

SERVICE DATE – APRIL 13, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36688

GREEN MOUNTAIN RAILROAD CORPORATION—TRackage RIGHTS
EXEMPTION—NEW ENGLAND CENTRAL RAILROAD, INC.

MOTION FOR PROTECTIVE ORDER

Decided: April 11, 2023

On March 28, 2023, Green Mountain Railroad Corporation (GMRC) filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) for acquisition of overhead trackage rights over 61.4 miles of rail line owned by New England Central Railroad, Inc. (NECR). By motion filed on the same day, GMRC seeks a protective order to protect against the public disclosure of highly confidential information in the trackage rights agreement dated March 28, 2023 (the Agreement), between GMRC and NECR, which GMRC submitted under seal. A proposed protective order and undertaking are included with the motion. GMRC submits that a protective order is necessary because public disclosure of the Agreement could cause competitive or other harm to GMRC and NECR.

Good cause exists to grant the motion for protective order and issue the protective order as modified in the Appendix to this decision.¹ Issuance of a protective order will ensure that highly confidential information will be used solely for this proceeding and not for other purposes. Further, the motion conforms to 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, the motion for protective order will be granted and the protective order and undertaking as modified and set forth in the Appendix will be adopted.

It is ordered:

1. The modified protective order and undertaking in the Appendix to this decision are adopted.
2. Materials designated as highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

¹ Among other things, the last clause of GMRC's proposed paragraph 1 and the first clause of paragraph 3 have been omitted.

3. The decision is effective on its service date.

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

APPENDIX
PROTECTIVE
ORDER

1. For the purposes of this Protective Order, “Highly Confidential Information” means the un-redacted version of the Trackage Rights Agreement between New England Central Railroad, Inc. and Green Mountain Railroad Corporation, dated March 28, 2023 (“TRA”), and submitted under seal on March 28, 2023, in STB Docket No. FD 36688.

2. For purposes of this Protective Order, “Proceeding” means the class exemption proceeding pending before the Surface Transportation Board (“Board”) in STB Docket No. FD 36688, any related proceedings before the Board, and any judicial review arising from Docket No. 36688 or any related proceedings before the Board.

3. The TRA, any copies of the TRA, and any documents incorporating information copied or derived from the TRA, shall be designated and stamped as “HIGHLY CONFIDENTIAL,” and shall be handled as provided in this Protective Order.

4. The Highly Confidential Information shall be provided only pursuant to this Protective Order, and only upon execution and delivery to Green Mountain Railroad Corporation (“GMRC”) and New England Central Railroad, Inc. (“NECR”) of the attached Highly Confidential Undertaking. Highly Confidential Information shall be used solely for the purpose of this Proceeding, and not for any other business, commercial, or other competitive purpose.

5. The Highly Confidential Information shall not be disclosed in any way or to any person without the written consent of GMRC and NECR or an order of the Board, and then solely for use in connection with this Proceeding, provided that such person has been given and has read a copy of this Protective Order and agrees to be bound by its terms by executing the attached Highly Confidential Undertaking prior to receiving access to Highly Confidential Information.

6. The Highly Confidential Information shall not be disclosed in any way, directly or indirectly, to an employee of a party to this Proceeding, or to any other person or entity except to outside legal counsel, or retained outside consultant, who, before receiving any access to the Highly Confidential Information, has been given and has read a copy of this Protective Order, and has agreed to be bound by its terms by signing the Highly Confidential Undertaking in the form set forth hereafter.

7. Any copies of or notes or documents incorporating the Highly Confidential Information (other than file copies retained by outside counsel for a party to this Proceeding) must be destroyed, and notice of such destruction must be served on GMRC and NECR, at the earlier occurrence of (a) such time as the party receiving the Highly Confidential Information withdraws from this Proceeding or (b) the completion of this Proceeding.

8. If any party intends to use the Highly Confidential Information at hearings or otherwise in this Proceeding, the party shall submit any filings or documents setting

forth or revealing such Highly Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (a) restrict attendance at any hearing during discussion of such Highly Confidential Information, and (b) restrict access to the portion of the record or briefs reflecting discussion of such Highly Confidential Information in accordance with the Protective Order.

