

SERVICE DATE – MAY 15, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 772

OVERSIGHT PERTAINING TO UNION PACIFIC RAILROAD COMPANY'S
EMBARGOES

Digest:¹ The Board directs Union Pacific Railroad Company (UP) to provide additional documents and data and grants UP's motion for a protective order with certain amendments.

Decided: May 15, 2023

Pursuant to an order served on November 22, 2022, Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes (Hearing Order), EP 772 (STB served Nov. 22, 2022), the Board held a public hearing in Washington, D.C., on December 13 and 14, 2022. In order to assist the Board in its efforts to understand UP's substantial increase in its use of embargoes in recent years, the Board directed UP to be ready to discuss the following topics:

- UP's decision-making process in determining to issue an embargo, including underlying causes (e.g., network issues and crew shortages), whether UP's market power plays a role in the decision making, and UP's consideration of alternatives to embargoes;
- How UP measures congestion and total excess cars throughout its system;
- UP's explanations for the dramatic increase in embargoes since 2017, including whether UP has maintained sufficient resources during that time period;
- UP's practices and policies with respect to notification and outreach to shippers;
- UP's consideration of shippers' operational needs, including alternative avenues to meet their shipping requirements;
- UP's implementation and use of the Customer Inventory Management System (CIMS);
- Whether UP has considered the impact of its embargoes on its common carrier and other legal obligations, and if so, the specifics of that consideration; and

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

- UP's plans, if any, to decrease the need for embargoes going forward.

Hearing Order, EP 772, slip op. at 4.

Hearing Order also directed UP to file information and documents “in support of the above topics so that the Board may understand UP’s processes for deciding when and how to use embargoes,” as well as information and documents “so that the Board may understand how UP is using and intends to use the CIMS as a tool to reset inventory levels in the short-term and for continual maintenance in the long term.” Id. UP was directed to file these materials with the Board by December 6, 2022. Id. at 5.

Prior to the hearing, on December 6, 2022, UP filed with the Board one PowerPoint file containing seven slides. The slides addressed some of the topics listed in Hearing Order in general terms, without providing any substantial detail, while other topics listed in the order were not addressed at all. Accordingly, on December 8, 2022, Chairman Martin J. Oberman sent a letter to UP expressing concern that UP’s submission was not fully responsive to the Board’s order and reminding UP of its continuing obligation to respond to the Board’s order.²

During the hearing, UP’s representatives described numerous documents in UP’s possession that were responsive to the Board’s order but had not been submitted. Neither UP’s hearing testimony nor the written materials that UP submitted prior to the hearing contained the necessary level of detail for the Board to achieve the stated goals of the hearing, which included understanding UP’s processes for deciding when and how to use embargoes, understanding how UP is using its CIMS or Private Car Pipeline Management (PCPM) (collectively, the Programs) to manage inventory levels, and understanding the causes and impacts of UP’s embargoes.

Following the hearing, on December 22, 2022, UP filed a motion for a protective order that would protect what UP characterized as “confidential commercial information.” (UP Mot. 1, Dec. 22, 2022.) Concurrent with the filing of the motion, UP submitted additional documents that it claimed were responsive to requests made by Chairman Oberman during the hearing.³ While these documents provide some additional information responsive to the Board’s requests prior to and during the hearing, additional documents and information are required from UP to evaluate the issues raised in Hearing Order and additional concerns raised by the hearing

² On December 9, 2022, UP submitted an additional PowerPoint file as an exhibit to accompany its testimony. Some of the slides were duplicates of those submitted on December 6, 2022. On December 12, 2022, UP filed a letter stating that it believed that the information it had provided to the Board was responsive to its requests in Hearing Order.

³ The letter UP filed with these documents stated that they were being filed “subject to approval of the Motion for Protective Order filed on December 22, 2022.” As explained below, the Board denied that motion. Accordingly, these documents are not currently part of the record in this proceeding. In order for these documents to be accepted into the record, UP must refile them according to the requirements of the protective order approved in this decision.

testimony and to decide whether further action is necessary.⁴ Accordingly, UP is directed to provide the Board with the additional documents and information described in Appendix 1 of this decision.

UP's December 22, 2022 motion for a protective order requested that the Board issue an order (i) allowing UP to designate information submitted in this proceeding as "confidential commercial information" by indicating on documents it produces to the Board that they contain "Confidential Commercial Information, Subject to Exemption 4 of [the Freedom of Information Act (FOIA)]" and (ii) providing that the Board will treat any information so designated as nonpublic, confidential commercial information and treat UP as the submitter of the information subject to all the protections provided in 49 C.F.R. § 1001.4. (UP Mot. 2, Dec. 22, 2022.) By order issued on January 20, 2023, UP's motion was denied. The order stated that UP may not use a blanket "confidential commercial information" designation for all information submitted and that for each document UP submits containing "confidential commercial information," it must submit a public version that redacts only that information properly designated as "confidential commercial information." Oversight Pertaining to Union Pac. R.R. Embargoes, EP 772, slip op. at 2 (STB served Jan. 20, 2023). The order directed UP to submit a draft protective order consistent with the decision. Id.

On January 27, 2023, UP submitted a new motion for a protective order accompanied by a draft protective order (the Draft Order). The Draft Order contemplates three categories of confidential information. As with many protective orders previously approved by the Board, the Draft Order designates a category of "confidential" information and a category of "highly confidential" information.⁵ (UP Mot., App. A at 1-2, Jan. 27, 2023). The Draft Order also designates a category of "confidential commercial information, subject to Exemption 4 of FOIA" (Category 3).⁶ (Id., App. A at 2.) The Draft Order states that a party may designate information

⁴ UP has taken steps to address some of the concerns raised by the Board and by shippers at the hearing. On December 16, 2022, UP filed a letter with the Board stating that it had paused any additional embargoes under the PCPM program. On April 27, 2023, UP filed a status update informing the Board that it had ceased its PCPM program and made enhancements to its inventory management system. According to UP, implementation of these enhancements has reduced customer embargoes by 65% when comparing January through April year-over-year data from 2022 and 2023.

⁵ The Draft Order treats confidential information and highly confidential information in the same manner as protective orders typically approved by the Board. Specifically, it allows disclosure of confidential information only to employees, counsel, or agents of a party of record who have a need to know, handle, or review the material for purposes of the proceeding and any resulting judicial review, and only where such persons have read and agreed to be bound by the terms of the protective order. The Draft Order contains the same disclosure limitations for highly confidential material except that it further limits disclosure to outside counsel or consultants of a party of record who have a need to know, handle, or review the materials for purposes of the proceeding at issue.

⁶ As directed by the January 20, 2023 decision, the Draft Order requires the submission of public versions. (See UP Mot., App. A at 3, Jan. 27, 2023.)

as belonging to Category 3 “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 competitive harm.” (*Id.*) It goes on to state that “[m]aterial that is so designated will be treated by the Board as nonpublic, confidential commercial information.” (*Id.*) Thus, under the Draft Order, for the purposes of this proceeding, information designated under Category 3 could not be disclosed to anyone, including outside counsel or consultants of a party of record.

The Board will approve the Draft Order with certain amendments (the Amended Order). The Amended Order, attached as Appendix 2 to this decision, adds a requirement that for each redaction of information⁷ belonging to Category 3, the highly confidential, confidential, and public versions provide a brief description of the type of information redacted (e.g., “internal discussion of pricing strategy”). This will allow other parties to understand the nature of the information designated under Category 3 so that they can better determine whether to challenge those designations. In addition, the Amended Order eliminates language inconsistent with Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019). In Argus Leader, the Supreme Court held that “substantial competitive harm” is not required for information to be protected by Exemption 4 of FOIA (Exemption 4). *Id.* at 2364-66. Accordingly, the Amended Order removes language suggesting that Exemption 4 applies only to information that could cause “substantial competitive harm” if disclosed.⁸ The Amended Order also removes references to the Board’s FOIA regulations at 49 C.F.R. § 1001.4, which are based on the “substantial competitive harm” standard.⁹ Finally, the Amended Order adds language to clarify that

⁷ Where there are multiple redactions on the same page or spreadsheet that involve the same type of information, the descriptions of the redacted information may be grouped together. For example, if there are multiple redactions of Category 3 information about customer-specific shipping volumes on the same page, the description could say: “The redacted information in paragraphs X and Y of page Z consists of customer-specific shipping volumes.” Similarly, if there is a column on a spreadsheet that lists customer-specific shipping volumes designated as Category 3 information, the description could say: “The redacted information in column X consists of customer-specific shipping volumes.”

⁸ UP states that Category 3 is intended to protect only the most sensitive information. (UP Mot. 2, Jan. 27, 2023.) The Board agrees that Category 3 should be applied very narrowly. Accordingly, despite the fact that Exemption 4 is no longer interpreted to require a showing of “substantial competitive harm,” the Amended Order retains UP’s proposed limitation on the use of Category 3 to information that could reasonably be expected to cause UP substantial competitive harm if disclosed, to ensure that it is only applied to the most sensitive information. If the Board were to receive a FOIA request for any information submitted by UP in this docket, it would analyze that request according to the standard delineated in Argus Leader.

