

December 2, 2021

Submitted via e-filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

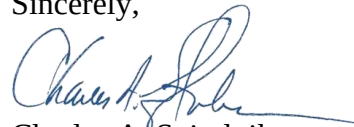
Re: STB Docket No. AB 1311, *Metro-North Commuter Railroad Company—Adverse
Discontinuance of Trackage Rights—Housatonic Railroad Company*

Dear Ms. Brown:

I am attaching for e-filing in the above-captioned proceeding the Reply of Metro-North Commuter Railroad Company to Request for Protective Conditions and Motion of Metro-North Commuter Railroad Company to Compel Production of Documents.

Please do not hesitate to contact me with any questions.

Sincerely,



Charles A. Spitulnik

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

**METRO-NORTH COMMUTER RAILROAD COMPANY—ADVERSE
DISCONTINUANCE OF TRACKAGE RIGHTS—HOUSATONIC RAILROAD
COMPANY**

**REPLY OF
METRO-NORTH COMMUTER RAILROAD COMPANY TO
REQUEST FOR PROTECTIVE CONDITIONS AND
MOTION OF METRO-NORTH COMMUTER RAILROAD COMPANY
TO COMPEL PRODUCTION OF DOCUMENTS**

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Counsel for Metro-North Commuter Railroad
Company

Dated: December 2, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB 1311

**METRO-NORTH COMMUTER RAILROAD COMPANY—ADVERSE
DISCONTINUANCE OF TRACKAGE RIGHTS—HOUSATONIC RAILROAD
COMPANY**

**REPLY OF
METRO-NORTH COMMUTER RAILROAD COMPANY TO
REQUEST FOR PROTECTIVE CONDITIONS AND
MOTION OF METRO-NORTH COMMUTER RAILROAD COMPANY
TO COMPEL PRODUCTION OF DOCUMENTS**

Metro-North Commuter Railroad Company (“Metro-North”), through counsel, hereby (1) replies to the request of Housatonic Railroad Company (“HRRC”) for protective conditions and its objections to the Metro-North’s Requests for Production of Documents, served on November 11, 2021, and (2) submits this Motion to Compel Production of Documents to request the Surface Transportation Board (“STB” or “Board”) to compel HRRC to produce the documents included in Metro-North’s October 22, 2021 Request for Production of Documents.

Despite the straightforward issues presented in this proceeding, HRRC has undertaken to delay it by serving substantial discovery requests on Metro-North. When Metro-North objected, and following a conference with Administrative Law Judge McCarthy, the parties agreed that HRRC would revise certain interrogatories to which Metro-North had objected and would withdraw others. Metro-North has now responded to those revised requests and has made David Melillo, who submitted a Verified Statement in this proceeding, available for a deposition which was conducted on November 22, 2021.

On October 22, 2021, Metro-North served HRRC with a five item Request for Production of Documents, all relating to claims that HRRC has made in this proceeding about alleged requests to provide freight service that it has received since Metro-North acquired the line at issue in this proceeding. In its responses served on November 11, 2021, HRRC provided only two documents – photographs of trains arriving at two points on the subject line – but refused to provide any other materials, stating that the requests were burdensome, and that the information requested was too voluminous and was confidential. HRRC also sought unspecified protective conditions with respect to the information covered by Metro-North’s Request for Production.

HRRC had referred, in earlier pleadings in this proceeding, to requests it had received to provide freight service and had stated that it possesses documents on which it plans to rely in its Reply to Metro-North’s Application for Adverse Abandonment. This is the information that Metro-North seeks in its Request for Production of Documents.

In view of (1) the protections available to HRRC through the use of a protective order that is consistent with long-standing STB precedent, and (2) the clear relevance of the documents Metro-North has requested based on HRRC’s own statements in this proceeding, this Board should issue the protective order Metro-North proposes and require HRRC to provide any such requested documents promptly.

BACKGROUND

On April 30, 2021, Metro-North filed an Application for Adverse Discontinuance of Trackage Rights (“Application”) of HRRC over the line of railroad in New York State known as the “Beacon Line” between milepost 0.0 at Beacon, New York, and milepost 71.2 at the Connecticut/New York state line, a distance of 41.1 miles from Beacon, New York to Brewster,

New York in Dutchess and Putnam Counties, New York (hereafter, the “Line” or “Beacon Line”). Application, 1.

