

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 772

OVERSIGHT PERTAINING TO UNION PACIFIC RAILROAD COMPANY'S
EMBARGOES

**UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR PROTECTIVE ORDER**

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January 27, 2023

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Pursuant to the Board's order served January 20, 2023, Union Pacific Railroad Company is submitting the draft protective order attached as Appendix A. The proposed order generally follows the format of protective orders adopted in other recent Ex Parte proceedings, including STB Docket No. EP 766 and STB Docket No. EP 768. The proposed order will enable Union Pacific to submit sensitive information responsive to information requests the Board has made and might make in this proceeding under seal. The proposed order differs from orders adopted in prior proceedings because it expressly provides for the fact that certain types of information the Board has requested or indicated it might request, particularly information regarding Union Pacific's plans for future employment levels and service levels, would qualify for heightened protection as "confidential commercial information" pursuant to 49 C.F.R. § 1001.4.

As the Board recognized in its January 20 Order, Board regulations allow an entity that provides the Board "confidential commercial information"—i.e., records that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), because disclosure could reasonably be believed to cause substantial commercial harm—to designate the information in good faith as confidential commercial information at the time of submission. When the submitter has designated information as confidential commercial information at the time of submission (or within a reasonable time thereafter), the submitter is

generally entitled to certain legal protections, including notice and an opportunity to be heard, before the Board may disclose the information. *See generally* 49 C.F.R. § 1001.4.

Although the Board's rules provide a process for an entity to designate information as "confidential commercial information" without requiring issuance of a special protective order, Union Pacific understands the Board's desire that Union Pacific create and submit a confidential version and a public version of any submissions containing confidential commercial information. Union Pacific's proposed protective order addresses that desire and goes even further to promote transparency. Union Pacific is proposing to designate information as "confidential commercial information" only when the information requires even greater protection than is provided by the "Confidential" and "Highly Confidential" designations used in the Board's standard protective order. Stated differently, the "confidential commercial information" designation would protect the most sensitive information; it would not be used to justify withholding information typically designated as "Confidential" or "Highly Confidential." As a result, Union Pacific's proposed order could require creating as many as four different versions of any submission to ensure all parties of record have access to as much information as possible, consistent with legitimate concerns for confidentiality.

Respectfully submitted,

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Appendix A

PROTECTIVE ORDER

1. Any party submitting information, data, documents, or other material (hereinafter collectively referred to as “material”) in pleadings or otherwise in this docket 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 purposes of this proceeding and any judicial review proceedings arising herefrom, and not for any other business, commercial, or competitive purpose.
 - b. May be disclosed only to employees, counsel, or agents of a party of record in this proceeding 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 material.
 - c. Must be destroyed by the requesting party, its employees, counsel, and agents at the completion of this proceeding and any judicial review proceedings 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.
 - d. If contained in any pleading filed physically 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.
 - e. If contained in any pleading filed electronically with the Board, shall, in order to be kept confidential, be identified as “Confidential” on the Board’s electronic submission form.
2. Any Party submitting material in this proceeding may in good faith designate particular material, such as material containing shipper-specific or railroad-specific rate or cost 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 a party of record 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 material. Material designated as "HIGHLY CONFIDENTIAL" shall be subject to all the other provisions of this Protective Order, including without limitation Paragraph 1, except Paragraph 1.b.

3. Any party submitting material in this proceeding may in good faith designate material as "CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA" under the Board's rules regarding predisclosure notification procedures for confidential commercial information where disclosure of such material could reasonably be expected to cause substantial commercial harm. See 49 C.F.R. § 1001.4. 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 will be treated by the Board as nonpublic, confidential commercial information, and the Board will treat the party submitting such information as the submitter of the information subject to all the protections provided in 49 C.F.R. § 1001.4.
4. In the event that a party submits or serves material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" or "CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" or "CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA," the submitting party may notify the Board and other parties in writing within five days of discovery of its inadvertent failure to make the confidentiality designation. Any 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 submitting party, or take such other steps as the parties agree to in writing. The submitting party will promptly furnish the receiving party with the material in a properly designated form.
5. In the event that a party inadvertently submits or serves material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the submitting party may make a written request within a reasonable time after the submitting party discovers the inadvertent disclosure that another party return or destroy the inadvertently submitted material. Any party who received the inadvertently submitted material will either return it to the submitting party or destroy it (including any and all copies) immediately upon receipt of the written request, as directed by the submitting 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 submittal waived the privilege.
6. If any party intends to use "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" or "CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA" 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" or "HIGHLY

CONFIDENTIAL” or “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” 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” or “HIGHLY CONFIDENTIAL” or “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” or “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” 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 or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the party that submitted the material in writing within three business days of the determination that such material is to be released, or within three business days prior to such release, whichever is soonest, to permit the submitting 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 publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” or “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” 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 another party, without securing prior permission from the other party. If a party (the “submitting party”) is required to provide another party (the “reviewing party”) a pleading or other item containing the “HIGHLY CONFIDENTIAL” material of the submitting party, the submitting party shall also contemporaneously provide to outside counsel for the reviewing party a “CONFIDENTIAL” version of such pleading that redacts any “HIGHLY CONFIDENTIAL” material of the submitting party that cannot be reviewed by the in-house personnel of the reviewing party. Such “CONFIDENTIAL” version may be provided in a pdf or other electronic format.
10. If a party (the “submitting party”) is required to provide another party (the “reviewing party”) a pleading or other item containing the “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” material of the submitting party, the submitting party shall provide to outside counsel for the reviewing party a “HIGHLY CONFIDENTIAL” version of such pleading that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” material of the submitting party. Such “HIGHLY CONFIDENTIAL” version may be provided in a pdf or other electronic format.

11. Any party submitting to the Board a pleading or other item containing “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” material should simultaneously submit (i) a “HIGHLY CONFIDENTIAL” version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” material, (ii) a “CONFIDENTIAL” version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” and “HIGHLY CONFIDENTIAL” material, and (iii) a public version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION, SUBJECT TO EXEMPTION 4 OF FOIA” and “HIGHLY CONFIDENTIAL” and “CONFIDENTIAL” material.
12. Any party submitting to the Board a pleading or other item containing “HIGHLY CONFIDENTIAL” material should simultaneously submit (i) a “CONFIDENTIAL” version of such submission that redacts any “HIGHLY CONFIDENTIAL” material, and (ii) a public version of such submission that redacts any “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL” and “CONFIDENTIAL” material.
13. Any party submitting to the Board a pleading or other item containing “CONFIDENTIAL” material should simultaneously submit a public version of such submission that redacts any “CONFIDENTIAL” material.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on _____, governing the production of confidential documents in STB Docket No. EP 772, 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 772 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 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 which I am acting in this proceeding, I have read the Protective Order served on _____, governing the production of confidential documents in STB Docket No. EP 772, 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: _____