⁹ The Board’s regulations at 49 C.F.R. § 1001.4 provide for certain procedures before the disclosure of records that “arguably contain material exempt from release under Exemption 4 of [FOIA] because disclosure could reasonably be expected to cause substantial competitive harm.” As a result of Argus Leader, there is no longer a requirement to establish substantial competitive

information designated by UP under Category 3 will not be available to other parties to the proceeding or their outside counsel or consultants.

The Board emphasizes that this type of protective order is not appropriate for all proceedings. This is not an adversarial proceeding where other parties require access to such information to present their case. Rather, this is an oversight proceeding where the Board is requesting information from UP to try to understand why and how UP substantially increased its use of embargoes in recent years. While the Board also sought input from other interested parties so that it could better understand the cause and impact of UP's embargoes, the interests of those other parties—shippers, shipper trade associations, unions, and other railroads—in being able to provide outside counsel or consultants with a subset of UP's sensitive commercial information for use in this proceeding¹⁰ is outweighed by UP's interest in protecting its most sensitive commercial information.¹¹ However, the Board notes that it will review UP's designations to ensure that the Category 3 designation is used only where appropriate.

Technical questions regarding compliance with this order may be directed to the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238.

It is ordered:

1. UP shall submit the documents and information described in Appendix 1 of this decision by June 14, 2023.
2. UP's motion for a protective order is granted, and the modified protective order and undertakings in Appendix 2 of this decision are adopted.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

harm to invoke Exemption 4. However, because the intent of 49 C.F.R. § 1001.4 is to provide for certain procedures before disclosure of records arguably protected under Exemption 4, the Board will apply the same type of procedures as provided for in 49 C.F.R. § 1001.4 for all information submitted by UP that is arguably exempt from disclosure under Exemption 4 of FOIA based on the standard set forth in Argus Leader.

¹⁰ As noted above, typical protective orders approved by the Board allow disclosure of "highly confidential" information 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 the proceeding at issue.

¹¹ The Board recognizes that the general public has an interest in Board proceedings being as open and transparent as possible. However, the public likely would not have access to UP's sensitive commercial information under the type of protective order normally approved by the Board in any event, given that UP would presumably designate such information as "Confidential" or "Highly Confidential."

APPENDIX 1

Pursuant to 49 U.S.C. §§ 1321(b) and 11145(a), UP is hereby directed to provide to the Board the following documents¹² and information,¹³ to the extent not privileged:¹⁴

1. All manuals, policies, procedures, and/or guidance regarding CIMS and PCPM in effect at any time from January 1, 2017, to present.
2. All three-year hiring plans referred to in the December 13, 2022 hearing, from January 1, 2015, to present. Provide each plan as it existed when originally produced (i.e., before any monthly adjustments).
3. In a computer-readable format, on a monthly basis from January 2015 to present, for each category of employees covered in the Monthly Report of Number of Railroad Employees (Form C) submitted to the Board's Office of Economics under 49 C.F.R. § 1246.1:

¹² Document pages should be numbered and an index should be provided that includes a description/title of each document. Documents should be provided in native format (e.g., Microsoft Word, Microsoft PowerPoint, Microsoft Excel, etc.) to the maximum extent practicable. In the alternative, documents may be provided in a searchable format with optical character recognition applied to all Portable Document Format ("PDF") files.

¹³ Where these requests seek data in a computer-readable format, please provide the information as follows. For each computer file supplied, provide: the name and description of the source database or other file from which the records in the computer file were selected; a description of how the records in the file produced were selected; the character encoding (e.g. UTF-8, ASCII, ANSI, etc.), the delimiter character used to separate fields, the escape character, and the character used for line endings; and each computer program (in native software and text file) and intermediate files used in deriving the files produced. For each field in each computer database file provide: the name of the field; the starting and ending positions of the field; a detailed definition of the field; a detailed description of the data in the field, including an explanation of what they are used for; the type of data in the field, i.e., whether numeric, character, alphanumeric, number of digits, number of significant digits, whether signed or unsigned (i.e., negatives allowed); if the values in a field are terms or abbreviations, a list of all terms or abbreviations used with detailed definitions of each; an indication of whether the data in the field are packed or compressed; and if the data in the field are packed or compressed, the type of packing or compression (along with detailed instructions for unpacking).

¹⁴ If any responsive documents are withheld under a claim of attorney-client privilege, work product privilege, or other applicable privilege, UP shall submit a log of such documents which shall, for each document, describe the nature of the document not produced in a manner that will allow the Board to assess the claim, provide a brief description or summary of the contents of the document (see Sulaymu-Bey v. City of New York, 372 F. Supp. 3d 90, 93 (E.D.N.Y. 2019)), and identify the attorney involved, the date of the document, the person(s) shown on the document to have prepared and/or sent the document, and the person(s) shown on the document to have received copies of the document.

