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SERVICE DATE - LATE RELEASE SEPTEMBER 11, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42034

PSI ENERGY, INC.

v.

CSX TRANSPORTATION, INC.

and

SOO LINE RAILROAD COMPANY

(MOTION FOR A PROTECTIVE ORDER)

Decided: September 10, 1998

We are entering a protective order to safeguard the confidentiality of proprietary and commercially sensitive information.

BACKGROUND

By complaint filed on July 6, 1998, PSI Energy, Inc. ("PSI" or "the shipper") requests that we order defendants CSX Transportation, Inc., and Soo Line Railroad Company, d/b/a Canadian Pacific Railway ("CSXT/CP" or "the carriers") to establish reasonable rates for the movement of coal in specified volumes from origins in Indiana to PSI's generating station at Cayuga, in Vermillion County, Indiana.

By motion filed on July 21, 1998, CSXT/CP requests that we enter a protective order to safeguard the confidentiality of proprietary and commercially sensitive information. A draft protective order was attached to the motion.

On August 4, 1998, PSI filed a reply to CSXT/CP's motion for a protective order. In its reply, PSI objects to Paragraph 6 of the protective order proposed by the carriers. This provision limits the disclosure of information designated as "Highly Confidential" to outside counsel and consultants only. PSI seeks to allow one designated in-house attorney and one designated legal assistant for each party to review highly confidential information, subject to "the same restrictions imposed on outside counsel and consultants." In particular, PSI seeks to designate the following four persons as eligible to receive and review highly confidential information:

Donald P. Bogard	Assistant General Counsel for Cinergy Services, Inc. (“CSI”), and the in-house attorney for PSI assigned to handle this proceeding
Susan Wilde	A paralegal in the CSI Legal Department assigned to Mr. Bogard
Fred R. Birkholz	Senior Counsel for CSXT and the principal in-house attorney for CSXT assigned to handle this proceeding
Timothy G. Mulcahy	General Attorney for CP and the principal in-house attorney for CP assigned to handle this proceeding

On September 1, 1998, Indianapolis Power & Light Company (IPL) filed a letter opposing release of confidential contract information to any in-house personnel for PSI, with which it competes, or for CSXT, with which it does business. IPL reports that it has a confidential rail transportation contract with CP that is the subject of discovery in this case.

PRELIMINARY MATTER

On August 7, 1998, the carriers filed a statement containing information that they view as relevant to arguments addressed in PSI’s reply. On August 7, 1998, PSI responded with a statement opposing the admission of the carriers’ statement filed on August 7, 1998, as an improper reply to a reply under our rules at 49 CFR 1104.13(c), but tendering argument for our consideration in the event that we accept the carriers’ statement. We will not consider the carriers’ supplemental statement because: (1) it is an impermissible reply to a reply under CFR 1104.13(c); (2) the carriers did not accompany submission of this statement with a petition for waiver; and (3) the statement contains information and arguments that could have been submitted earlier.

DISCUSSION AND CONCLUSIONS

To the extent that discovery is conducted in this proceeding, which is being held in abeyance by separate order issued simultaneously with this one, we will adopt the protective order that was originally proposed by the carrier, which appears as the Appendix hereto. We will not modify the protective order to allow in-house counsel to have access to highly confidential information.

In Burlington Northern, Inc., and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision No. 21 (STB served May 3, 1995) at 2, we refused to allow in-house counsel for shippers to have access to proprietary information. We believe that this precedent has equal validity here because the information obtained in maximum rate cases can be as broad and confidential as that obtained in a merger proceeding.

As noted by PSI, we have issued protective orders in maximum rate complaints that have allowed in-house counsel to have access to highly confidential information.¹ However, the issue of access by in-house-counsel did not arise in those proceedings because the aforementioned protective orders were the subject of agreement between the parties. That is not the case here.

We have received a letter from Mr. Bogard stating that he takes seriously his ethical obligations to protect confidential information. We have no reason to doubt Mr. Bogard's integrity, but our decision here will have ramifications beyond this case. And as a general proposition, as reflected in the letter from IPL, good reason exists to draw a line between in-house counsel, who necessarily has obligations to his employer which transcend the case, and outside counsel, whose obligations to the complainant are far more narrowly circumscribed. PSI's outside counsel are highly competent transportation specialists with substantial experience and expertise in maximum rate cases. PSI does not support its assertion that Mr. Bogard cannot effectively oversee the litigation because he does not have access to traffic data and other commercially sensitive information. In-house counsel does not need to know every detail of every aspect of the litigation in order to assure itself that outside counsel is following PSI's directions.

