

SERVICE DATE – AUGUST 9, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: August 8, 2022

Omaha Public Power District (OPPD) has filed a complaint challenging the reasonableness of a rate assessed by Union Pacific Railroad Company (UP) for the transportation of unit trains¹ of coal in shipper-supplied railcars to OPPD's North Omaha Power Station in Omaha, Neb., from UP's interchange with BNSF Railway Company (BNSF) in BNSF's Gibson Yard located in Omaha (Gibson Yard Interchange) and the return of the empty unit trains by UP to the Gibson Yard Interchange. (Compl. 1.)

On May 2, 2022, OPPD filed a motion for protective order, and on August 2, 2022, OPPD filed a second motion for protective order.² In its August 2 submission, OPPD states that, following discussion with UP, OPPD modified certain language from the originally filed draft protective order and that UP concurs with the version filed on August 2. The August 2 motion conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, OPPD's August 2 motion for protective order will be granted, and the protective order and undertakings, as modified here and included in the Appendix to this decision, will be adopted. OPPD's original, May 2 motion will be denied as moot.

It is ordered:

1. OPPD's August 2, 2022 motion for protective order is granted, and the protective order and undertakings, as modified here and included in the Appendix to this decision, are adopted.

2. OPPD's May 2, 2022 motion for protective order is denied as moot.

¹ OPPD states that, in the context of the complaint, "unit train" means a train of between 135 and 152 shipper-provided aluminum railcars. (Compl. 1.)

² On August 1, 2022, UP filed a motion for protective order under 49 C.F.R. § 1114.21(c), seeking a Board order quashing OPPD's discovery requests and staying further discovery by OPPD. That motion will be addressed in a separate decision.

3. This decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, 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 10.
- (d) If contained in any pleading filed with the Surface Transportation Board (“Board” or “STB”) shall, in order to be kept confidential, be designated within single braces {X} and filed only in pleadings clearly marked “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14(c).

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper and/or private railcar owner car costs or pricing 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 that is so designated 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” and produced in discovery under this provision shall be subject to

all of the other provisions of this Protective Order, including without limitation paragraph 1, *provided however* that if material designated “HIGHLY CONFIDENTIAL” is contained in any pleading filed with the Board it shall, in order to be kept confidential, be designated within double braces {{Y}} and filed only in pleadings clearly marked “Highly Confidential Materials Subject to Protective Order.”

3. Any party producing in discovery railroad traffic data that has been designated Sensitive Security Information (“SSI”) by the United States Department of Transportation (“DOT”) or the United States Department of Homeland Security (“DHS”) shall produce such material in accordance with governing DOT and DHS regulations, rules and policies, including but not necessarily limited to 49 C.F.R. pts. 15 and 1520, and the terms and conditions set forth in the FRA Administrator’s “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings,” (July 29, 2011), and SSI Order 2011-06-FRA-01 (July 29, 2011).¹ In addition to other applicable conditions and requirements, rail traffic SSI shall be produced only to those outside counsel or consultants to a party who, prior to production, have (i) reviewed and executed an Undertaking for Highly Confidential Material; and (ii) reviewed and executed an Undertaking for Sensitive Security Information and Material. Executed copies of Undertakings for Highly Confidential Material and Undertakings for SSI Material must be provided to the producing party before that SSI material may be produced to representatives of a requesting party. Moreover, material designated “SSI” contained in any pleading filed with the Board shall, in order to be kept confidential, be designated within triple braces {{{Z}}} and filed only in pleadings clearly marked “Sensitive Security Information Subject to Protective Order.”

4. In the event that a party produces material which should have been designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” or “SSI” and inadvertently fails to designate the material as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” or “SSI”, the producing party may notify the other party in writing within five (5) days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

5. In the event that a party inadvertently produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege, the producing party may make a

¹ A party producing rail traffic information containing or constituting SSI in discovery or submitting such material in pleadings should also comply with other applicable requirements of DOT and DHS SSI regulations governing the use and handling of SSI, including the SSI marking requirements set forth in 49 C.F.R. § 15.13 or, if that is not practicable, the marking requirements of the July 29, 2011 memorandum from Federal Railroad Administration Administrator Joseph C. Szabo titled “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings.”

written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document 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 production waived the privilege.

6. If any party intends to use “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” and/or “SSI” 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,” “HIGHLY CONFIDENTIAL” and/or “SSI” 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,” “HIGHLY CONFIDENTIAL” and/or “SSI” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” and/or “SSI” material in accordance with the terms of this Protective Order.

7. If any party intends to use “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” and/or “SSI” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party 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,” “HIGHLY CONFIDENTIAL” and/or “SSI” 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,” “HIGHLY CONFIDENTIAL” and/or “SSI” material shall be kept under seal and treated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL” and/or “SSI” material in accordance with the terms of this Protective Order.

8. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions. Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 8 shall be treated as “HIGHLY CONFIDENTIAL” and/or “SSI” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed

essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

9. 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,” “HIGHLY CONFIDENTIAL” or “SSI” material 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 producing party in writing within three (3) working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, “SSI,” or copies or notes are to be released, or within three (3) working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding. 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” or “SSI” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon another party (the “reviewing party”) a pleading or evidence containing the filing party’s “HIGHLY CONFIDENTIAL” or “SSI” material, the filing party shall also prepare and serve within three (3) business days upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party’s “HIGHLY CONFIDENTIAL” or “SSI” 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”).

11. Any party filing with the Board a “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL,” or “SSI” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2022, governing the production of confidential documents in STB Docket NOR 42173, 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 NOR 42173 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.

Signed: _____

Print: _____

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 2022, governing the production of confidential documents in STB Docket NOR 42173, 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]

Print: _____

Dated: _____

UNDERTAKING**SENSITIVE SECURITY INFORMATION AND MATERIAL**

I _____ have read FRA Order 2011-06-FRA-01 designating certain railroad traffic information as Sensitive Security Information (“SSI”) and the July 29, 2011 memorandum from FRA Administrator Joseph C. Szabo titled “Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings” (hereafter “July 29 Memorandum”). I agree to be bound by the terms of FRA Order 2011-06-FRA-01 and the July 29 Memorandum for rail traffic SSI data or information produced in discovery or submitted as evidence (including evidence or materials derived or compiled from SSI produced in this proceeding) in STB Docket No. NOR 42173. I have also executed an Undertaking for Highly Confidential Material, and acknowledge that all SSI produced in this proceeding is also designated HIGHLY CONFIDENTIAL and is subject to all of the requirements and limitations that apply to HIGHLY CONFIDENTIAL material, as well as the additional requirements set forth in this undertaking.

I have been advised and hereby acknowledge that the conditional disclosure of SSI data or information in STB Docket No. NOR 42173 pursuant to FRA Order 2011-06-FRA-01 and the July 29 Memorandum makes me a “covered person” within the meaning of 49 C.F.R. §§ 15.7(m) and 1520.7 as to any such SSI information I receive, access, review, and/or use. I understand my duties and responsibilities as a “covered person” under federal law and applicable regulations (including but not limited to 49 C.F.R. parts 15 and 1520), and will comply with those responsibilities. I understand that unauthorized disclosure of SSI may result in civil penalty or other action. Pursuant to 49 C.F.R. §§ 15.19 and 1520.19, I agree to destroy all SSI data or information in my possession, custody, or control after the conclusion of STB Docket No. NOR 42173, including the final disposition of any appeals of the STB final decision in that docket.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Dated: _____