

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35157

THE CITY OF ALEXANDRIA, VIRGINIA—PETITION FOR DECLARATORY ORDER

MOTION FOR PROTECTIVE ORDER

Decided: December 29, 2008

By motion filed on December 8, 2008, the City of Alexandria, VA (Alexandria or the City), seeks a protective order under 49 CFR 1104.14(b) in connection with its concurrently filed reply to the Board decision served on November 6, 2008 (November Decision).¹ The November Decision directed Norfolk Southern Railway Company (NS) to file specific supplemental information to complete the record in this proceeding. The November Decision allowed the City to reply to the new information provided by NS. Alexandria seeks the protective order because its reply contains excerpts of deposition testimony and documents obtained by the City in discovery in ongoing litigation before the United States District Court for the Eastern District of Virginia with NS and RSI Leasing, Inc. (RSI). Alexandria states that some of the deposition testimony contains confidential proprietary information relating to the commercial terms of NS's relationship with RSI and details regarding the ethanol transloading business at NS's Van Dorn Yard. Alexandria argues that, if made public, such information could be competitively damaging to NS. Alexandria states that the parties have agreed to the provisions related to disclosure and access to information and documents.

Good cause exists to grant the motion for protective order. Issuance of the protective order ensures that the parties' confidential information will be used solely for this proceeding and not for other purposes.

The motion conforms with the Board's rules at 49 CFR 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 properly designated filings in this proceeding shall be subject to the Protective Order and Undertakings as modified in the Appendix to this decision.²

¹ The City of Alexandria, VA—Petition for Declaratory Order, STB Finance Docket No. 35157 (STB served Nov. 6, 2008).

² A proposed protective order and undertakings were included with the motion.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for a protective order is granted, and the Protective Order and Undertakings in the Appendix to this decision are adopted.
2. All properly designated filings submitted in STB Finance Docket No. 35157 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the appropriate attached Undertaking is executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.
3. This decision is effective on its service date.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary

APPENDIX A

PROTECTIVE ORDER

1. For 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 data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, 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 (“the Board”) concerning any directly related proceedings covered by STB Finance Docket No. 35157, and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

(e) “STB” means the U.S. Surface Transportation 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 so 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 shipper-specific rate or cost data, trackage rights compensation levels, 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 as “HIGHLY CONFIDENTIAL” 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, 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 outside counsel, the City Attorney, the Assistant City Attorney, Rich Baier, Tom Culpepper, Joan Wagner and/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. In the event that a party determines that additional individuals need access to “Highly Confidential” documents, the party must notify the opposing party: (1) identifying the individual or individuals to whom the party would like to disclose “Highly Confidential” documents, and (2) identifying the “Highly Confidential” documents to be disclosed, after which the opposing party has 24 hours either to consent or to object to the additional disclosure. If the opposing party objects to the additional disclosure, the “Highly Confidential” documents will not be disclosed until the objection is resolved either by agreement of the parties or by the STB.

7. 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 STB to adjudicate such challenges.

8. Designated Material must be kept either in the office of outside counsel or in the office of the City Attorney, may not be copied, and 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 the Proceedings, any related proceedings before the District Court, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.

9. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB 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.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.

11. No party may present or otherwise use any Designated Material at a 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 STB to whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB: (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 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 paragraphs 1, 2, or 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 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. All parties must comply with all of the provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.

15. 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.

16. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in these Proceedings shall simultaneously file a public version of the pleading.

EXHIBIT A**UNDERTAKING****CONFIDENTIAL INFORMATION**

I, _____, have read the Protective Order served on December 29, 2008, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 35157, 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 STB Finance Docket No. 35157, before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Finance Docket No. 35157. 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 this 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 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 a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. 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: _____

Position: _____

Affiliation: _____

Date: _____

EXHIBIT B**UNDERTAKING****HIGHLY CONFIDENTIAL MATERIAL**

I, _____, am outside [counsel] [consultant] [other] for [Party to Proceeding], for whom I am acting in this Proceeding. I have read the Protective Order served on December 29, 2008, governing the production and use of Highly Confidential Information and Highly Confidential Documents in STB Finance Docket No. 35157, 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 Information or Highly 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 STB Finance Docket No. 35157 before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Finance Docket No. 35157. I further agree not to disclose any Highly Confidential Information, Highly 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 Highly Confidential 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. At the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I agree to destroy promptly 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 a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. 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: _____

Position: _____

Affiliation: _____

Date: _____