

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

233931

NORTH AMERICA FREIGHT CAR ASSOCIATION)	
)	ENTERED
)	Office of Proceedings
)	March 15, 2013
Complainant,)	Part of Public Record
)	
v.)	Docket NOR 42137
)	
BNSF RAILWAY COMPANY, et al)	
)	
Defendants.)	

**SUPPLEMENT TO
MOTION FOR PROTECTIVE ORDER**

North America Freight Car Association (“NAFCA”), hereby supplements its Motion for Protective Order (“Motion”) filed in this proceeding on February 27, 2013, requesting that the Board adopt a protective order for purposes of protection against the public disclosure of confidential and highly confidential materials that may be included in discovery responses or depositions. The proposed Protective Order attached to the Motion contained certain provisions on which NAFCA and the defendants¹ reached an agreement, but also contained provisions proposed by NAFCA on which the parties had not been able to reach agreement. These remaining issues were confined to paragraph 2, governing access to material designated Highly Confidential by the parties. Subsequent to the filing of the Motion, the parties have continued to

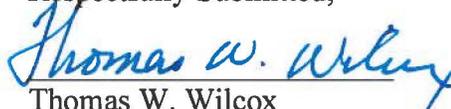
¹ BNSF Railway Company, CSX Transportation, Inc., Canadian National Railway Company, The Kansas City Southern Railway Company, Norfolk Southern Railway, Canadian Pacific Railway Company, Union Pacific Railroad Company, and Association of American Railroads.

discuss the outstanding issues, and NAFCA and defendant AAR have succeeded in reaching agreement on the terms of a draft protective order. This agreement is reflected in the draft Protective Order attached hereto as Exhibit A, which supersedes the previously filed version and amends the relevant portions of the Motion accordingly. NAFCA is authorized by AAR to represent to the Board that AAR concurs with the attached draft.

The remaining defendants have not similarly authorized NAFCA to represent that they also concur with the attached version of the Protective Order, and so therefore may still file replies to the Motion. NAFCA has consented to their request to extend the deadline for the remaining defendants to reply to the Motion from March 19 to March 22, 2013.

WHEREFORE, for the reasons set forth above, NAFCA hereby supplements and amends its Motion, and requests that the draft Protective Order attached hereto be adopted by the Board for use in this proceeding.

Respectfully Submitted,



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March 15, 2013

PROTECTIVE ORDER

STB Docket No. NOR 42137

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 and consultants for a party are permitted to retain file copies of all pleadings 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 and/or private railcar owner car costs or pricing 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 persons in the following categories 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 they 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: (i) outside counsel and outside consultants of the parties; (ii) the following inside counsel for the Defendant AAR:, Louis P. Warchot and Daniel Sapphire; and (iii) up to four (4) non-lawyer personnel employed by Defendant AAR/TTCI, provided Complainant is given seven-days advance notice of such persons' identity and an opportunity to object before any such person receives access to HIGHLY CONFIDENTIAL materials, with consent not to be unreasonably withheld. 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. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 8 shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic 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 publicly 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 the other party (the “reviewing party”) a

pleading or evidence containing the “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the In-house Personnel of the reviewing party.

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 _____ [date], governing the production of confidential documents in STB Docket No. NOR 42137, 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 Docket No. NOR 42137 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 counsel and consultants may retain copies of pleadings which 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 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.

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As an authorized recipient of Highly Confidential materials (as outside counsel, outside consultant or [_____] for _____ in this proceeding, I have read the Protective Order served on _____ [date], governing the production of confidential documents in STB Docket No. NOR 42137, 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 and consultants 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.

[NAME]

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Complainant's Supplement to Motion for Protective Order, has been served this 15th day of March, 2013 on counsel for each of the defendants by electronic mail and by first class mail, postage prepaid.


Thomas W. Wilcox