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SEC

SERVICE DATE - JANUARY 31, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42051

WISCONSIN POWER AND LIGHT COMPANY.

v.

UNION PACIFIC RAILROAD COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: January 28, 2000

In a verified complaint filed, and served on defendant Union Pacific Railroad Company (UP), on December 30, 1999, Wisconsin Power and Light Company (WPL or complainant) alleges that rates to be assessed by UP to move complainant's unit trains of coal from origins in the Powder River Basin of Wyoming to WPL's electric generating facility at Sheboygan, WI, will exceed a maximum reasonable level.¹ Complainant alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with related rules and service terms for the transportation. Complainant also requests an award of reparations.

By joint motion filed January 13, 2000, the parties seek a protective order with respect to evidentiary submissions and in aid of discovery. The parties present a proposed order modeled on the protective orders entered by the Board in two recent rate proceedings.² The proposed order, set out in the appendix, includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material produced, in response to a

¹ The service was formerly provided by UP under a rail transportation contract that expired on December 31, 1999.

² See Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, STB Docket No. 42038 (STB served Jan. 19, 1999), and FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Finance Docket No. 33467, et al. (STB served Nov. 24, 1997).

discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

In a separate petition filed on January 14, 2000, WPL requests the appointment of an Administrative Law Judge to preside over discovery disputes that may arise during the course of this proceeding. UP replied in opposition on January 20, 2000. WPL's request is premature and will be denied. The Board no longer conducts active oversight of discovery, but limits its role to the resolution of disputes. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1 and Nov. 15, 1996), aff'd sub nom. United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd., 132 F.3d 71 (D.C. Cir. 1998). There is not yet any dispute to be resolved, nor is there any indication on the record that any dispute is imminent, or that whatever disputes may arise cannot be resolved under the modified procedure. Upon subsequent request, the Board will proceed expeditiously to resolve any impasse that may occur in the course of discovery.

It is ordered:

1. The joint motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The request for appointment of an ALJ to resolve discovery disputes is denied without prejudice.
4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this proceeding, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as “CONFIDENTIAL” and shall be used solely for the purpose of this proceeding, and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

(b) Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Board or any Administrative Law Judge presiding in this proceeding, except to employees, counsel, or agents of the party requesting such materials, solely for use in connection with this proceeding and any judicial review proceeding arising therefrom, provided that such employee, counsel, or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials.

(c) If produced through discovery, must be destroyed by the requesting party, its employees, counsel, and agents, and notice of such destruction served on the Board and any presiding Administrative Law Judge and the party producing materials, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.

(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 CFR 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-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL—OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding in this proceeding. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this proceeding,

and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order and agree to be bound by its terms prior to receiving access to such materials. 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. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to any Administrative Law Judge, the Board, or the reviewing court, with a written request to the Administrative Law Judge, the Board, or the court to (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.

4. 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 that material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” materials shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

5. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraph 1 or 2 above, such production, disclosure, 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.

6. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served January 31, 2000, governing the production of the confidential documents in STB Docket No. 42051, 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. 42051 or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof.

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 outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served January 31, 2000, governing the production of confidential documents in STB Docket No. 42051, understand the same, and agreed to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL—OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, 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, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all other 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—OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY” 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.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____