

50901
EB

SERVICE DATE - OCTOBER 19, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36514

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
—CONTROL—
KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY, AND
THE TEXAS MEXICAN RAILWAY COMPANY

Digest:¹ The Board admonishes counsel for Canadian Pacific Railway Limited for disclosing confidential material in violation of a protective order.

Decision No. 6

Decided: October 18, 2021

On July 12, 2021, Canadian National Railway Company and its rail operating subsidiaries (collectively, CN) filed a letter to inform the Board of a “significant violation of the Protective Order issued on April 28, 2021” in this proceeding. (CN Letter 1); see Canadian Nat'l Ry.—Control—Kan. City S. (Decision No. 1), FD 36514 (STB served Apr. 28, 2021). Specifically, CN alleges that outside counsel for Canadian Pacific Railway Limited (CP) and CP violated the Protective Order by sharing material designated as “highly confidential.”² CN requests that CP explain its breach of the Protective Order and specify the safeguards and protocols CP would adopt to avoid further violations. (CN Letter 3.)³

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).

² The Protective Order provides that material designated 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 to a party to these proceedings, or to an employee of such outside counsel or outside consultant.” Decision No. 1, FD 36514, App., Protective Order ¶ 8.

³ CN designated nearly all of its July 12 letter as highly confidential. While attempting to avoid references to information designated as confidential or highly confidential in its decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. See Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 n.2

On July 13, 2021, outside counsel for CP replied to CN's letter, noting that, among other things, CP's counsel provided an explanation to CN within hours of CN's email concerning the issue, that CP has "corrected the inadvertent disclosure of material," and that CP and its counsel would ensure that designated material would not be inappropriately disclosed. (CP Reply 1, 2.)

CP's outside counsel does not dispute that material designated as highly confidential was improperly disclosed, and it appears that CP took remedial action. However, the Board finds CP's counsel's explanation of how the disclosure occurred not helpful, especially to the extent it suggests that the disclosure was excusable because CN never should have designated the material highly confidential in the first place. (CP Reply 1.) Indeed, parties are always free to challenge the designation of material as "confidential" or "highly confidential." See Decision No. 1, FD 36514, App., Protective Order ¶ 10. Accordingly, the Board admonishes CP and its outside counsel for failing to comply with the terms of the Protective Order.⁴

The Board has long recognized that unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data could cause serious competitive injury to the parties. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 2 (STB served Apr. 2, 2021) (citing Canadian Nat'l Ry.—Control—Ill. Central Corp., FD 33556 (STB served Feb. 26, 1998)). As stated in the confidentiality undertaking, applicants or other parties producing highly confidential materials may be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. See Decision No. 1, FD 36514, App., Ex. B, Undertaking—Highly Confidential Material. Participants and counsel practicing before the Board are reminded that violating a protective order may result in sanctions, including subjecting outside counsel to disciplinary action, see generally 49 C.F.R. § 1103.5, and/or imposing civil monetary penalties, see 49 U.S.C. § 11901.

(STB served Jan. 11, 2018). Here, the Board determined that it could not adequately address the allegation without disclosing the general nature of the issue described in CN's letter and the July 13, 2021 reply filed by outside counsel for CP, discussed below.

⁴ The Protective Order in this case permits parties to designate as "highly confidential" material that contains "shipper-specific rate or cost data or other competitively sensitive or proprietary information." Decision No. 1, FD 36514, App., Protective Order ¶ 6. The information at issue here concerned a condition offered by CN to "address comments about the potential for anticompetitive impacts on customers in the Baton Rouge-New Orleans vicinity during the voting trust period." Canadian Nat'l Ry.—Control—Kan. City S., FD 36514, slip op. at 28 n.59 (STB served Aug. 31, 2021). Given the public interest standard applied in voting trust determinations under 49 C.F.R. § 1180.4(b)(4)(iv), and because the process of approving voting trusts, itself, requires public scrutiny, in the future, the Board will carefully scrutinize the propriety of designating as "confidential" or "highly confidential" information offered by applicants for the purpose of gaining approval of a voting trust, including conditions and agreements offered for that purpose.

It is ordered:

1. This decision is effective on its service date.

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