

RAILROAD WEEK IN REVIEW

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“Protective orders and confidentiality designations in Board proceedings allow commercially sensitive data to be used in connection with the proceeding, but not for any other business or other commercial purpose.” STB in FD 33407 re confidentiality of information submitted.

The STB has given the DM&E build-in to the PRB more ammunition to proceed. In FD 33407 the Board denied the motion of the so-called Mid States Coalition for Progress (MSC; Rochester Chamber of Commerce, City of Skyline, MN, and Brian Brademeyer) seeking “extensive discovery from DM&E, including commercially sensitive information about DM&E’s business.”

The language in this proceeding is most eloquent. The Board writes that in response to the motion “the railroad provided over 16,000 pages of documents to MSC pursuant to a protective order that DM&E and MSC had proposed together, which was issued on August 5, 1998. DM&E also made witnesses available for deposition, and MSC deposed DM&E’s president, Mr. Kevin Schieffer, on August 14, 1998. MSC used the evidence it received — including a volume, which is marked “highly confidential,” containing Mr. Schieffer’s deposition and related documents — in its opposition to DM&E’s application filed on August 31, 1998.” One week later MSC filed a motion to declassify what DM&E had submitted as “classified” and the motion was denied.

Fast forward six years to July 28, 2006. “MSC filed a similar motion asking the Board to remove the ‘highly confidential’ designation that had been attached to portions of Mr. Schieffer’s deposition and the documents attached to it. MSC explains that DM&E made public some ‘highly confidential’ excerpts from Mr. Schieffer’s deposition in two other Board proceedings involving DM&E [and,] MSC argues, based on a series of cases, that a divulgence of privileged or confidential material acts as a waiver of confidentiality as to all other materials pertaining to the disclosure.”

From here MSC makes the leap to the present case saying that “DM&E’s disclosure to the public in IMRL of the deposition excerpts means that it has waived confidentiality to the entire deposition and all of the attached documents. Based on DM&E’s alleged waiver, MSC asks the Board to make public all of the materials in question. DM&E filed a reply in opposition to MSC’s motion on August 17, 2006.”

The STB goes in for the kill. “MSC’s motion will be denied. The cases MSC cites are *not on point* [emphasis added]. These cases involve waiver of the attorney work product privilege or the attorney-client privilege. Documents protected by these privileges are never disclosed to other parties or to the Board, unless and until the privilege is waived by a disclosure of privileged material.

“In contrast, protective orders and confidentiality designations in Board proceedings allow commercially sensitive data to be used in connection with the proceeding, but not for any other business or other commercial purpose. In order to encourage free and open discovery in Board proceedings, there is a right to have confidential information remain so, absent some overriding policy concern requiring that the information be divulged. MSC, however, has not shown that disclosure of the classified information (those portions of the protected materials that have not yet been made public) now is necessary to serve any overriding public policy concern.

“As the Board explained in DM&E 1998 when examining MSC’s earlier request to make public commercially sensitive data that had been filed under seal, the agency’s focus in resolving an issue

such as this is on whether a party needs the material classified at a less confidential level to present its case. *MSC has not even attempted to make this showing* [emphasis once again added].

“Furthermore, the protective order governing this proceeding, which was agreed to and jointly proposed by MSC and DM&E, specifically allows parties to voluntarily disclose their own confidential material to the public so long as no other party’s confidential material will also be disclosed. MSC would have the Board find that, in exercising this right, a party destroys the applicability of the protective order to any other confidential or highly confidential information associated with the information so disclosed. That position, however, ignores the terms and intent of the protective order.

“DM&E states that, if MSC believes a specific confidential or highly confidential passage of the transcript should be made public, DM&E would be open to discussion with MSC on that point. But DM&E is correct that a blanket motion to make the entire transcript public without a showing of why disclosure to the public of material not previously made public is necessary would jeopardize the railroad’s legitimate rights and expectations in the protective order. For all of these reasons, we deny MSC’s motion.” In other words, don’t push the envelope with the STB. WIR applauds this Decision.