Metro-North is a New York State public benefit corporation and subsidiary of the Metropolitan Transportation Authority (“MTA”), a New York State public authority. Application, 1. Metro-North acquired the Beacon Line in 1995 for \$4.2 Million. HRRC has exclusive freight operating rights on the Beacon Line pursuant to a Trackage Rights Agreement originally executed between Metro-North and HRRC’s predecessor railroad. *Id.* at 3-4.

Since Metro-North acquired the Beacon Line in 1995, no freight traffic has moved on the Line. *Id.* at 5-6, citing Exhibit D, Verified Statement of John Longobardi. Accordingly, in 2020 Metro-North took steps to abandon the Line to alleviate the costs associated with ownership of an active rail line. Pursuant to the authority granted by the Interstate Commerce Commission in 1995, Metro-North is exempt from the provisions of 49 U.S.C., Subtitle IV and may abandon the Beacon Line subject only to the operating carrier seeking authority to discontinue freight service. Application, 2; *Metro North Commuter R.R. Co.—Acquisition Exemption—The Maybrook Line*; *Metro North Commuter R.R. Co.—Exemption—From 49 U.S.C. Subtitle IV*, ICC Finance Docket No. 32639 (Sub-No. 1), slip op. at 2 (Service Date Jan. 13, 1995).

Further, the governing Trackage Rights Agreement between Metro-North and HRRC provides that Metro-North may abandon the Beacon Line by giving HRRC 120 days’ notice of Metro-North’s intent to abandon the Line. Application, 4 (quoting Application, Exhibit B). The terms of the Trackage Rights Agreement require HRRC to seek authority to discontinue its operations on the Line concurrently with Metro-North’s abandonment of the Line, and also prohibit HRRC from interfering with or opposing Metro-North’s actions to seek and exercise abandonment authority. *Id.*

In spite of HRRC's obligation to seek discontinuance authority and to not interfere with Metro-North's abandonment of the Line, HRRC has indicated its opposition to Metro-North's abandonment of the Line in violation of the Trackage Rights Agreement. *Reply of Housatonic Railroad Company to Petition for Waivers of Discontinuance Regulations and for Exemption*, AB 1311 (filed Feb. 12, 2021).

On May 13, 2021, HRRC served Metro-North with a list of Interrogatories. The Interrogatories contain three parts: Part I – Proposed Abandonment, Part II – Current and Planned Trail Use, and Part III – General Line Characteristics, Condition and Maintenance. Metro-North provided HRRC with responses to the requests contained in Parts I and II. However, because the requests contained in Part III are irrelevant and burdensome, Metro-North filed a Motion for Protective Conditions to Interrogatories on June 9, 2021.¹

On June 29, 2021, HRRC filed a Reply to Motion for Protective Conditions. In the Reply, HRRC asserted that it needed the responses to the Interrogatories from Metro-North to “properly prepare” its Reply to the Application. *Housatonic Railroad Company Reply to Motion for Protective Conditions*, AB 1311, at p. 8 (filed June 29, 2021). In addition, HRRC argued that the Beacon Line “formerly constituted a major freight link to New England” and signaled HRRC's intention to “show in greater detail in its Reply [to the Application], that there have been significant freight opportunities in the past and that there are significant freight opportunities currently and in the future that will not be realized by reason of the failure of Metro-North to maintain the line.” *Id.* at 4, 6.

On October 22, 2021, Metro-North filed a Request for Production of Documents seeking information about the inquiries about freight movements across the Beacon Line that HRRC

¹ Following the conference with ALJ McCarthy, HRRC revised the interrogatories in Part III and Metro-North served responses to them on October 1, 2021.

allegedly had received since Metro-North acquired the Beacon Line, as well as information about alleged current and future freight opportunities for HRRC on the Line.

