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SERVICE DATE - JUNE 17, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36137

CITY OF FISHERS, CITY OF NOBLESVILLE, & HAMILTON COUNTY, IND.—PETITION
FOR PARTIAL REVOCATION OF EXEMPTION

Docket No AB 290 (Sub-No. 117X)¹

NORFOLK & WESTERN RAILWAY—ABANDONMENT EXEMPTION—BETWEEN
INDIANAPOLIS & TIPTON IN MARION, HAMILTON, & TIPTON COUNTIES, IND.

MOTION FOR PROTECTIVE ORDER

Decided: June 14, 2019

On August 1, 2017, the cities of Fishers, Ind. (Fishers), and Noblesville, Ind. (Noblesville), and Hamilton County, Ind. (collectively, the Owners), jointly filed a petition in Docket No. FD 36137 to partially revoke their exempt status on 37.56 miles of rail line between milepost I-2.13 at Indianapolis, Ind., and milepost I-39.69 at Tipton, Ind. (the Line), in order to pursue interim trail use for the Line. On May 31, 2018, the Board issued a decision finding that the Owners could pursue railbanking of the Line without revocation of their exemption authority. City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137 (STB served May 31, 2018). Thereafter, the Board received requests for issuance of notices of interim trail use or abandonment (NITUs) for portions of the Line, one each from Fishers, Noblesville, and the City of Indianapolis, Ind. (Indianapolis), in Docket No. AB 290 (Sub-No. 117X). In a decision served December 21, 2018, the Board, among other things, issued the three requested NITUs. City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137 et al. (STB served Dec. 21, 2018).

On March 29, 2019, US Rail Holdings, LLC (US Rail), filed a motion to vacate the NITUs and to reactivate rail service and a motion for a preliminary injunction under 49 U.S.C. § 1321(b)(4), to which the Owners replied. On May 10, 2019, US Rail filed a motion for leave to file a rebuttal, and, as relevant here, a motion for a protective order as well as public and redacted versions of its rebuttal. On May 17, 2019, the Owners filed a motion to reject and to

¹ These proceedings have not been consolidated but are being addressed in the same decision for administrative convenience.

strike, urging the Board to deny the motions and strike the rebuttal from the record.² US Rail replied to the Owners' motion on May 22, 2019.

This decision addresses only the motion for a protective order. US Rail's motion for leave to file a rebuttal will be addressed in a later decision.

US Rail states that the redacted information in its rebuttal is "highly confidential and commercially sensitive, relating to [US Rail's] financing." (US Rail Mot. for Protective Order 1.) US Rail further states that a protective order is "necessary to protect this highly confidential information from public disclosure." (*Id.*) The Owners argue that the Board should deny the motion for protective order "to avoid tacitly approving the introduction of [US Rail's]" rebuttal information, and "to avoid burdening the Owners with the task of formulating a substantive response to an unsanctioned Rebuttal." (Owners Motion to Reject & to Strike 3, May 17, 2019.)

The motion conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board, and the Owners do not dispute US Rail's contention that the information submitted is highly confidential and commercially sensitive. Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes. Accordingly, the motion for a protective order will be granted and the documents will be made subject to the Protective Order and the Undertakings, as modified in the Appendix to this decision.

It is ordered:

1. The motion for a protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
2. The unredacted documents submitted in Docket Nos. FD 36137 and AB 290 (Sub-No. 117X) 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.

² In their April 22, 2019 reply, the Owners object to US Rail's filing of the motion to vacate the NITUs in Docket No. FD 36137, arguing that it should be filed only in Docket No. AB 290 (Sub-No. 117X). This issue will be addressed by the Board in a later decision. Issuance of this decision in both dockets does not indicate the Board's position on that argument, but as confidential information has been submitted in both dockets, it is necessary to issue the protective order in both dockets to secure that information.

3. This decision is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For the purposes of this Protective Order:
 - a. “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
 - b. “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other databases, and cost work papers); the identification of shippers and receivers, in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers or carriers; confidential financial and cost data; and other confidential or proprietary business or personal information.
 - c. “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with Paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
 - d. “Proceedings” means those before the Surface Transportation Board (“Board”) concerning FD 36137, AB 290 (Sub-No. 117X), and any related proceedings before the Board, and any judicial review proceedings arising from FD 36137, AB 290 (Sub-No. 117X), and any related proceedings before the Board.
2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.
3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains specific financing information or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.
5. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.
6. Any party to these Proceedings may challenge the designation by any other party of information or documents 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. Designated Material may not be used for any purposes, including (without limitation) any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in FD 36137, AB 290 (Sub-No. 117X), and/or in any related proceedings.
8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.
9. No party may include Designated Material 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 “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings 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 this 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,” 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 these Proceedings, 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 are authorized to review that material by 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 as provided in Paragraph 9 of this Protective Order.
13. To the extent that materials reflecting Confidential Information are produced by a party to these Proceedings, and are held and/or used by the receiving person in compliance with Paragraphs 1, 2 and 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain 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 of any other relevant provision of the ICC Termination Act of 1995.
14. Any party that files with the Board a document containing Confidential Information must simultaneously file with the Board a public version of that document.

15. All parties must comply with all of the provisions of this Protective Order unless the Board, 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 Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

EXHIBIT A

UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the production and use of Confidential Information and Confidential Documents in FD 36137 and AB 290 (Sub-No. 117X), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents 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 or information, for any purpose other than the preparation and presentation of evidence and argument in FD 36137, AB 290 (Sub-No. 117X), and/or in any related proceedings. I further agree not to disclose any Confidential Information, Confidential 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 these proceedings (including any proceeding or 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 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 Undertaking and that parties producing confidential information or confidential documents 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.

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 governing the production and use of Confidential Information and Confidential Documents in FD 36137 and AB 290 (Sub-No. 117X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents 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 or information, for any purpose other than the preparation and presentation of evidence and argument in FD 36137, AB 290 (Sub-No. 117X), and any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with FD 36137, AB 290 (Sub-No. 117X), and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential 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.

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 assure 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 this 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, 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 undertaking and that parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for 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: