

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35622

STEELRIVER INFRASTRUCTURE PARTNERS LP, STEELRIVER INFRASTRUCTURE ASSOCIATES LLC, STEELRIVER INFRASTRUCTURE FUND NORTH AMERICA LP, AND PATRIOT FUNDING LLC—CONTROL EXEMPTION—
PATRIOT RAIL CORP., ET AL.

Decided: May 25, 2012

By motion filed May 7, 2012, SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, SteelRiver Infrastructure Fund North America LP, and Patriot Funding LLC (collectively, SteelRiver) sought a protective order pursuant to 49 C.F.R. § 1104.14(b) to protect the confidential and commercially sensitive information contained in the unredacted Stock Purchase Agreement (SPA) dated May 4, 2012, among SteelRiver and Patriot Rail Holdings LLC. With the motion, SteelRiver included a proposed protective order and undertaking. Concurrently, SteelRiver filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to acquire control of Patriot Rail Corp. (Patriot) and its rail carrier subsidiaries.¹ SteelRiver filed a redacted public version of the SPA with its notice, as well as an unredacted version of the SPA under seal.

On May 18, 2012, Sierra Railroad Company and Sierra Northern Railway (SERA) (collectively, Sierra) filed a motion for access to the unredacted SPA filed under seal by SteelRiver. Sierra expressed concern that Patriot may be misusing the Board's exemption procedures to preclude effective review by any legal authority (namely, the Board and the federal court in California adjudicating a dispute between Sierra and Patriot) of the impact of alleged anticompetitive conduct on SERA's common carrier rights to operate over certain rail facilities in California.² Sierra asserts that access to the unredacted SPA is necessary to determine whether its concerns are justified and, if so, whether to seek to stay or revoke the exemption.

¹ Notice of the control exemption was served and published in the Federal Register (77 Fed. Reg. 30,589) on May 23, 2012.

² Patriot and Sierra are currently involved in litigation before the U.S. District Court for the Eastern District of California in Patriot Rail Corp. v. Sierra Railroad Co., No. 2:09-CV-00009-MCE-EFB. Among other things, Sierra alleges that Patriot relied on proprietary financial and operational data received from Sierra to organize the Sacramento Valley Railroad Company, LLC (SAV) and bid against Sierra for the right to provide service within the McClellan industrial park in McClellan, Cal. In Sierra Railroad v. Sacramento Valley Railroad, STB Docket No. NOR 42133, Sierra alleges that SAV, McClellan Business Park, and the County of Sacramento

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By decision served on May 18, 2012, the Board granted a protective order in this proceeding. That protective order, consistent with SteelRiver's original request, designates a single category of "Confidential" information. The Board indicated that Sierra may access the SPA pursuant to the terms of the protective order and undertaking adopted in its decision.

By motion filed on May 21, 2012, SteelRiver and Patriot now ask the Board to modify the protective order to include protection for documents classified "Highly Confidential" and to permit the reclassification of the unredacted SPA as Highly Confidential.³ Under the proposed protective order, "Highly Confidential" materials could only be accessed by outside STB counsel and consultants that have executed an undertaking. SteelRiver and Patriot submit that the modified protective order would facilitate the potential exchange and use of commercially sensitive information.

On May 22, 2012, Sierra filed a reply in opposition to this motion, arguing that the restrictions proposed by SteelRiver and Patriot would prevent Sierra from obtaining informed advice from counsel regarding the position Sierra should take on the proposed acquisition of control. Specifically, Sierra requests that its outside counsel in the federal court action have access to the SPA so that they can better understand the impact of the proposed acquisition on Sierra's rights in the federal court action. Sierra further requests that its inside counsel and Sierra's executive management personnel have access to the SPA so that they can better assess the impact of the proposed acquisition on Sierra's rights as a competitor to one of Patriot's rail carrier subsidiaries. Sierra also proposes that the Board establish a procedure, including a Board-sponsored technical conference, that would enable parties jointly to determine the proper classification of the redacted SPA materials as either "Confidential" or "Highly Confidential" information.

In a letter submitted on May 23, 2012, SteelRiver and Patriot request that the Board deny the relief sought by Sierra. SteelRiver and Patriot state that they offered to provide a less redacted version of the SPA to Sierra's management, other counsel, and outside counsel and consultants upon execution of the undertaking required by the Board's decision served May 18, 2012. SteelRiver and Patriot indicate that Sierra has rejected this offer. On May 24, 2012, Sierra replied to SteelRiver's and Patriot's letter.

