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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 334 (Sub-No. 8A)

Joint Petition for Exemption of Arbitration Rule
from Application of 49 U.S.C. § 10706 and Motion to Dismiss

Motion for Protective Order
by the Railway Supply Institute

ENTERED
Office of Proceedings
March 25, 2024
Part of
Public Record

 GRANTED Office of Proceedings	DECISION ID NO.: 52120
	DECIDED DATE: 4/23/2024
	SERVED DATE: 4-23-2024
	APPROVED:  Director
	Not ruling here on the issue ☒ highlighted below.

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Counsel for the Railway Supply Institute

Date: March 25, 2024

Pursuant to 49 C.F.R. § 1104.14(b), the Railway Supply Institute (RSI) respectfully requests that the Surface Transportation Board issue for the above-captioned proceeding the proposed protective order attached as Appendix 1. The conditions of the proposed protective order are consistent with those that the Board has recently issued in other proceedings.¹

RSI seeks a protective order to preserve the confidentiality of certain data and workpapers that it is submitting to the Board in connection with a simultaneously filed petition in this proceeding (the Petition). The Petition, supporting Verified Statement of Dr. Nicholas E. Powers of The Brattle Group, and several workpapers underlying the Verified Statement contain data and analyses that are highly confidential, competitively sensitive, and proprietary to certain RSI members. For example, they identify car-hire rates and payments between certain parties and the identities of those parties, provide railcar build information that is confidential to car owners, and provide railcar pricing information. This data is either not publicly available or, to the extent it is publicly available, is not available with the additional data in the workpapers that would allow attribution of the data to specific railcar owners and users. RSI also anticipates that other parties may desire to submit similar data in this proceeding.

RSI also seeks the protective order in connection with its request in the Petition that the Board require the Association of American Railroads, Railinc, and TTX to make certain information available to interested parties to facilitate meaningful participation in this proceeding. This information may include highly confidential car-hire rate and payment data, railcar build information, TTX payment data, and car-hire arbitration data. This information is not publicly available.

¹ See, e.g., *Canadian Nat'l Ry.—Control—Iowa N. Ry.*, FD 36744 (STB served Feb. 8, 2024); *GMexico Transportes, S.A.B. de C.V.—Acquisition of Control Exemption—CG Ry.*, FD 36701 (STB served Jan. 5, 2024).

For these reasons, RSI respectfully requests that the Board issue the attached protective order.

Respectfully submitted,

/s/ Jason D. Tutrone

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Dated: March 25, 2024

APPENDIX 1

Protective Order

1. For purposes of this Protective Order:
 - (a) “Confidential Material” means information, data, documents, or other material (collectively, “Material”) that are subject to a confidentiality agreement or contain proprietary or confidential information.
 - (b) “Designated Material” means Material designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” under paragraphs 2 or 3 of this Protective Order and any Confidential Material in or derived from such Materials.
 - (c) “Proceeding” means the proceeding before the Surface Transportation Board (“Board”) under STB Docket No. EP 334 (Sub-No. 8A).
2. If a party determines in good faith that Material it submits or produces in filings or otherwise in this Proceeding is Confidential Material, it may designate and stamp such Material as “CONFIDENTIAL.”
3. If a party determines in good faith that Material it submits or produces in filings or otherwise in this Proceeding is Confidential Material that contains competitively sensitive information, is subject to or contains content that is subject to a confidentiality agreement prohibiting disclosure to any person other than outside counsel or consultants that have a need to access the material, contains data specific to a shipper, railcar owner or lessee, or railroad, or is otherwise highly confidential, the party may designate and stamp such Confidential Material as “HIGHLY CONFIDENTIAL.”
4. A person or entity that receives Material designated or stamped as “CONFIDENTIAL” shall not disclose the Material in any way, directly or indirectly, to any person or entity except an employee, counsel, or agent of a party to this Proceeding, or an employee of such counsel, consultant, or agent, who has a need to know, handle, or review the Material for purposes of this Proceeding or any judicial review proceeding arising from it and, before receiving access to the Material, has been given and has read a copy of this Protective Order, has agreed to be bound by its provisions by signing the confidentiality undertaking set forth at Exhibit A to this Protective Order, and has provided a copy of the signed undertaking to the party that originally designated the Material as “CONFIDENTIAL.”
5. A person or entity that receives Material designated or stamped as “HIGHLY CONFIDENTIAL” shall not disclose the Material in any way, directly or indirectly, to any employee of a party to this Proceeding, or to any other person or entity except an outside counsel or outside consultant of a party to this Proceeding, or to an employee of such outside counsel or outside consultant, who has a need to know, handle, or review the Material for purposes of this Proceeding and, before receiving access to the Material, has been given and has read a copy of this Protective Order, has agreed to be bound by its provisions by signing the confidentiality undertaking set forth at Exhibit B to this Protective Order, and has provided a

