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SERVICE DATE – LATE RELEASE JANUARY 13, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Docket No. FD 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION—PETITION FOR
DECLARATORY ORDER

Decided: January 13, 2012

This decision grants a motion of the Western Coal Traffic League (WCTL) requesting that the Board issue a new protective order in Docket No. FD 35557 and modify the protective order in Docket No. FD 35305 to extend to the proceeding in Docket No. FD 35557.

In Docket No. FD 35305, the Board found a BNSF Railway Company (BNSF) tariff intended to mitigate dispersion of coal dust from rail cars, when considered as a whole, to be an unreasonable practice. Following BNSF's issuance of a new tariff to mitigate coal dust, which included a safe-harbor coal dust suppression provision, the Board denied WCTL's request to reopen the Docket No. FD 35305 proceeding, but initiated a new proceeding – Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, Docket No. FD 35557 – to consider the reasonableness of the new tariff's safe harbor provision. Ark. Elec. Coop. Corp.—Petition for Declaratory Order (November Decision), FD 35305, et al. (STB served Nov. 22, 2011). In that decision, the Board stated that parties “may petition the Board to modify the protective order of the previous proceeding to extend to the new proceeding. Parties would need to demonstrate the relevance of such material to a determination of the reasonableness of the new safe harbor provision before the Board would extend the protective order.” Id. at 4.

On December 20, 2011, WCTL filed a motion requesting that the Board issue a protective order in Docket No. FD 35557 and modify the protective order in Docket No. FD 35305 to extend to the proceeding in Docket No. FD 35557. WCTL states that BNSF has

agreed to the proposed protective order attached to WCTL's motion and does not object to WCTL's request to extend the FD 35305 protective order.¹

Good cause exists to grant the request for a new protective order in Docket No. FD 35557. Issuance of a protective order ensures that the parties' confidential information will be used solely for Docket No. FD 35557 and not for any other purposes.

The request for the new protective order 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. Accordingly, the request for a protective order will be granted, and properly designated filings in this proceeding shall be subject to the Protective Order and Undertakings in the Appendix to this decision.

The Board, however, will not grant a blanket extension of the protective order in Docket No. FD 35305. The parties have not yet demonstrated the relevance of the materials from the prior proceeding to the new proceeding, but the request to modify and extend the protective order from Docket No. FD 35305 will be granted with regard to WCTL and BNSF pleadings to allow discovery to move forward. The Board grants this request in light of the parties' agreement to the modification of the prior protective order, the fact that the discovery period has started, and the Board's desire to avoid unnecessary discovery disputes.

The parties are reminded that the Board opened the declaratory order proceeding in Docket No. FD 35557 "to consider the reasonableness of the safe harbor provision in the new tariff." November Decision, slip op. at 4. This decision extending the protective order does not make any findings regarding the relevance of the confidential material from the prior proceeding to the reasonableness of the safe harbor provision. In addition, because WCTL did not indicate whether other parties that filed confidential or highly confidential materials in Docket No. FD 35305 consented to the extension of the protective order, the extension is limited to materials filed by WCTL and BNSF in the prior proceeding. Should parties wish to use confidential or highly confidential materials filed by other parties in Docket No. FD 35305, they must first seek the Board's approval to extend the prior protective order to those parties.

¹ The motion states that BNSF does not concede that discovery materials from the prior proceeding will lead to the development of relevant evidence in the new proceeding and reserves the right to challenge the relevance of evidence derived from discovery produced or pleadings filed in the prior proceeding. WCTL likewise reserves the same right.

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

It is ordered:

1. WCTL's request for a protective order in Docket No. FD 35557 is granted, and the Protective Order and Undertakings in the Appendix to this decision are adopted.

2. WCTL's request to modify the protective order in Docket No. FD 35305 and extend it to Docket No. FD 35557 is granted to allow parties to the new proceeding to use confidential and highly confidential materials filed by BNSF and WCTL in the prior proceeding as discussed above.

3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, 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 purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.

(b) May be disclosed only to employees, counsel, or agents of the party requesting such material 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 materials.

(c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel for a party is permitted to retain file copies of all pleadings filed with the Board which they were authorized to review under this Protective Order, including Paragraph 10.

(d) If contained in any pleading filed 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.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-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 the party 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 materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The 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 producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document 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 production waived the privilege.

5. If any party intends to use “CONFIDENTIAL” and/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” and/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” and/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” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting the shipper-specific data or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. 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 produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it 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.

10. 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 a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon another party (the “reviewing party”) a pleading or evidence containing the filing party’s “HIGHLY CONFIDENTIAL” material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party’s “HIGHLY CONFIDENTIAL” material has been redacted. The “CONFIDENTIAL” version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). In lieu of preparing a “CONFIDENTIAL” version, the filing party may (simultaneously with the party’s submission to the Board of its “HIGHLY CONFIDENTIAL” version) make available to outside counsel for any other party a list of all “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the “HIGHLY CONFIDENTIAL” version before permitting any clients to review the submission.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on January 13, 2012, governing the production of confidential documents in STB Finance Docket No. 35557, 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 Finance Docket No. 35557 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 outside counsel may retain file copies of pleadings 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 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:_____

Print:_____

Affiliation:_____

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 January 13, 2012, governing the production of confidential documents in STB Finance Docket No. 35557, 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 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]

Print: _____

Affiliation: _____

Dated: _____