Astonishingly, and despite its prior representations in this proceeding, HRRC responded by objecting to Request 1 for “all Documents related to any request you received from any person for you to provide service on, over, or in any way using the railroad line subject to adverse abandonment in these proceedings after January 9, 1995.” *Housatonic Railroad’s Objection to Request by Metro-North Commuter Railroad Company for Production of Documents / Motion for Protective Conditions*, AB 1311, at p. 2 (filed Nov. 11, 2021). HRRC’s objection is based on the breadth of the request and the purported lack of relevance of documents requested. However, HRRC asserted in its June 29, 2021 filing that it possessed evidence of demand for service on the Line, and Metro-North is entitled to ascertain whether HRRC has documents to support its claims. HRRC’s statements clearly underscore the relevance of those materials to the issues in this proceeding. HRRC also stated that it should not be required to produce those documents because Metro-North already had copies, but that is not a supportable objection. In view of the relevance of the requested documents to claims that HRRC states that it will make in this proceeding, the Board should compel HRRC to produce any such documents to Metro-North.

HRRC also objected to the request to provide information that it described as “information about freight rates, financial information, and competitive factors relating to the business of Housatonic Railroad and its customers and potential customers.” *HRRC’s Objection to Request by Metro-North Commuter Railroad Company for Production of Documents, Motion For Protective Conditions*, filed November 11, 2021, at 3. Information about the proposed freight shipments is directly relevant to the claims HRRC has made about potential freight movements, and its confidentiality can be preserved through the use of a standard confidentiality order along

the lines of those routinely ordered by the Board in its proceedings. Metro-North submits that the Board should issue a Protective Order in this proceeding that will allow discovery to proceed apace.

ARGUMENT

A. The Proposed Protective Order will Address HRRC’s Confidentiality Concerns.

In its response to Metro-North’s Request No. 1, and the definitions associated with it, HRRC has refused to provide the requested documents because of an expressed concern over preservation of the confidentiality of customer information. However, this Board has a well-established procedure for addressing confidentiality concerns in its proceedings, and has often issued a Protective Order substantially in the form attached hereto as Exhibit 1. Metro-North requests the Board to issue such a Protective Order in this case, thus removing any objection that HRRC may have to release information that it suggests is confidential.

B. Discovery Includes All Documents “Relevant to the Subject Matter Involved in a Proceeding” and HRRC Should Be Required to Produce Any Documents It Has That Are Related to Alleged Traffic Opportunities on the Beacon Line.

Pursuant to 49 C.F.R. § 1114.21(a)(1), discovery in abandonment proceedings covers matters “relevant to the subject matter involved in a proceeding. . . .” The Board has interpreted its regulations around discovery broadly. *See Canadian Pac. Ry. Ltd. et al.*, FD 36500 (No. 7), slip op. at 4 (STB served Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); *Order of Administrative Law Judge Clarifying Prior Order on Motion to Compel Discovery Responses, Finch Paper LLC—Petition for Declaratory Order*, FD 35981, slip op. at 2 (STB served Jan. 18, 2017) (referring to STB discovery regulations as using “a very liberal standard” and describing “relevant” as “a broad standard”); *CSX Transportation, Inc. and Del. and*

Hudson Ry. Co., Inc.—Joint Use Agreement, Motion to Compel, FD 35348, slip op. at 3 (STB served Aug. 16, 2010) (parties are entitled to discover regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding and relevance means that information might be able to affect the outcome of a proceeding) (citing 49 C.F.R. § 1114.21).

The Board’s discovery rules in 49 C.F.R. § 1114, subpart B “follow generally those in the Federal Rules of Civil Procedure.” *PEPCO v. Consolidated Rail Corp. et al.*, STB Docket No. 41989, slip op. at 1 n.5 (STB served May 27, 1997). Therefore, “as a general matter, parties may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in a proceeding.” *Id.* Indeed, the Board, referencing Rule 26 of the Federal Rules of Civil Procedure (“FRCP”), determined that discovery in STB proceedings covers “all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses” *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub.-No. 1), slip op. at 69 (STB served Sept. 5, 2007).

The documents sought in Request 1 of Metro-North’s Request for Documents relate to HRRC’s claims about demand for service on the Beacon Line, which is relevant to HRRC’s argument that public convenience and necessity do not allow for discontinuance of HRRC’s right to operate on the Line. A central issue in an Adverse Discontinuance Case such as this is “whether the present or future public convenience and necessity require or permit the proposed discontinuance.” *Port of Benton County, Wash.—Adverse Discontinuance of Rail Service—Tri-City R.R. Co., LLC*, STB Docket No. AB 1270, slip op. at 4 (STB served October 31, 2019) (citing 49 U.S.C. § 10903(d)).

Therefore, because HRRC alluded to evidence of “significant freight opportunities” on the Beacon Line in the past, present, and future it will seek to introduce in its Reply opposing the Application for Adverse Discontinuance, Metro-North was well within its right to ask for such documents in discovery, especially since HRRC believes such documents are relevant to a primary question in this proceeding: whether discontinuance of the Line would impair public convenience and necessity by denying freight opportunities? *Housatonic Railroad Company Reply to Motion for Protective Conditions*, AB 1311, at p. 4 (filed June 29, 2021). HRRC’s alleged evidence undoubtedly falls within the broad ambit of the Board’s discovery regulations, particularly given that HRRC may seek to use the alleged evidence to impact the outcome of the proceeding. See *Canadian Pac. Ry. Ltd. et al.*, FD 36500 (No. 7), slip op. at 4 (STB served Aug. 2, 2021) (scope of relevance in discovery is broad); *Order of Administrative Law Judge Clarifying Prior Order on Motion to Compel Discovery Responses, Finch Paper LLC—Petition for Declaratory Order*, FD 35981, slip op. at 2 (STB served Jan. 18, 2017) (referring to STB discovery regulations as using “a very liberal standard” and describing relevance as “a broad standard”); *CSX Transportation, Inc. and Del. And Hudson Ry. Co., Inc.—Joint Use Agreement, Motion to Compel*, FD 35348, slip op. at 3 (STB served Aug. 16, 2010) (relevance means that information might be able to affect the outcome of the proceeding).

Furthermore, under FRCP 26 the scope of discovery includes all documents and information in the “possession, custody, or control” of the disclosing party that may be used to “support its claims or defenses.” FRCP 26; see also *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub.-No. 1), slip op. at 69 (STB served Sept. 5, 2007) (referencing FRCP 26 to explain breadth of discovery). Because STB discovery regulations generally follow FRCP, this provides further support for the need for HRRC to provide any alleged documents on which it

intends to rely to argue that the Line is subject to significant freight opportunities. *See PEPCO v. Consolidated Rail Corp. et al.*, STB Docket No. 41989, slip op. at 1 n.5 (STB served May 27, 1997) (STB discovery regulations generally follow FRCP). In addition, to the extent HRRC plans to rely on documents to support its Reply to the Application, HRRC cannot claim that producing those materials is too burdensome because it presumably already has them identified and ready to reference as part of its Reply or has already used them as the basis for its prior assertions.

C. Requester’s Alleged Possession of the Documents Requested is Not a Valid Excuse in Failing to Produce Discovery.

HRRC asserts that Metro-North already has some of the documents it is requesting in Metro-North’s possession. For example, in response to Metro-North’s Request No. 2, HRRC states: “These documents should be in Metro North’s possession. No documents could be found as yet in Housatonic Railroad records.” Response of HRRC to Metro-North Request for Production of Documents, served on November 12, 2021, at 3.

Such an allegation does not negate HRRC’s need to produce relevant documents. Federal district courts in the Second Circuit have interpreted Rules 26 and 45 of FRCP to conclude that alleged possession of documents by the requester is not a valid excuse from discovery. *See Certain Underwriters at Lloyd’s v. Amtrak*, No. 16-MC-2778 (FB), 2016 U.S. Dist. LEXIS 162783, at *13 (E.D.N.Y. Nov. 23, 2016) (“[C]onsistent with precedent from within this Circuit, RMI should not be excused from responding to the subpoena on the ground that Amtrak already has the documents sought.”) (citations omitted); *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, No. 03 Civ. 5560 (RMB)(HBP), 2008 U.S. Dist. LEXIS 77018, 2008 WL 4452134, at *5 (S.D.N.Y. Oct. 2, 2008) (“While [the subpoenaed party’s] files for this period may not contain anything that is not already in [the requesting party’s] files, this fact alone is an insufficient ground on which to quash the subpoena.”); *Burns v. Bank of Am.*, No. 03 Civ. 1685 (RMB)(JCF), 2007 U.S. Dist. LEXIS

40037, 2007 WL 1589437, at *15 n.13 (S.D.N.Y. June 4, 2007) (“Even if Bank of America already possesses many of the documents in question, this is not a bar to its taking discovery [from non-party] . . .”).