It is ordered:

1. The protective order and confidentiality undertaking in the Appendix hereto are adopted.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹ See: Pennsylvania Power and Light Company v. Consolidated Rail Corporation, Inc., and Norfolk Southern Corporation, No. 41295 (STB served Feb. 12, 1997); and Northern Indiana Public Service Company v. Consolidated Rail Corporation, No. 42027 (STB served May 21, 1998).

APPENDIX

Protective Order And Confidentiality Undertaking Adopted by Board

1. This Order shall apply to all documents, information and other products of discovery (including testimony and transcripts of testimony taken at deposition) obtained by any party to this proceeding pursuant to discovery requests (including workpaper requests), whether directed to another party or to a person to this proceeding, or through evidentiary filings in this proceeding.

2. Any party or person responding to a discovery request (including a workpaper request) may designate as “Confidential Information” any response (including production of documents) or portion thereof that is in good faith contends contains confidential, proprietary or commercially sensitive information. Any party or person responding to such a request may also designate as “Highly Confidential Information” any “Confidential Information” that is in good faith contends contains such highly sensitive information (e.g., the non-public terms of transportation or coal supply agreements involving any of the parties, customer-specific traffic, revenue, price or cost information, traffic and revenue projections, purchase power minimums or demand-side management plans) that disclosure to employees or agents of another party, even subject to the restrictions of this Order governing the use and dissemination of “Confidential Information,” could reasonably threaten significant economic or competitive harm to the producing party or person. Except as provided by Paragraph 5, “Confidential Information” and “Highly Confidential Information” as used herein include all such designated responses, any copies, extracts, abstracts or summaries or all or part of such responses, and all or any portion of information contained in such responses.

3. Responses to discovery requests (including workpaper requests) may be designated as “Confidential Information” or “Highly Confidential Information” as follows:

(a) Responses or portions or responses to interrogatories, written deposition interrogatories, requests for admission or workpaper requests may be designated by stamping or printing “Confidential” or “Confidential Information.” or “Highly Confidential” or “Highly Confidential Information,” in the front thereof and, if only portions of the response are to be so designated, clearly marking the confidential or highly confidential portions.

(b) Prior to the production of copies to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they are “Confidential Information” or Highly Confidential Information.” Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing “Confidential Information” or “Highly Confidential Information” or stamping “Confidential” or “Confidential Information” on each page containing “Confidential Information,” or stamping “Highly Confidential” or “Highly Confidential Information” on each page

containing “Highly Confidential Information,” and, if only portions of a document page are to be so designated, clearly marking the confidential portions.

(c) A deponent or the attorney for a deponent may designate the deponent’s entire testimony and the transcript thereof to be treated as “Confidential Information” or “Highly Confidential Information” by so requesting on the record prior to the conclusion of the deposition. Such designation shall be effective only until 15 days after the availability of the transcript of the deposition, after which portions of the deposition testimony may be designated “Confidential Information” or “Highly Confidential Information” only by informing each party in writing of the pages, and the portions thereof, that contain “Confidential Information” or “Highly Confidential Information.”

4. If a party or person inadvertently fails to designate discovery or other material as “Confidential Information” or “Highly Confidential Information” in a timely fashion as provided herein, it may make such a designation subsequently by notifying the parties in writing. After receipt of such information, such materials and information shall be treated as if they had been designated in a timely fashion.

5. Any party at any time may by written notice request that the producing party or person cancel the “Confidential Information” or “Highly Confidential” designation of any transcript, document or discovery response or portion thereof. Such request should identify particularly the designated responses it contends should not be treated as “Confidential Information” or “Highly Confidential Information,” provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted ten days after receipt of the request, unless the producing party or person, prior to the end of the ten-day period, sends the requesting party a written denial of the request by telecopier or hand delivery. If such request is denied in whole or in part, the requesting party may file a motion with the Board to have the “Confidential Information” or “Highly Confidential Information” designation removed as to the discovery responses listed in the request. The burden of establishing that the responses should not be afforded the protections of this Order shall be on the moving party.

6. Other than as provided in Paragraph 7 below, “Confidential Information” and “Highly Confidential Information” may only be disclosed to “Authorized Persons.” An “Authorized Person” is a person who, prior to the receipt of any “Confidential Information” or “Highly Confidential Information,” has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and is:

(a) an attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney’s supervision;

(b) a person who is an employee or agent of a party and is actively involved in this proceeding;

(c) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(d) a reporter employed to record depositions;

or who, in the case of "Highly Confidential Information" is:

(x) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(y) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(z) a reporter employed to record depositions.

Each such undertaking by an "Authorized Person" shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such undertaking shall be served upon counsel of record for each party no later than ten days after such undertaking is executed.