Good cause exists to grant SteelRiver's and Patriot's motion to modify the protective order to include protection for documents classified "Highly Confidential." The Board has routinely allowed parties to protect competitively sensitive or proprietary information by

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failed to maintain reasonable practices under the Interstate Commerce Act by interfering with SERA's common carrier obligation to provide service within the McClellan industrial park while at the same time failing to seek adverse discontinuance of SERA's operating authority.

³ SteelRiver and Patriot included a new proposed protective order, a confidential undertaking, and a highly confidential undertaking with their motion.

designating material as “Highly Confidential.”⁴ Therefore, the Board will adopt the new protective order (Revised Protective Order) and undertakings submitted by SteelRiver and Patriot, as modified to conform to the standard language typically used regarding information designated as “Highly Confidential.”⁵ No party has provided good reason for the Board to depart from that standard approach. In accordance with the terms of the protective order, designated material, whether “Confidential” or “Highly Confidential,” may be used solely for this proceeding and not for other purposes. The SPA shall be subject to the protective order and undertakings, as modified, in the Appendix to this decision, which will supersede the protective order served on May 18, 2012.

Further, in accordance with the terms of the Revised Protective Order (paragraph 6), any party to this proceeding may challenge the designation of information or documents as “Confidential” or as “Highly Confidential” by filing a motion with the Board. In light of this provision, we will not schedule a technical conference to determine the status of the designated information. Instead, the parties are encouraged to work together to resolve their differences regarding designation. If the parties are unable to do so, one or both parties may file a motion pursuant to paragraph 6 of the Revised Protective Order. If such a matter needs to be resolved prior to the filing of any petitions for stay in this case, the appropriate party shall file a motion with the Board by May 30, 2012, in order to provide the Board with sufficient time to fully consider any issues presented. Any reply will be due by May 31, 2012.

To permit sufficient time for the Board to rule on any motion regarding the confidentiality designation of the SPA and permit sufficient time thereafter for Sierra to prepare and file a stay petition if it chooses to do so, a housekeeping stay of the effective date of SteelRiver’s notice of exemption will be imposed until June 16, 2012. The deadline for filing petitions to stay the proceeding beyond that date will be extended to June 8, 2012.

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 to modify the protective order is granted, to the extent discussed above. The Revised Protective Order and Undertakings in the Appendix to this decision are adopted and replace the protective order and undertaking served May 18, 2012.

⁴ See, e.g., Nittany & Bald Eagle R.R.—Temporary Trackage Rights Exemption—Norfolk S. Ry., FD 35597 (STB served March 28, 2012); Sierra R.R. v. Sacramento Valley R.R., NOR 42133 (STB served March 9, 2012).

⁵ The Revised Protective Order provides that “Highly Confidential” information and documents may be disclosed to “outside counsel,” rather than “outside STB counsel,” as suggested by SteelRiver and Patriot. Parties should note that, by execution of the Highly Confidential Undertaking (Exhibit B), the undersigned counsel represents that he or she is acting as outside counsel for a party “in this proceeding.”

2. The unredacted SPA submitted in this proceeding will be kept under seal by the Board and will not be placed in the public docket or otherwise disclosed to the public, unless the undertakings are executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

3. As discussed above, motions to challenge the designation of material as “Confidential” or “Highly Confidential” are due by May 30, 2012. Any replies will be due by May 31, 2012.

4. The effective date of SteelRiver’s notice of exemption is stayed until June 16, 2012.

5. Petitions to further stay this proceeding are due by June 8, 2012.

6. This decision is effective on its service date.

By the Board, Chairman Daniel R. Elliott.

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 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 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 the Notice of Exemption filed in Docket No. FD 35622 and any related proceedings before the Board, and any judicial review proceedings arising from Docket No. FD 35622 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, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a 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, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a 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 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 Docket No. FD 35622, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 35622 and/or with 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, 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 any 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 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.

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 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.

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. 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.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on May 25, 2012, governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 35622 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 35622, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 35622 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.

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 May 25, 2012, governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 35622 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 Docket No. FD 35622, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Docket No. FD 35622 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 other 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.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party Name]

Dated: