

**Before the
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
March 10, 2023
Part of
Public Record

STB Docket No. NOR 42176

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

**JOINT REPLY TO VICTOR INSULATORS, INC. CHALLENGE TO THE
DESIGNATION OF INFORMATION AS CONFIDENTIAL AND/OR HIGHLY
CONFIDENTIAL PURSUANT TO THE PROTECTIVE ORDER**

Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway
Corp. and Ontario Central Railroad
Corp.*

Dated: March 10, 2023

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. NOR 42176

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

**JOINT REPLY TO VICTOR INSULATORS, INC. CHALLENGE TO THE
DESIGNATION OF INFORMATION AS CONFIDENTIAL AND/OR HIGHLY
CONFIDENTIAL PURSUANT TO THE PROTECTIVE ORDER**

Finger Lakes Railway Corp. (“FGLK”) and Ontario Central Railroad Corp. (“ONCT”) file this joint reply opposing, in part, the March 1, 2023, Victor Insulators, Inc. (“VI”) motion challenging the confidentiality designation¹ of redacted items in the FGLK/ONCT Joint Motion to Dismiss filed February 9 simultaneously with a motion for protective order.²

On December 27, 2022, VI filed a complaint against FGLK alleging a failure to provide transportation service on reasonable request. On February 9, 2023, FGLK/ONCT filed a Joint Motion to Dismiss. In the FGLK/ONCT Joint Motion to Dismiss, ONCT redacted three items as highly confidential: 1) the ONCT estimate to rehabilitate the common carrier portion of the Out-of-Service-Segment; 2) the ONCT estimate to rehabilitate the industrial spur that serves VI’s facility; and 3) ONCT’s revenue division of the transportation charges applicable to the VI traffic.³ In the VI Motion to Re-Designate, VI objects to the highly confidential designation

¹ Referred to herein as the “VI Motion to Re-Designate.”

² The Board granted the motion for protective order on February 16, 2023.

³ Joint Motion to Dismiss of Finger Lakes Railway Corp. and Ontario Central Railroad Corp, at 8-9.

asserted in the FGLK/ONCT Joint Motion to Dismiss and is requesting the Board to require FGLK/ONCT to make public the three items that FGLK/ONCT redacted as highly confidential.

ONCT is willing to re-designate the rehabilitation estimates originally filed as highly confidential, as “public”. ONCT is enclosing, as Exhibit A, errata copies of pages 8 and 9 of the FGLK/ONCT Joint Motion to Dismiss unmasking the ONCT rehabilitation estimates.

However, ONCT is unwilling to re-designate as public the revenues that it receives from another carrier for VI traffic because ONCT is not the originating carrier of carloads transported to VI. ONCT receives a division of the overall transportation rate that is charged for the movement of the cars from origin to VI. This division is negotiated between ONCT and the originating carrier and in ONCT’s view, this information is competitively sensitive and rightfully considered highly confidential.

I. Argument

A. Legal Standard

The Board’s standard for resolving questions over confidentiality is “in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.”⁴ In making a confidentiality determination, the Board applies a balancing test between the “requestor’s purported need for the data against the commercially sensitive nature of the unmasked revenue data.”⁵ The Board is particularly careful to preserve the confidentiality of railroad revenue data. As the Board has stated in waybill proceedings, “[i]t is undeniable that

⁴ *The Central Illinois Railroad Company – Lease and Operation Exemption – Lines of the Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL*. STB Finance Docket No. 33960, slip op. at 1-2 (served Mar. 2, 2001).

⁵ *Request for Waybill Data*, STB Docket No. WB 17-44, slip op. at 8 (served Mar. 23, 2018).

unmasked revenue data is among the most commercially sensitive data railroads possess.”⁶

Protective orders issued by the Board regularly identify “confidential financial and cost data” and compensation between carriers as “Confidential Information.” Further, standard protective orders used by parties before the Board provide that “shipper-specific rate or cost data” and compensation between carriers can also be designated as “Highly Confidential.”

B. Unmasking the ONCT Revenue Data is Unnecessary for VI to Argue its Case

The Board should reject the VI motion to unmask ONCT’s revenue data to the public because VI has provided no argument that the public needs to review the ONCT revenue data for VI to make its case to the Board.

VI does not apply the Board’s balancing test for unmasking the ONCT revenue data. Instead, VI argues that ONCT’s revenue information is “the sort of information routinely made public during proceedings in front of the Board, including but not limited to, abandonment and discontinuance proceedings.”⁷ VI cites the Board’s Offer of Financial Assistance (“OFA”) regulations at 49 C.F.R. § 1152.27(a)(2)-(3). VI states that ONCT’s confidentiality designation “could place parties seeking to file an offer of financial assistance to provide continued rail service on the line at a significant disadvantage.”⁸

VI’s OFA arguments are irrelevant. First, nothing in the OFA regulations prevents parties from seeking a motion for protective order in an OFA proceeding. Second, in OFA proceedings, a railroad provides its information to a single offeror that has been deemed preliminarily financially responsible by the Board – not to the public at large.⁹ Third, even if an

⁶ *Id.*

⁷ VI Motion to Re-Designate at 2.

⁸ *Id.*

⁹ 49 C.F.R. §1152.27(a).

OFA proceeding required a party to provide unmasked revenue data, which it does not, this proceeding is not an OFA proceeding.