In addition, numerous district courts in other jurisdictions have reached similar holdings. *See Strobel v. Rusch*, No. 18-656 RB/JFR, 2020 U.S. Dist. LEXIS 248004, at *5, *14-15 (D.N.M. Jan. 23, 2020) (“The fact that Plaintiffs may already have some of the documents they are seeking does not relieve Defendants of their discovery obligations [under FRCP 26].”) (citations omitted); *P.R. Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.*, 318 F.R.D. 224, 230 (D.P.R. 2016) (“Courts have held that [under FRCP 34] a responding party is required to produce documents in its possession, custody, or control regardless of whether the requesting party is already in possession of the requested documents.”); *SSL, LLC v. Garcia-Chicoine Enters.*, Nos. 04-1017-JTM, 04-1189-JTM, 2005 U.S. Dist. LEXIS 48112, at *10 (D. Kansas Aug. 24, 2005) (“[T]he fact that G-C may already have these bids in its possession is not a proper objection to disclosure [under FRCP 26].”); *Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D. Cal. 1996) (“[Under FRCP 26,] defendant DeFabiis is required to produce documents he has in his possession, custody or control, regardless of whether he believes plaintiff already has those documents.”); *Fort Wash. Resources v. Tannen*, 153 F.R.D. 78, 79 (E.D. Pa. 1994) (“[I]t is not a bar to the discovery of relevant material [under FRCP 26] that the same material may be in the possession of the requesting party or obtainable from another source.”).

Like the responding parties in these cases, HRRC cannot avoid its discovery obligations by claiming that the requested documents are already in Metro-North’s possession. The Board should grant Metro-North’s motion to compel.

CONCLUSION

For the foregoing reasons, the Metro-North hereby requests the Board to (1) issue the Protective Order in the form attached hereto as Exhibit 1 and require HRRC to produce those documents within ten (10) days of the issuance of the Protective Order; and (2) compel HRRC to produce the documents requested in Request 1 of Metro-North's October 22, 2021 Request for Production of Documents within ten (10) days of the issuance of an order requiring such production.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

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Dated: December 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December 2021, I caused the foregoing Reply of Metro-North Commuter Railroad Company to Request for Protective Conditions and Motion of Metro-North Commuter Railroad Company to Compel Production of Documents to be served on the following parties by email:

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Charles A. Spitulnik

EXHIBIT 1
DRAFT PROTECTIVE ORDER

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 workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 5 or 6 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (“Board”) concerning the application in STB Docket No. AB 1311 and any related proceedings before the Board, and any judicial review proceedings arising from STB Docket No. AB 1311 or from any related proceedings before the Board.

2. Personnel of Metro-North Commuter Railroad Company (“MNR”) and Housatonic Railroad Company (“HRRC”), including outside consultants and attorneys for MNR or HRRC (“representatives”), may exchange Confidential Information for the purpose of participating in the proceedings, but not for any other business, commercial, or other competitive purpose, unless and until their control application in the Proceedings is approved.

3. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of MNR and HRRC 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, 11904, or any other relevant provision of the ICCTA Termination Act of 1995 (ICCTA).

4. If the application in this proceeding is not approved by the Board, or if the application is approved but the requested relief 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.

5. If any party to these proceedings determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper 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 paragraph 2 of this Protective Order.

6. Any party producing material in discovery to another party to these proceedings, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary 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 paragraph 2 of this Protective Order.

7. 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 Order.

8. 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 Order.

9. 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.

10. 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 challenge(s).

11. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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 13 of this Protective Order.

17. 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 the terms of 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 ICCTA.

18. 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.

19. 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 _____, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. AB-1311, understand the same, and agree to be bound by its terms. I agree not to use or 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. AB 1311, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Docket No. AB 1311, 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 these Proceedings (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 _____, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. AB 1311, 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. AB 1311, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Docket No. AB 1311 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.

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 assure 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 these Proceedings (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.

Outside [Counsel] [Consultant]:

Dated: