

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 711 (Sub-No. 2)

Reciprocal Switching for Inadequate Service

MOTION FOR PROTECTIVE ORDER

 GRANTED Office of Proceedings ☐	DECISION ID NO.: <u>51995</u>
	DECIDED DATE: <u>12/21/2023</u>
	SERVED DATE: <u>12/21/2023</u>
	APPROVED: <u><i>meacham</i></u> Director

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December 19, 2023

Counsel for the Association of American Railroads

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Pursuant to 49 C.F.R. § 1104.14(b), the Association of American Railroads (“AAR”) respectfully requests that the Surface Transportation Board enter a protective order in the above-captioned proceeding in the form set forth in the Appendix to this motion. The text of that proposed order substantially follows the form of protective orders that the Board has approved in other rulemaking proceedings.* The order is required to permit AAR to submit to the Board the workpapers supporting the Reply Verified Statement of Michael R. Baranowski and Nathaniel S. Zebrowski of FTI Consulting, which AAR intends to submit with its reply comments in this proceeding.

The Baranowski and Zebrowski Reply Verified Statement contains data analyses responsive to the issues raised in the Board’s Notice of Proposed Rulemaking in this proceeding. The supporting workpapers contain highly confidential, competitively sensitive and proprietary information. Specifically, the workpapers contain proprietary trip data processed and maintained by Railinc comprising individual traffic movement data for all rail freight movements over the

* See, e.g., Protective Order, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use By Railroads*, EP 768 (STB served June 13, 2022); Protective Order, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, EP 766 (STB served Feb. 4, 2021); Protective Order, *Policy Statement on Demurrage and Accessorial Rules and Charges*, EP 757 (STB served December 11, 2019); Order, EP 704 (Sub-No. 1) (STB served July 29, 2016); Protective Order, *Petition Regarding Methodology for Determining Railroad Revenue Adequacy*, EP 679 (STB served May 23, 2008).

North American freight rail system. These data include both shipper and receiver information as well as carrier information for individual traffic movements where available. This full set of data is not available to the general public or to individual carriers or shippers. A protective order is required to enable AAR to provide this information to the Board and simultaneously appropriately limit the dissemination and use of this type of data.

Accordingly, AAR respectfully requests that the Board enter the attached protective order.

Dated: December 19, 2023

Respectfully Submitted,

/s/ Benjamin J. Horwich

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APPENDIX 1

PROTECTIVE ORDER

1. Any party submitting or producing 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 or producing material in this proceeding may in good faith designate particular material, such as material containing shipper-specific and/or railroad-specific 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 requesting such materials 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. In the event that a party submits, produces, or serves material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," 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.
4. In the event that a party inadvertently submits, produces, 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.
5. If any party intends to use "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" 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" and/or "HIGHLY CONFIDENTIAL" 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" and/or "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
6. If any party intends to use "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as such 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” and/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 the “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” 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” 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. 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” material. It shall not be necessary to prepare a “CONFIDENTIAL” or a public version of “HIGHLY CONFIDENTIAL” exhibits that are filed in and are primarily useful in their native electronic format, such as Microsoft Excel spreadsheets used to perform calculations, nor shall it be necessary to prepare “CONFIDENTIAL” or public versions of materials submitted solely as workpapers.
11. 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. It shall not be necessary to prepare a public version of “CONFIDENTIAL” exhibits that are filed in and are primarily useful in their native electronic format, such as Microsoft Excel spreadsheets used to perform calculations, nor shall it be necessary to prepare public versions of materials submitted solely as workpapers.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on _____, governing the submission of confidential documents in STB Docket No. EP 711 (Sub-No. 2), 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 711 (Sub-No. 2) 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 and outside consultants 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 submitting 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.

Signed: _____

Employer: _____

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 submission of confidential documents in STB Docket No. EP 711 (Sub-No. 2), 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 submitting 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]

Printed Name: _____

Employer: _____

Dated: _____