

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 677 (Sub-No. 1)

COMMON CARRIER OBLIGATION OF RAILROADS—
TRANSPORTATION OF HAZARDOUS MATERIALS

MOTION FOR PROTECTIVE ORDER

Decided: September 25, 2008

On July 22, 2008, the Board held a public hearing to examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. After the hearing, the record remained open for replies until August 22, 2008.

By motion filed on August 21, 2008, Union Pacific Railroad Company (UP) seeks a protective order under 49 CFR 1104.14(b) to protect material containing proprietary and highly sensitive commercial information that has been or will be filed during this proceeding.¹ UP asserts that the protective order is required to permit UP to submit to the Board proprietary and highly sensitive information relating to its cost of insurance coverage filed in response to questions raised by Board members at the hearing. On August 21, 2008, UP also filed a redacted version of a verified statement and filed, under seal, a highly confidential version.

Good cause exists to grant the motion for a protective order. The proposed protective order substantially conforms with the Board's rules at 49 CFR 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Issuance of a protective order substantially in the form of the proposed protective order will ensure that confidential information will be used only in connection with this proceeding, as defined in the Appendix to this decision, and not for any other purposes. Accordingly, the motion for protective order will be granted. The unredacted confidential and highly confidential information will be subject to the Protective Order and Undertakings as modified in the Appendix to this decision.

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

¹ A proposed protective order and undertakings were included with the motion.

It is ordered:

1. The motion for a protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
2. The material containing proprietary and highly sensitive information submitted in STB Ex Parte 677 (Sub-No. 1) 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 the date of service.

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

Anne K. Quinlan
Acting Secretary

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 (i) information related to the cost of insurance coverage offered to or obtained by a Party, and (ii) 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) in STB Ex Parte No. 677 (Sub-No. 1), and any related proceedings before the Board, and any judicial review proceedings arising from STB Ex Parte No. 677 (Sub-No. 1) or from any related proceedings before the Board.

(e) “Parties” means those entities shown as “Parties of Record” on the service list for these Proceedings available on the Board’s website.

2. If any Party to these Proceedings determines that any part of (i) a document it submits, (ii) a discovery request it propounds, (iii) a discovery response it produces, (iv) a transcript of a deposition or hearing in which it participates, or (v) 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 (i) a document it submits, (ii) a discovery request it propounds, (iii) a discovery response it produces, (iv) a transcript of a deposition or hearing in which it participates, or (v) a pleading or other paper to be submitted, filed, or served in these Proceedings contains information related to the cost of insurance coverage offered to or obtained by that Party, or other competitive 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 received 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 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 received 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. The 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 other than the preparation and presentation of evidence and argument in these Proceedings, as defined herein. Such proscribed purpose include without limitation: business, commercial, operational, and/or competitive purpose.

9. 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, 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 CFR § 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 tribunal other than the 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.

12. 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.

13. 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 11 of this Protective Order.

14. 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 this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of these Proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 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 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.

Exhibit A

UNDERTAKING—CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on September 25, 2008, governing the production and use of Confidential Information and Confidential Documents concerning STB Ex Parte No. 677 (Sub-No. 1), 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 Ex Parte No. 677 (Sub-No. 1), any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with STB Ex Parte No. 677 (Sub-No. 1) 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 these Proceedings, 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. 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: _____

Affiliation: _____

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 September 25, 2008, governing the production and use of Confidential Information and Confidential Documents concerning STB Ex Parte No. 677 (Sub-No. 1), 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 Ex Parte No. 677 (Sub-No. 1), any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Ex Parte No. 677 (Sub-No. 1) 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 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 ensure 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 these Proceedings, 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 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. 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: _____