

Midwest & Bluegrass Rail, LLC, Ivory Beggs,	)	ENTERED
Brian Miller and Dustin Shaver, and	)	Office of Proceedings
MB Rail TTI, LLC	)	December 29, 2020
--Control Exemption --	)	Part of
Transkentucky Transportation Railroad, Inc.	)	F.D. 36475 Public Record

Motion for a Protective Order

Expedited Consideration Requested

Pursuant to 49 C.F.R. 1104.14, Midwest & Bluegrass Rail, LLC (“MBR Rail”), Ivory Beggs, Brian Miller and Dustin Shaver (collectively “MBR”), and MB Rail TTI, LLC, all non-carriers, hereby request that the Board issue a protective order allowing MBR to file under seal the Draft Contract and the Draft Operating Agreement between MB Rail TTI, LLC (a non-carrier controlled by MBR) and The Carrollton Railroad (“TCR”) which sets forth the material terms of the transaction underlying the exemption for continued control sought in this proceeding. A proposed protective order is attached. The proposed protective order is also designed to govern any potential discovery in this proceeding.

MBR is filing herewith a notice of exemption pursuant to 49 C.F.R. 1180.2(d)(2) for MBR's continued control MB Rail IB, LLC, which in turn controls four railroads, all Class III carriers, upon acquisition of all the stock of Transkentucky Transportation Railroad, Inc. ("TTI") from TCR by non-carrier MB Rail TTI, LLC, which is also controlled by MBR. MBR has filed a redacted version of the Draft Contract as Exhibit B and a redacted form of the Operating Agreement as Exhibit C to its notice of exemption pursuant to 49 C.F.R. 11806(a)(7)(ii) and has filed the unredacted "confidential" version under seal, subject to this request for a protective order. The Draft Contract and Draft Operating Agreement have been the subject of extensive private negotiations between the parties, and contain commercially sensitive and confidential information the public release of which could cause competitive or other injury to MBR/MB Rail TTI, LLC and/or TCR. Public disclosure of the unredacted documents also is not necessary for the consideration or disposition of MBR's notice of exemption.

MBR accordingly requests that the Board accept the unredacted Draft Contract and unredacted Draft Operating Agreement for filing under seal and adopt the proposed protective order contained in the Appendix hereto to govern not only access to the unredacted documents, but also any discovery that may occur in this proceeding. This approach is consistent with that taken by the Board in similar

circumstances. E.g., Pinsky Railroad Company – Control Exemption – The Prescott and Northwestern Railroad Company, F.D. 35292, served Oct. 6, 2009; Genesee & Wyoming, Inc. – Control Exemption – Columbus and Greenville Railway Company, F.D. 35319, served May 23, 2008; Progressive Rail, Inc. – Acquisition of Control Exemption – Central Midland Railway Company, F.D. 35051, served July 6, 2007. The form of protective order is drawn from Genesee & Wyoming, Inc. – Acquisition of Control Exemption – Arkansas Midland Railroad Company, Inc., The Prescott and Northwestern Railroad Company, and Warren & Saline River Railroad Company, F.D. 35877, served December 5, 2014.

Because the Notice of Exemption is being filed simultaneously with the redacted copy of the Draft Contract and Draft Operating Agreement, MBR requests expedited consideration of this Motion.

For the reasons stated, MBR moves that the Board adopt the protective order contained in the appendix hereto.

Respectfully submitted,

/s/ Charles H. Montange

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Attorney for Midwest & Bluegrass Rail, LLC,

Avory Beggs, Brian Miller and Dustin

Shaver and MB Rail TTI, LLC

December 29, 2020

Attachments:

Appendix – Proposed Protective Order

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers); the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers or carriers; confidential financial and cost data; divisions of rates, trackage rights compensation levels and other compensation between carriers; and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraphs 6 or 7 of this Protective Order and any Confidential Information contained in such materials.

(d) "Proceedings" means those proceedings before the Surface Transportation Board ("Board") concerning the transaction in STB Docket No. FD 36475 and any related proceedings before the Board, and any judicial review proceedings arising from STB Docket No. FD 36475 or from any related proceedings before the Board.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to Midwest & Bluegrass Rail, LLC ("MBR Rail"), Avory Beggs, Brian Miller and Dustin Shaver (collectively "MBR") and The Carrollton Railroad ("TCR") of the applicable Undertaking, forms of which are attached as Exhibits A and B to this Protective Order. Confidential Information shall be used solely for the purpose of the Proceedings, and not for any other business, commercial, or competitive purpose.

3. Personnel of MBR on the one hand, and TCR on the other hand, and their respective affiliates, including outside consultants and attorneys for any of them, may exchange Confidential Information related to the proposed transaction for the purpose of participating in the Proceedings, but not for any other business,

commercial, or other competitive purpose, unless and until the exemption in the Proceedings becomes effective.

4. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of MBR and TCR or their affiliates are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such Proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995.

5. If the Notice of Exemption is not approved by the Board, then all Confidential Documents (other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings) that are exchanged between MBR and TCR and their affiliates but which are not otherwise available to them as a result of their existing affiliation and pursuant to their reporting responsibilities for securities, tax and other purposes, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents. With respect to parties other than MBR and TCR and their affiliates, if the Notice of Exemption is not approved by the Board, or if the Notice of Exemption is issued but MBR does not consummate the acquisition of equity, or control is not effected, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

6. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

7. If any party to these Proceedings determines that any part of a document it submits (including the Term Sheet), discovery request it propounds, or a discovery

response it produces, or a transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carriers; or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 3 and 4 of this Protective Order.

8. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality Undertaking substantially in the form set forth at Exhibit A to this Protective Order.

9. Information and documents designated or stamped 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, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality Undertaking substantially in the form set forth at Exhibit B to this Protective Order.

10. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board, whether the submission is designated as a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. 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 to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

12. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in STB Docket No. FD 36475, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Docket No. FD 36475 and/or with any related proceedings.

13. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings; or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals or remands.

14. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

15. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding; or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting

issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that, if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

16. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material; and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

17. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 14 of this Protective Order.

18. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §§ 11323 or 11904, or of any other relevant provision of the ICC Termination Act of 1995.

19. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

20. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on _____, 2020, governing the production and use of Confidential Information and Confidential Documents concerning STB Docket No. FD 36475, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36475, any related proceedings before the Surface Transportation Board (“Board”), and/or any judicial review proceedings in connection with STB Docket No. FD 36475 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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.

Signed: _____

Affiliation: _____

Dated: _____

Exhibit B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____ am outside [counsel][consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____, 2020, governing the production and use of Confidential Information and Confidential Documents concerning STB Docket No. FD 36475, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36475, any related proceedings before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Docket No. FD 36475 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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.

Signed:

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____