7. "Confidential Information" and "Highly Confidential Information" may also be disclosed to:

(a) an employee of the producing party during a deposition of such employee;

(b) a deponent employed by an organization that also employs the person who produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to the deponent; or

(c) any person so authorized either (i) in writing by the party or person that produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to such person or (ii) by the Board upon motion by any party for good cause.

8. Storage, transmission or communication of "Confidential Information" and "Highly Confidential Information" must be such as to reasonably ensure that the "Confidential Information" and "Highly Confidential Information" will not be disclosed, accidentally or otherwise, to non-authorized persons.

9. No person may be present at a deposition during the discussion of “Confidential Information” or “Highly Confidential Information” who has not been authorized by this Order to review the “Confidential Information” or “Highly Confidential Information” to be discussed.

10. “Confidential Information” and “Highly Confidential Information” may be used by the receiving party, and by any “Authorized Person,” solely for purposes of this proceeding and any directly related proceedings involving judicial review of any Board decision or order in this proceeding, and not for any other purpose whatsoever (including any business or commercial purpose). “Confidential Information” and “Highly Confidential Information” may not be used in any other litigation unless obtained in this litigation.

11. All “Confidential Information” and “Highly Confidential Information” filed with the Board, and any pleading, motion, or other paper filed with the Board that contains or discloses “Confidential Information” or “Highly Confidential Information” shall be filed under seal and kept under seal until further order of the Board.

12. All documents containing “Confidential Information” or “Highly Confidential Information” shall, at the option of the producing party/person, be destroyed or returned to the producing party/person at the termination of this proceeding, including all appeals; provided, however, that outside counsel may retain file copies of any unredacted pleadings and materials filed with the Board or a court.

13. The provisions of this Order that restrict the handling, communication and use of “Confidential Information” and “Highly Confidential Information” shall continue to be binding after the termination of this proceeding, including any related court litigation or judicial appeals, unless the Board or the producing party/person authorizes in writing alternative handling.

14. This Order shall not bar or otherwise restrict:

(a) a party or producing person from opposing production of any information under the Board’s Rules of Practice;

(b) an “Authorized Person” from making copies, abstracts, digests and analyses of “Confidential Information” and “Highly Confidential Information” for use in connection with this proceeding subject to the requirement that all such copies, abstracts, digests and analyses be treated as “Confidential Information” or “Highly Confidential Information,” as the case may be, and clearly marked as such;

(c) an “Authorized Person” from rendering advice or opinions with respect to this proceeding to his or her client or employer based upon his or her examination of “Confidential Information” or “Highly Confidential Information” as long as such person does not disclose the “Confidential Information” or “Highly Confidential Information” itself to a person not authorized by this Order to have access to the “Confidential Information” or

“Highly Confidential Information,” as the case may be;

(d) a party from using any “Confidential Information” or “Highly Confidential Information” during hearings in this proceeding, subject to any further order of the Board;

(e) a party or purchasing person from using its own “Confidential Information” or “Highly Confidential Information” in any manner it sees fit, or from revealing such “Confidential Information” or “Highly Confidential Information” to whomever it chooses, without the prior consent of any other party or of the Board; and

(f) a party or producing person from applying to the Board at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires.

15. If “Confidential Information” or “Highly Confidential Information” in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such “Confidential Information” or “Highly Confidential Information” on less than four business days’ notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

16. Information that is obtained outside of this proceeding shall not be subject to this Order even if the same information is produced and designated as “Confidential Information” or “Highly Confidential Information” in this proceeding.

17. To the extent that “Confidential Information” or “Highly Confidential Information” is produced by a party or other person in this proceeding and held and used by the receiving party in compliance with the terms of this Order, such production, disclosure and use of such “Confidential Information” or “Highly Confidential Information” are deemed essential for the disposition of this proceeding and shall not be deemed a violation of 49 U.S.C. § 11904.

18. This Order shall be effective on the date served.

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____)
PSI ENERGY, INC.)
))
Complainant,)
))
v.) STB Docket No. 42034
))
CSX TRANSPORTATION, INC. and)
SOO LINE RAILROAD COMPANY)
d/b/a CANADIAN PACIFIC RAILWAY,)
))
Defendants.)
_____)

CONFIDENTIALITY UNDERTAKING

I, _____, am _____, of _____
[Name] [Position or Job Title] [Company, Firm, or
_____, _____ I am:
Employer] [Address of Company, Firm, or Employer]

- () an outside attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney’s supervision;
- () an attorney who is a regular employee of a party and is actively involved in this proceeding;
- () a person who is an employee or agent of a party and is actively involved in this proceeding;
- () a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person’s supervision;

() a court reporter employed to record deposition in the captioned proceeding,
and affirm that I have read and understand the Protective Order served _____, 1998, in the
captioned proceeding, and that I agree to abide by the terms of such Protective Order.

[Signature]

Dated: _____