(i) total employee count, (ii) how many employees were added, (iii) how many employees were separated (with a breakout of those employees who separated by voluntary resignation), (iv) how many employees were furloughed but were potentially available for recall, (v) the number of “extra-board employees,”¹⁵ (vi) how many trainees entered training, (vii) how many trainees dropped out of training, (viii) how many trainees completed training, and (ix) how many trainees were in training. UP shall report the data for each operating division to the maximum extent practicable in addition to reporting on a system-wide basis.

4. In a computer-readable format to the extent available, a monthly count of train, engine, and yard (TE&Y) employees in active service allocated to local industrial switching jobs broken out by operating division from January 1, 2017, to present.
5. Communications to or from UP executives,¹⁶ from January 1, 2017, to present, that discuss any relationship between labor levels and the use of embargoes.
6. In a computer-readable format, a list of facilities subject to “congestion” embargoes¹⁷ from January 1, 2017, to present. This list should include the embargo number, request date, effective date, expiration date, and station name and associated State/Province.
7. All documents created between January 1, 2017, to present regarding how “congestion” embargoes, the threat of such embargoes, or the Programs relate to UP’s common carrier obligation, other statutory or regulatory obligations, or potential action by the Board. See supra note 14.
8. UP is directed to provide a detailed description of the root cause(s) for the increased use of embargoes from 2018 through 2021. UP is directed to provide documentation and/or data on which its description is based.
9. Describe what steps (if any) UP took, starting January 1, 2018, to:
 - a. reduce the accelerating use of congestion embargoes over the last five years (e.g., by increasing crew or locomotives or changing CIMS-related methodologies); and

¹⁵ Extra-board employees are workers who are available to cover for regular employees.

¹⁶ “Executive” means any person listed in Union Pacific Corporation’s 10-K as “Senior Management.”

¹⁷ The Association of American Railroads (“AAR”) Circular TD-1 explains that “[a]n embargo is a method of controlling Traffic movements when, in the judgment of the serving railroad, an actual or threatened Physical or Operational Impairment, of a temporary nature, warrants restrictions against such movements.” AAR Circular TD-1 at 1, effective January 1, 2021. Nothing in this order or proceeding should be construed to suggest that the Board is endorsing or legitimizing the use of embargoes by any railroad to manage congestion on its network.

- b. for customers over their “Maximum Inventory Threshold” (MIT),¹⁸ including by more than five cars, reduce or eliminate the probability of a “congestion” embargo when the serving area as a whole is not showing to be congested by the overall inventory for all customer locations in that serving area.

UP is directed to provide documentation and/or data on which its description is based.

¹⁸ According to UP, “[i]n CIMS, each customer facility has a maximum inventory threshold known as MIT, which is the number of cars that can be held in its serving yard prior to receiving a warning or exception.” (Hr’g Tr. 203:2-6, Dec. 13, 2022.) UP states that if the “maximum inventory threshold is exceeded in the serving yard or projected to exceed MIT over the next four days, based on the in or out cars, CIMS triggers an alert.” (Id. at 203:11-14.) UP further states that “MIT is based on the customer’s release rate and [its] service frequency,” (id. at 203:6-7), and that UP “review[s] [its] customers’ release rates on a quarterly basis to update the [MIT] and ensure [its] system is taking into account any changes in demand,” (id. at 203:8-11.)

APPENDIX 2

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” where disclosure of such material could reasonably be expected to cause substantial competitive harm. 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 will not be disclosed to other parties to the proceeding, or their outside counsel or consultants, pursuant to this protective order.
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” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” or “CONFIDENTIAL COMMERCIAL INFORMATION,” 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” 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,” 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” 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” 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” 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 inhouse 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” 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” material of the submitting party. For each redaction of “CONFIDENTIAL COMMERCIAL INFORMATION,” the submitting party shall provide a brief description of the information redacted. 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” material should simultaneously submit (i) a “HIGHLY CONFIDENTIAL” version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION” material, (ii) a

“CONFIDENTIAL” version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION” and “HIGHLY CONFIDENTIAL” material, and (iii) a public version of such submission that redacts any “CONFIDENTIAL COMMERCIAL INFORMATION” and “HIGHLY CONFIDENTIAL” and “CONFIDENTIAL” material. In any “HIGHLY CONFIDENTIAL,” “CONFIDENTIAL,” or public version that redacts “CONFIDENTIAL COMMERCIAL INFORMATION,” the submitting party shall provide for each redaction a brief description of the information redacted.

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: _____