

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR DECLARATORY ORDER

MOTION FOR PROTECTIVE ORDER

Decided: January 23, 2012

By motion filed on August 21, 2012, Grafton & Upton Railroad Company (G&U), seeks a protective order pursuant to 49 C.F.R. § 1104.14(b) to protect the confidential and commercially sensitive information contained in an unredacted Terminal Transloading Agreement between G&U and Grafton Upton Railcare, LLC, and an unredacted Lease Agreement between G&U and Upton Development Group, LLC (the Agreements), submitted under seal in this proceeding.¹ The motion for protective order was filed in response to a petition for declaratory order filed on August 1, 2012.

With the filing of its motion, G&U submitted “highly confidential” versions of the Agreements, but failed to simultaneously submit unredacted versions of the documents, as required by the Board. Because all parties must simultaneously file a public version of any confidential or highly confidential submission filed with the Board, G&U is directed to submit public versions of the Agreements by January 31, 2013. Further, as G&U has provided no support for designating the Agreements as “highly confidential,” the Agreements will be designated as “confidential,” subject to G&U providing additional information to justify the “highly confidential” designation.

Good cause exists to grant the motion for protective order. G&U states that a protective order would enable it to submit commercially sensitive information needed for the Board to evaluate and reach a decision with respect to a petition for declaratory order filed in this proceeding. According to G&U, these commercially sensitive materials, if publicly disclosed, could have an adverse impact on the business of G&U, as well as its customers and other interested parties.

¹ In its motion for protective order, G&U stated that it was concurrently filing, under seal, a reply along with accompanying verified statements and exhibits which all contain confidential, proprietary, and commercially sensitive information. In a letter filed on September 5, 2012, however, G&U’s attorney indicated that only the Agreements warranted protection.

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. 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 Agreements will be made subject to the Protective Order and the Undertakings, as modified in the Appendix to this decision.²

This action 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. G&U is directed to file public versions of the Terminal Transloading Agreement and the Lease Agreement by January 31, 2013.
3. The unredacted Terminal Transloading Agreement and Lease Agreement submitted in Docket No. FD 35652 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.
4. This decision is effective on its service date.

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

² Although G&U included a proposed protective order and a "Highly Confidential" undertaking with its motion, it failed to include a "Confidential" undertaking. The Board has included such an undertaking in the Appendix to this decision.

APPENDIX

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 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; confidential financial and cost data; confidential divisions of rates, compensation levels and other compensation arrangements; confidential information regarding the appraised value of property; 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 documents.
 - (d) “Proceedings” means those before the Surface Transportation Board (“Board”) in Finance Docket No. 35652 and any related proceedings before the Board, and any judicial review proceedings arising from Finance Docket No. 35652 or from 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 that it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed or served by it in these Proceedings contains Confidential Information or consists of Confidential Documents, then such party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents so designated or stamped 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, pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data; divisions of rates, compensation levels, confidential cost or financial information, or other competitively

sensitive or proprietary information, then such 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, to any person or entity except to an individual person who is a party, or 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 Protective Order.
5. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any individual person who is a party, or to an individual employee of a party, to these Proceedings, to any employee of a party to these Proceedings that is not an individual person (but rather a corporation, partnership, limited liability company or some other form of business enterprise), 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 Protective Order.
6. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party’s submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party’s in-house counsel. The Confidential Version may be served on other parties in electronic format only. 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.
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 Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

8. Designated Material may not be used for any purposes, including without limitation any business, commercial, strategic or competitive purposes, other than the preparation and presentation of evidence and argument in these Proceedings and any related proceedings before the Board, or any judicial review proceedings in connection with these Proceedings or any related proceedings. Any person or entity receiving Designated Material shall at all times keep secure all notes, abstractions or other work product derived from or containing Designated Materials, shall be obligated to maintain the confidentiality of such work product, and shall not disclose or reveal the content of said notes, abstractions, or other work product after the Designated Material is returned or destroyed pursuant to this Protective Order. Any recipient of any Designated Material protected by this Protective Order shall not disseminate, orally or by any other means, any Designated Material other than as permitted by this Protective Order. Once protections pursuant to this Protective Order have attached to Designated Material, such protection shall not be reduced or waived by further communicating, restating, summarizing, discussing or referring to any Designated Material during the course of these Proceedings.
9. Any person or entity 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: (a) such time as it withdraws from these Proceedings, or (b) 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 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.
11. 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: (a) 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 (b) 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 that 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.

12. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless it 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.
13. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, it shall so advise opposing counsel 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 paragraph 9 of this Protective Order.
14. To the extent that Designated Material is produced by a party in these Proceedings and is held or used by the receiving person in compliance with the provisions of this Protective Order, such production, disclosure, holding or use of the Designated Material and of the data that the Designated Material contains are deemed essential for the disposition of these Proceedings 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.
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 person or entity to disclose voluntarily any Confidential Information originated by that person or entity or to disclose voluntarily any Confidential Documents originated by that person or entity, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other person or entity, unless such person or entity has consented in writing to such disclosure.

Exhibit A
UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on January 24, 2013, governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 35652, 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 Docket No. FD 35652, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 35652 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, 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 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.

Signed: _____

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 January 24, 2013, governing the production and use of Highly Confidential Information and Highly Confidential Documents concerning Docket No. FD 35652, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Highly Confidential Information or Highly Confidential Documents obtained pursuant to the 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 Docket No. FD 35652, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with Docket No. FD 35652 or with any related proceedings. 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 Protective 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 highly 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 applicants or other parties producing Highly Confidential Information or Highly 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.

Signed: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____