copy of the signed undertaking to the party that originally designated the Material as “HIGHLY CONFIDENTIAL.”

6. Any party to these Proceedings may challenge the designation by any other party of Material as “CONFIDENTIAL” or 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 challenges.

7. No person or entity receiving Designated Material may use it for any purpose, including any business, commercial, or competitive purpose, other than this Proceeding or judicial review proceedings arising from it.

8. Any party who receives Designated Material, and its employees, counsel, and agents, shall destroy such Designated Material and any notes or documents reflecting it at the earlier of: (1) such time as the party receiving the Designated Material withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands. However, counsel and consultants for a party are permitted to retain file copies of all pleadings that they were authorized to review under this Protective Order.

9. No party may include Designated Material in any document physically submitted to the Board, unless the document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” *See* 49 C.F.R. § 1104.14. No party may include Designated Material in any document filed electronically with the Board unless identified as “Confidential” on the Board’s electronic submission form. All documents submitted in accordance with this paragraph 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 or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” (or submitted electronically in an equivalent manner) and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in this proceeding, or any judicial review proceeding arising from it, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b)

restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled pursuant to their designation as provided in this Protective Order.

13. To the extent that Materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. Any party that files with the Board a document containing Confidential Material must simultaneously file with the Board a public version of that document that redacts the any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material. But it shall not be necessary to prepare a “CONFIDENTIAL” or a public version of “HIGHLY CONFIDENTIAL” or “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.

15. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

16. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Material originated by that party, if such Confidential Material does not contain or reflect any Confidential Material originated by any other party.

EXHIBIT A

Undertaking—Confidential Material

I, _____, have read the Protective Order served on _____, 2024, governing the production and use of Confidential Material in STB Docket No. EP 334 (Sub-No. 8A) (the Proceeding), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Material obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data, documents, or information, for any purpose other than the preparation and presentation of evidence and argument in the Proceeding and/or any judicial review proceedings in connection with the Proceeding. I further agree not to disclose any Confidential Material, documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of the Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by counsel and outside consultants, of pleadings and other documents that 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 Material shall be entitled to specific performance and injunctive and/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: _____

Name: _____

Employer: _____

Dated: _____

EXHIBIT B
Undertaking—Highly Confidential Material

I, _____ am outside [counsel][consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____, 2024, governing the production and use of Highly Confidential Material in STB Docket No. EP 334 (Sub-No. 8A) (the Proceeding), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Highly Confidential Material obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such documents, data, or information, for any purpose other than the preparation and presentation of evidence and argument in the Proceeding or any judicial review proceedings in connection with the Proceeding. I further agree not to disclose any Highly Confidential Material, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to ensure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners; and that at the conclusion of the Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel and consultants, of pleadings and other documents that 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 Highly Confidential Material shall be entitled to specific performance and injunctive and/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: _____

OUTSIDE [COUNSEL] [CONSULTANT]

Name: _____

Employer: _____

Dated: _____