Canadian Pacific held its annual Short Line Conference in Saratoga Springs two weeks ago, alternating as it does between eastern and western regions. Among those in attendance from CPR were Brock Winter, Sr. Vice President Operations, Mike Franczak, Vice President Transportation, and Bob Milloy, Vice President Marketing & Yield. A total of 95 persons participated, representing 49 of CP’s Regional and Short Line Partners and other related associations.

Those who were unable to attend can get a good flavor for what was discussed by downloading the presentation PPT on the [investors](#) page at www.cpr.com. The presentations do an excellent job of blending corporate overview material such as one might find in an analysts’ presentation with specific actions for shortline operators wishing to fit their operations to CP’s corporate goals.

CP shortline volumes have increased at a faster rate than CP’s organic volume over five years and the past 12 months and that revenues from moves touching shortlines account for 14% of CP’s total, call it an estimated \$600 mm-plus for 2006 based on first-half revenues with grain, forest products, mines & metals and chems and energy (ex coal) contributing nearly half the total shortline revenues.

Following a detailed discussion of how and why CP is improving its infrastructure and service, shortlines were challenged to focus on “quality revenue growth, asset velocity, and ISAs.” In short, CP seeks new business that can bring added value to the service package, accelerate the process (where have we heard *that* before?) and use the ISAs to create pricing leverage.

CP is using information and technology to bring the shortlines into the fold as full commercial, operating and financial partners. There were no holds barred as the corporate material laid it all out and showed specifically where the shortline-CP combo as a whole will be better than the sum of its parts. The synergy works.

Trading Notes: Last week’s comments re my decision to add Florida East Coast (NYSE: FLA) raised some eyebrows. A reader who follows this stuff closely writes, “Why that fat PE ratio? Earnings growth doesn't justify it, or BNSF would be \$150 now. Isn't the housing market really soft? What happens to the rock business out of Hialeah (Medley) when homebuilding hits the skids? FEC haul five entire trains of rock north each day - it's a huge business. I am surprised the stock has done as well as it has.”

To which I replied, “Re FLA, this is a trade, not an investment. It's got a good tech run going and it ought to be good for a few points. Can't explain the fat PE though the building is commercial, not residential and the aggies the RR carries are for roads and commercial construction. Ops and marketing heads are tops in the industry and the RR carries the real estate arm, at least for the nonce. My target price is \$65. I may start taking some off the top at \$60.” And which I did Thurs.

In other words, there are two types of market plays: trades and investments. The former is looking for a few good bucks based on firm fundamentals – operating income, net earnings, cash flow, e.g. It's a stock you expect to rent for as long as it's comfortable. But if it turns you exit, and you start taking some off the top once you've reached a certain threshold. Like the man says, “bulls make money, bears make money; pigs get slaughtered.” I'm bullish on FLA but I'm not going to be a pig about it.

Union Pacific's Investor Conference call on Wednesday was highly rewarding. There was a welcome degree of energy and excitement that put a very strong story across very well, I thought. The slides are posted to www.up.com under the “investors” tab and I'd recommend at least paging through these if you can't listen to the entire call. There's a lot of material and I'll get into more detail next week and beyond. But let me touch on some highlights here.

The common thread throughout is “Aligning Supply and Demand” and the five-step process UP has identified to accomplish same. They are market forecasting, modeling the transportation product required to accommodate forecasted volumes, coping with projected constraints, supply/demand analysis and finally the commercial and operational imperatives that will create the required end result. Beginning next week and continuing until I think we've exhausted the theme WIR will drill down into the presentations with a particular eye to shortline applications. Close attention is advised.

Do the math. Norfolk Southern shelled out \$44 mm to establish a direct connection between its ex-PRR main line in western PA to the coal-powered Keystone Generating Station in Shelocta. The project took five years to complete, involved building five miles of new track and rehabilitating 11 miles. The new route is 51 miles shorter than the previous route and is expected to handle more than 3 mm tons of coal annually.

NS averages \$1300 per 100-ton car of coal (2Q06 earnings report) or \$1.30 per ton. The anticipated volumes ought to be worth something on the order of \$39 mm a year. I'd say the ROI looks pretty good -- \$44 mm spent over five years to take in revenues of \$39 mm a year in perpetuity.

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