FD 36514. (Id. at 11.) Alternatively, KCS argues, if the Board permits CP to file an application in this docket instead of

² The following parties filed comments in support of CP's petition: the Village of Barrington, Ill.; the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers-Mechanical Division, and National Conference of Firemen and Oilers, 32BJ/SEIU (collectively, Allied Rail Unions); the Transportation Communications Union/IAM; District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO; and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the American Train Dispatchers Association.

³ By decision served June 7, 2021, CP's request for an expedited reply deadline to its petition was denied.

⁴ An inconsistent application is filed "in response to" a primary application and seeks to displace the proposed acquiring railroad of the primary application as the consolidation partner. See 49 C.F.R. § 1180.3(h). Inconsistent applications (and other types of responsive applications) are consolidated with the primary application for consideration. See 49 C.F.R. § 1180.4(d)(3).

in response to an application filed by CN/KCS in Docket No. FD 36514, and CP has not been able to obtain the information necessary to present a complete application, it could seek a petition for waiver of any requirements it is unable to address. (Id. at 13-14.)

On June 21, 2021, CP replied to KCS's reply, asserting that it would not be in the public interest if CP were "forced to discontinue and destroy its work on its pending application" in this proceeding and made to wait to file an inconsistent application in Docket No. FD 36514.⁵ (CP Reply 3-4.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to eliminate controversy or remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proc., 5 I.C.C.2d 675 (1989). The Board will grant in part and deny in part CP's request, as discussed below.

CP asks the Board to confirm that KCS remains obligated to provide CP with information CP needs to complete its application and that CP may retain and continue to use materials provided by KCS before their merger agreement was terminated for the purposes of preparing and defending CP's application. (Pet. 3.) KCS states that the terms of the parties' Mutual Confidentiality Agreement address the parties' contractual rights as they concern the handling of materials previously provided by KCS upon termination of the merger agreement. (See KCS Reply 6 & n.4.) As a general matter, the Board leaves the enforcement of private contracts to the courts and will not opine here on the parties' agreement. See, e.g., New England Cent. R.R.—Trackage Rights Terms & Conditions—Pan Am S. LLC, FD 31250 (Sub-No. 1), slip op. at 5 n.29 (STB served Dec. 23, 2014). While CP argues that the Protective Order issued in Decision No. 1 governs the materials KCS previously provided to CP, the Protective Order does not provide a basis for the relief sought by CP. The Protective Order does not require the production of particular information and is generally intended to protect the discloser of material (here, KCS), see generally 49 C.F.R. § 1114.21(c). Moreover, even if none of the scenarios set forth in the Protective Order that trigger mandatory destruction or return of material has occurred, (see Pet. 6 (citing paragraph 4 of the Protective Order)), the Protective Order does not preclude the possibility that other voluntary arrangements could trigger a duty to return voluntarily exchanged materials.

CP's arguments that it is in the public interest to allow it to prepare an application do not support its request for a declaration that KCS must permit or provide continuing access to KCS's

⁵ On June 23, 2021, KCS filed a motion to strike CP's July 21, 2021 submission as an unpermitted "reply to a reply." Allied Rail Unions filed a comment in opposition to KCS's motion to strike. While the Board's regulations do not permit replies to replies, 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will deny KCS's motion to strike and accept CP's June 21, 2021 submission into the record. See City of Alexandria—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

confidential material. CP has available mechanisms that would permit it to submit an application to acquire control of KCS, even without the cooperation of KCS. As discussed below, CP may seek discovery from KCS (with an opportunity to seek to compel production) and may seek waivers from the Board related to its application requirements. CP has not provided a persuasive argument for why it cannot use those processes.

In particular, and as CP acknowledges, (Pet. 4), under the Board's rules, a party may use discovery to seek material relevant to the subject matter of a proceeding. 49 C.F.R. § 1114.21. Accordingly, CP may seek materials from KCS through the discovery process in this proceeding that are relevant to its preparation of an application for authority to acquire control of KCS and may do so now without first filing an application in this docket or an inconsistent application in Docket No. FD 36514. Broadly, this could include information related to KCS's safety integration plan, environmental analysis, operating plan, and operational analysis or capacity analysis, as referenced in CP's petition. (Pet. 4); see Trailer Bridge, Inc. v. Sea Star Lines, LLC, WCC-104, slip op. at 8 (STB served Oct. 27, 2000) (emphasizing that "discovery can be broad" under the Board's rules); CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (Decision No. 34), FD 33388, slip op. at 2 n.9 (STB served Sept. 18, 1997) (referencing the "broad" relevancy standard applicable to discovery matters).⁶

The Board has already appointed an administrative law judge to handle all discovery disputes that may arise in this proceeding. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 3 (STB served Apr. 21, 2021). In the event that KCS objects to a formal discovery request from CP, it will be the administrative law judge's decision in the first instance to determine whether specific materials are discoverable. The Board would expect the parties to cooperate to avoid undue expense and delay, as well as unnecessary duplication of effort, with respect to the production of discoverable information.

In addition, if CP is unable to obtain information necessary for an application, it may seek a waiver under 49 C.F.R. § 1180.4(f) from the otherwise applicable informational requirements. See Norfolk S. Corp.—Control—Conrail Inc., FD 33286, slip op. at 1-2 (STB served Feb. 21, 1997) (granting waivers for certain merger application requirements requested by Norfolk Southern Corporation (NS), which sought waivers due to a "reluctance to cooperate" by the entity NS sought to acquire).

For these reasons, the Board grants in part CP's petition for declaratory relief, to the extent that CP seeks confirmation that it may obtain information in this proceeding through the Board's discovery processes under 49 C.F.R. § 1114.21, and denies the remainder of the petition.

It is ordered:

1. CP's petition is granted in part and denied in part, as explained above.
2. KCS's motion to strike is denied.

⁶ In other words, CP may have a right to obtain materials under the Board's discovery rules even if the parties' Mutual Confidentiality Agreement might require them to be returned.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.