

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

300069

HEARING ON REVENUE ADEQUACY

Docket No. EP 761

ENTERED
Office of Proceedings
November 26, 2019
Part of
Public Record

MOTION FOR PROTECTIVE ORDER

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Dated: November 26, 2019

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Pursuant to 49 C.F.R. § 1104.14(b), Norfolk Southern Railway Company (“Norfolk Southern”) respectfully requests that the Surface Transportation Board (“Board”) enter a protective order in the above-captioned proceeding, in the form provided in Appendix A to this motion. The order is required to permit Norfolk Southern to submit to the Board certain railroad-specific competitively sensitive and proprietary information in connection with this proceeding. This information is contained in the “Highly Confidential” version of Exhibit B to the Verified Statement of John H. Friedmann, Norfolk Southern’s Vice President of Network Planning and Optimization, which is a part of Norfolk Southern’s written testimony being filed contemporaneously with this motion.¹

The information that Norfolk Southern filed under seal is responsive to issues the Board raised in its Notice of Public Hearing. The information has also been previously filed by Norfolk Southern under a Highly Confidential designation pursuant to a protective order in Ex Parte 711 (Sub-No. 1). The proposed order is necessary to protect this information from disclosure.² The proposed order will enable Norfolk Southern to present this information to the Board while

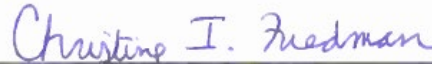
¹ Norfolk Southern is also filing a “Public” version of Exhibit B to the Verified Statement.

² A protective order already is in place in the accompanying docket of Ex Parte 722. *See Motion for Protective Order, Railroad Revenue Adequacy*, Docket No. EP 722 (STB served Sept. 17, 2014).

protecting its confidentiality. The proposed protective order generally follows the format of protective orders the Board has entered in other recent proceedings.

Accordingly, Norfolk Southern requests that the Board enter the proposed order.

Respectfully submitted,



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November 26, 2019

APPENDIX A
PROTECTIVE ORDER

1. Any party submitting information, data, documents, or other material (hereinafter collectively referred to as “material”) in filings in this proceeding, or producing material to another party in discovery in this proceeding, 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, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 9.

(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 submitting material in filings in this proceeding, or producing material in discovery to another party to this proceeding, may in good faith designate and stamp particular material, such as material containing specific rate, traffic, cost, production, routing, or sales 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 designated as “HIGHLY CONFIDENTIAL” 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” 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 submits or 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 submitting/producing party may notify the other party in writing within 5 days of the submitting/producing party’s discovery of its inadvertent failure to make the confidentiality designation. The party who received the material (“receiving party”) without the confidentiality designation will return the

non-designated portion (including any and all copies in any form or format) or destroy it, as directed by the submitting/producing party, or take such other steps as the parties agree to in writing. The submitting/producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently submits or produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege or protection from discovery or disclosure, the submitting/producing party may make a written request, within a reasonable time after the submitting/producing party discovers the inadvertent disclosure, that the receiving party return the inadvertently submitted/produced privileged material. The receiving party will either return the inadvertently submitted or produced material (including any and all copies in any form or format) to the submitting/producing party or destroy the material immediately upon receipt of the written request, as directed by the submitting/producing party. By returning or destroying the material, the receiving party is not conceding that the material 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 submission or 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 submitting or 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. 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 submitted or 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 submitting/producing party in writing within 3 business days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 business days prior to such release, whichever is soonest, to permit the submitting/producing party the opportunity to contest the release.

8. 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 submitted or produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

9. 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 submitting/producing party, without securing prior permission from the submitting/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 (or soon thereafter) 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”).

10. 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 _____, 2019 governing the governing the production of confidential documents in STB Docket No. EP 761, 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 No. EP 761 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 counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

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 whom I am acting in this proceeding, I have read the Protective Order served on _____, 2019, governing the production of confidential documents in STB Docket No. EP 761, 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 and consultants 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: _____