9. No party may include the Highly Confidential Information 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 "Highly Confidential Materials Subject to Protective Order." All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in this Proceeding except by order of the Board.

10. No party may include the Highly Confidential Information in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in this Proceeding unless (a) the pleading or other document is submitted under seal in accordance with this Protective Order, which requires the pleading or other document to be kept confidential by the other forum and not to be placed in the public docket in the Proceeding, or (b) the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Highly Confidential Materials Subject to Protective Order," and accompanied by a motion to the other forum requesting a protective order requiring that the pleading or other document be kept confidential and not to be placed in the public docket in that forum's proceedings, and requesting that if the motion is not granted by that forum, that the pleading or other document be returned to the filing party.

11. No party may present or otherwise use the Highly Confidential Information at a Board hearing in this Proceeding, unless that party has previously submitted, under seal, all proposed materials or exhibits containing or reflecting the Highly Confidential Information to the Board, and has accompanied such submission with a written request that the Board (a) restrict attendance at the hearing during any discussion of the Highly Confidential Information and (b) restrict access to any portion of the record, pleadings, or other briefs reflecting discussion of the Highly Confidential Information in accordance with this Protective Order.

12. No party may present or otherwise use the Highly Confidential Information at any deposition held in connection with this Proceeding without advising counsel for the party producing the Highly Confidential Information, counsel for the deponent, and all other counsel at the deposition. Attendance at any portion of the deposition at which the Highly Confidential Information is used or discussed shall be restricted to persons who may review it under the terms of this Protective Order. All portions of transcripts or exhibits which incorporate, refer to, or otherwise disclose the Highly Confidential Information shall be filed under seal and be otherwise handled as provided in this Protective Order.

13. To the extent that any materials reflecting the Highly Confidential Information

are produced by a party to this Proceeding, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and/or use of the Highly Confidential Information are deemed essential for the disposition of these and any related proceedings, and will not be deemed a violation of 49 U.S.C. § 11904 or any other relevant provision of the Interstate Commerce Commission Termination Act of 1995.

14. Nothing in this Protective Order shall restrict the right of any party to this Proceeding to disclose voluntarily any Highly Confidential Information originated by that party, if such Highly Confidential Information does not incorporate or otherwise reflect any Highly Confidential Information originated by any other party to this Proceeding.

15. If the Board retains the Highly Confidential Information, it shall treat the information in accordance with the procedures set forth at 49 C.F.R. § 1104.14.

16. All parties must file simultaneously a public version of any highly confidential submission filed with the Board. The highly confidential version may be served on other parties in electronic format only.

17. Any party to this Proceeding may challenge the designation by any other party of information or documents 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).

18. All parties must comply with the provisions stated in this Protective Order, unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

HIGHLY CONFIDENTIAL
UNDERTAKING

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this Proceeding. I certify that I have read the Protective Order governing the filing of Highly Confidential Information served on April __, 2023 in STB Docket No. FD 36688, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any information obtained under this Highly Confidential Undertaking, or to use or permit the use of any 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. FD 36688, or any administrative or judicial review proceedings taken or filed in connection therewith.

I further understand and agree not to disclose any information obtained under this Protective Order to any person who is not also bound by the terms of this Protective Order and has executed a Highly Confidential Undertaking in the form hereof. At the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting the Highly Confidential Information, other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I further understand and agree, as a condition precedent to receiving, viewing, or using copies of any information in this Proceeding, that I will take all necessary steps to ensure that the Highly Confidential Information will be kept on a highly confidential basis by any outside counsel or consultants working with me; that under no circumstances will I permit access to the Highly Confidential Information by any employees, my client, or its subsidiaries, affiliates, or owners; and that at the conclusion of this Proceeding (including any administrative or judicial review or remand), I will destroy all documents containing or reflecting the Highly Confidential Information (excluding 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 Highly Confidential Undertaking, and that GMRC and NECR 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 Highly Confidential Undertaking, but shall be in addition to all remedies available at law or equity.

Signature: _____ Outside [Counsel] [Consultant]

Dated: _____