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SERVICE DATE – FEBRUARY 4, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35776

UNION PACIFIC RAILROAD COMPANY—OPERATION EXEMPTION—IN BEXAR AND
WILSON COUNTIES, TEX.

Decided: February 3, 2014

By motion filed January 6, 2014, Union Pacific Railroad Company (UP) seeks a protective order under 49 C.F.R. § 1104.14(b) to govern the handling of confidential and highly confidential material in this proceeding. Included with the motion is a proposed protective order.

UP submits that a protective order is necessary because the Board's decision served on December 24, 2013, directed UP to submit its Industry Track Agreement with Frac Resources, L.P., which contains competitively sensitive and proprietary information.

Good cause exists to grant the motion for protective order, as modified here.¹ Issuance of the protective order will ensure that confidential and highly confidential information will be used solely for this proceeding and not for other purposes. Further, the motion, as modified, conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted, and the protective order is adopted for this proceeding, as modified in the Appendix to this decision.

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

It is ordered:

1. The motion for a protective order is granted, and the protective order and undertakings, as modified in the Appendix to this decision, are adopted.

¹ Among other things, the order submitted by UP has been modified, consistent with typical Board protective orders, to permit material designated as “Confidential” to be viewed by employees, counsel, consultants, or agents of a party to this proceeding who execute a Confidential Undertaking and to permit material designated as “Highly Confidential” to be viewed by outside counsel or consultants of a party (but not parties themselves or their employees) who execute a Highly Confidential Undertaking.

2. The parties are directed to comply with the protective order set forth in the Appendix to this decision.

3. Materials designated as confidential or highly confidential 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.

4. This decision is effective on its service date.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

a. "Confidential material" means information or material designated as "CONFIDENTIAL," and any information or material derived therefrom.

b. "Highly Confidential material" means information or material designated as "HIGHLY CONFIDENTIAL," and any information or material derived therefrom.

c. "Proceeding" means (i) the proceeding before the Surface Transportation Board ("Board") in FD 35776 and any related proceeding before the Board, and (ii) any judicial review proceedings arising from (i).

2. Any material produced in discovery or submitted in pleadings to the Surface Transportation Board ("Board") in connection with this Proceeding that the producing or submitting party believes in good faith reveals confidential information may be designated as "CONFIDENTIAL" in accordance with paragraph 4.

3. Any material produced in discovery or submitted in pleadings to the Board in connection with this Proceeding that the producing or submitting party believes in good faith reveals shipper-specific or railroad-specific rate, cost, quantity, routing, or other competitively sensitive or proprietary information may be designated as "HIGHLY CONFIDENTIAL" in accordance with paragraph 4.

4. The designation of information or material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be made as follows:

a. For pleadings, by imprinting the word(s) "Confidential" or "Highly Confidential" on the cover page of the pleading.

b. For documents and other materials, by imprinting the word(s) "Confidential" or "Highly Confidential" on the face of each page of a document so designated or in a similarly conspicuous location for non-document materials.

c. For depositions, by indicating on the record at the deposition or upon review of the deposition transcript which portions of the transcript and/or responses should be treated as "Confidential" or "Highly Confidential."

d. For electronically stored information, either by imprinting the word(s) "Confidential" or "Highly Confidential" on any disk or storage medium, or on the face of each page of a document so designated.

5. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee,

counsel, consultant, or agent of a party to this Proceeding, 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 in the form set forth at Exhibit A to this Order.

6. 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 this Proceeding, 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 in the form set forth at Exhibit B to this Order.

7. Confidential Material and Highly Confidential Material shall be used solely for the purposes of this Proceeding, and not for any other business, commercial, operational, or competitive purposes.

8. In the event that any 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," that party may notify the Board in writing within ten days of discovery of its inadvertent failure to make the confidentiality designation and promptly furnish properly designated material, at which time the Board will return the non-designated material or destroy it, and will make all reasonable efforts to recover such material from any non-parties to which it may have been disclosed, and any copies made by such non-parties.

9. In the event that any party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, that party may make a written request within a reasonable time after it discovers the inadvertent disclosure that the Board return the inadvertently produced material. If the Board receives inadvertently produced material, it must either return the material or destroy it immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the material, the Board is not conceding that the material 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.

10. Parties may not include Confidential Material or Highly Confidential 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.

11. If any party intends to use Confidential Material or Highly Confidential Material at a Board hearing or mediation in this Proceeding, or in any judicial review proceeding arising herefrom, it shall submit any proposed exhibits or other documents setting forth or revealing such Confidential Material or Highly Confidential Material to the Board, the mediator, or the court, as appropriate, with a written request that the Board, the mediator, or the court: (a) restrict

attendance at the hearings or mediation sessions during discussion of such Confidential Material or Highly Confidential Material and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential Material or Highly Confidential Material in accordance with the terms of this Protective Order.

12. If any party intends to use Confidential Material or Highly Confidential Material in the course of any deposition in this proceeding, it shall advise other counsel attending the deposition, and all portions of the deposition at which any such Confidential Material 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 Material or Highly Confidential Material shall be kept under seal and treated as Confidential Material or Highly Confidential Material in accordance with the terms of this Protective Order.

13. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by any party in this Proceeding and is held and used by the recipient in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains shall be deemed essential for the disposition of this and any related proceedings and shall not be deemed a violation of 49 U.S.C. § 11904 or any other relevant provision of the ICC Termination Act of 1995.

14. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it 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.

15. If any party files with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in this proceeding it shall simultaneously file a public version of the pleading.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on February 4, 2014, governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 35776, 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 35776, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 35776 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.

Name: _____

Signed: _____

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 February 4, 2014, governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 35776, 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 35776, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Docket No. FD 35776 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.

Name: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Signed: _____

Dated: _____