VI next argues that it “is the only shipper on the line, and if the Railroad Parties move forward with their intent to terminate service, the Railroad Parties will no longer have a competitive interest in the line.”¹⁰ The segment of line that ONCT intends to terminate service is a 4.4-mile segment of line. While ONCT intends to terminate service on that segment of line, ONCT serves shippers on other active segments of its line. Therefore, the division of revenue ONCT receives for its portion of the VI transportation remains commercially sensitive to ONCT since ONCT’s other customers could potentially view the information VI seeks to unmask.

Finally, VI argues that the financial condition of a rail carrier is relevant to the Board’s balancing test for reasonableness of a cessation of service as a reason to unmask the ONCT revenue information.¹¹ VI’s argument fails to explain why unmasking the ONCT revenue data prevents VI from arguing its position to the Board. VI can still make its argument because its counsel and any expert outside consultants – once the undertaking is executed – will have access to the revenue data.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

¹⁰ *Id.* (Internal citation omitted).

¹¹ *Id.* at 2-3.

II. Conclusion

For the foregoing reasons, ONCT and FGLK respectfully request that the Board reject the VI request to re-designate the ONCT revenue data as public. ONCT's commercial need to designate this revenue data as highly confidential outweighs VI's argument to unmask the information since VI remains capable of arguing its case before the Board even with the revenue data designated as highly confidential.

Respectfully submitted,



Eric M. Hocky
CLARK HILL PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

*Counsel for Finger Lakes Railway Corp.
and Ontario Central Railroad Corp.*

Dated: March 10, 2023

EXHIBIT A

common carrier obligation because there is no common carrier obligation with respect to the movement of an exempt commodity such as clay:

The exemption of a commodity under 49 U.S.C 10502 generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity. This includes the dual requirements that a carrier furnish rates and provide service on reasonable request pursuant to those rates. Thus, even if a carrier's conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force.¹⁶

Since the Complaint's claims only relate to the movement of an exempt commodity, the Complaint should be dismissed.

C. Although ONCT could have embargoed or terminated service over the Out-of-Service Segment, its cessation of service was reasonable under the circumstances.

Application of the Board's balancing test indicates that ONCT's cessation of service was reasonable under the circumstances. If ONCT had embargoed the Out-of-Service Segment, an analysis of the reasonableness of the embargo would also have determined that the embargo would have been reasonable.

1. The cost to restore service cannot be justified considering the amount of traffic on the line.

The VI facility is located on the Out-of-Service Segment which spans 3.37 miles of track and requires substantial rehabilitation. The cost to rehabilitate the common carrier portion of the Out-of-Service Segment is estimated by ONCT to be \$328,500.¹⁷ ONCT estimates that the

¹⁶ *Pejepscot Industrial Park, Inc. d/b/a Grimm Industries-Petition for Declaratory Order*, STB Finance Docket No. 33989 (served May 15, 2003), slip op. at 6 (citing *Consolidated Rail Corp-Declaratory Order-Exemption*, 1 ICC 2d 895 (1986) (Conrail Declaratory Order), aff'd sub nom. *G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3d Cir. 1987))(footnote explaining statutory history omitted).

¹⁷ FGLK and ONCT are simultaneously filing a Motion for a Protective Order, and are filing a separate highly confidential version of this Joint Motion pursuant to the proposed protective order.

industrial spur will cost an additional \$72,000 to rehabilitate. The cost to inspect the Out-of-Service Segment, if it were rehabilitated, is estimated to be \$6,000 per year. In 2022, VI received only 5 rail carloads of rail traffic, all of which were transloaded and delivered to VI's facility at ONCT's expense.¹⁸ ONCT's revenues on each carload is approximately [REDACTED] per car.¹⁹ Thus, the revenues available to ONCT from VI's traffic would not justify almost any rehabilitation cost, even the reduced amounts acknowledged by VI to be necessary to rehabilitate the spur. Complaint, ¶16 (\$20,000 - \$30,000 based on an informal estimate). Considering the relatively few railcars that VI has shipped, this factor does not justify the rehabilitation of the Out-of-Service Segment.

2. *ONCT did not act with an intent to drive shippers off the Out-of-Service Segment when it stopped operating over the segment in November 2021.*

The Board factors a carrier's intent and the length of the cessation when balancing the reasonableness of a cessation of service or an embargo of a line. In retrospect, ONCT perhaps should have either embargoed the Out-of-Service Segment or sooner issued a notice of partial termination (abandonment) under section 1150.24 instead of transloading VI's inbound rail cars at ONCT's cost. In total, ONCT transloaded 7 VI cars between November 15, 2021 to January 16, 2023. ONCT would not have absorbed the transloading and delivery costs if its intention were to drive VI away from rail service. Indeed, one of the reasons that it did not embargo or terminate service over the Out-of-Service Segment was to allow VI to continue to receive product by rail and truck-transfer. Moreover, ONCT has agreed to continue transloading and delivering clay for VI even after its service over the Out-of-Service Segment terminates (if VI

¹⁸ One of the cars was received in 2021 but not transloaded until 2022. A sixth car was received by FGLK in interchange on December 30, 2022, but was rejected because of a broken outlet pipe.

¹⁹ FGLK receives similar revenues for handling the cars over its connecting lines of railroad.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2023, I caused a copy of the foregoing to be served on the persons listed below by email as indicated.

Counsel for Victor Insulators, Inc.

Allison E. Bartlett
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place, Rochester, NY
14604-2711
abartlett@hselaw.com



Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com