

March 1, 2023

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. NOR 42176

VICTOR INSULATORS, INC. V. FINGER LAKES RAILWAY CORP.

**MOTION TO CHALLENGE DESIGNATION OF INFORMATION AS CONFIDENTIAL
AND/OR HIGHLY CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER**

Pursuant to Section (7) of the Protective Order proposed by Motion by Finger Lakes Railway Corp. (“FGLK”) and Ontario Central Railroad Corp. (“ONCT”) (collectively, the “Railroad Parties”) filed February 9, 2023, and granted by the Board on February 16, 2023, Victor Insulators, Inc. (“VI”) challenges the Railroad Parties’ designation of certain information as “confidential” and/or “highly confidential” in its Motion to Dismiss (filed February 9, 2023) (the “Motion to Dismiss”), and thereby respectfully requests the Board to require the Railroad Parties to make public the information redacted from its Motion to Dismiss.

The Railroad Parties seek to keep estimated repair costs and revenue generated from VI confidential. There is simply no reasonable basis to find that either an estimated cost of repair or revenue generated by a shipper’s orders is somehow confidential or proprietary. The “confidential” and “highly confidential” designations in the Motion for a Protective Order (“Protective Order”) filed by the Railroad Parties is overly broad because it is protecting information that is typically made public and, in fact, has previously been made public, from disclosure. Furthermore, the Protective Order provides the Railroad Parties blanket protection from disclosing anything they deem to be “confidential data” without requiring them to justify

why the information is indeed confidential or proprietary. The motion accompanying the Protective Order provides no basis at all as to why the redacted information requires the designation of “confidential” or “highly confidential.” FGLK simply states that the “protective order will facilitate the submission to the Board of Confidential and/or Highly Confidential information, which is directly relevant on issues raised in this proceeding.” Motion for Protective Order at 1.

Estimated costs of repair and revenue numbers is the sort of information routinely made public during proceedings in front of the Board, including but not limited to, abandonment and discontinuance proceedings.¹ Designating this information as “highly confidential”, or even “confidential”, could place parties seeking to file an offer of financial assistance to provide continued rail service on the line at a significant disadvantage. In the same vein, it is difficult to ascertain (and the Railroad Parties provide no detail) as to what competitive harm they would face if cost repair and revenue information is disclosed. VI is the only shipper on the line, and if the Railroad Parties move forward with their intent to terminate service,² the Railroad Parties will no longer have a competitive interest in the line.

Additionally, when analyzing whether a rail carrier is liable for damages for failing to provide service upon reasonable request, the Board “conducts a fact-specific balancing test to determine whether the actions of the carrier were reasonable.”³ Two factors are “the cost of repairs necessary to restore service” and “the financial condition of the carrier.”⁴ As evidenced

¹ See 49 C.F.R. § 1152.27(a)(2)-(3) (A party seeking to submit an offer of financial assistance is entitled to be provided information regarding “recent reports on the condition of the involved line” and “[t]raffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line.”).

² *Ontario Central Railroad Corp. -- Operations Between Shortsville and Victor, NY -- Notice of Intent to Partially Terminate (Abandon) Service*, I.C.C. Docket No. FD 29761 (filed Feb. 9, 2023).

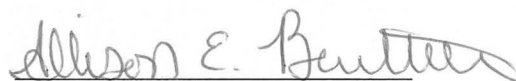
³ See *Groome & Assocs., Inc. & Lee K. Groome v. Greenville Cnty. Econ. Dev. Corp.*, STB Docket No. 42087, slip op. at 12 (served July 27, 2005).

⁴ *Id.*

by Board decisions that the Railroad Parties cite themselves in the Motion to Dismiss, estimated repair costs and a rail carrier's financial condition are generally discussed in detail and not considered confidential at any level.⁵ Moreover, the Railroad Parties provided VI with cost of repair information with no request it be kept confidential (see Verified Statement of Ira Knickerbocker, Attachment A to VI's Reply in Opposition to FGLK and ONCT's Motion to Dismiss). Thus, any confidentiality attached to such information has been waived.

For the foregoing reasons, VI respectfully requests that the Board require the Railroad Parties to make public the information redacted from its Motion to Dismiss by filing an unredacted, public version of the Motion to Dismiss.

Respectfully submitted,



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⁵ See *Groome & Assocs., Inc. & Lee K. Groome v. Greenville Cnty. Econ. Dev. Corp.*, STB Docket No. 42087, slip op. at 3 (served July 27, 2005) (identifying that repair costs were estimated to be \$300,000); *Bolen-Brunson-Bell Lumber Co., Inc. v. CSX Transp., Inc.*, STB Finance Docket No. 34236, slip op. at 5-7 (served May 15, 2003) (including a detailed breakdown of the estimated cost of repairs, totaling approx. \$200,000 and discussing the operating profit of the line).

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March 2023, caused copies of the foregoing Motion to Challenge Designation of Information as Confidential and/or Highly Confidential Pursuant to Protective Order to be served by email as follows:

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