

SURFACE TRANSPORTATION BOARD

Docket No. FD 35523

CSX TRANSPORTATION, INC.—JOINT USE—LOUISVILLE & INDIANA RAILROAD  
COMPANY, INC.

MOTION FOR PROTECTIVE ORDER

Decision No. 1

Decided: July 11, 2013

On June 14, 2013, CSX Transportation, Inc. (CSXT) and Louisville & Indiana Railroad Company, Inc. (L&I) (collectively, Applicants), filed a motion for protective order<sup>1</sup> under 49 C.F.R. § 1104.14 to protect the unredacted Joint Use Operating Agreement between CSXT and L&I, which was submitted under seal in this proceeding.<sup>2</sup>

Applicants have filed an application pursuant to 49 U.S.C. § 11323 *et seq.*, seeking the Board's approval for joint use by CSXT and L&I of L&I's 106.5-mile railroad line between its connection with CSXT in Indianapolis, Ind., milepost 4.0±, and its connection with CSXT in Louisville, Ky., milepost 110.5±. Applicants state that the Joint Use Operating Agreement contains commercially sensitive and confidential information that could harm the parties if the terms were made public. Applicants assert that public disclosure of the complete Joint Use Operating Agreement is not necessary for the disposition of the application. Applicants also have submitted a redacted version of the Joint Use Operating Agreement with their application.

Good cause exists to grant the motion, which conforms to the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data could cause competitive injury to the parties. Accordingly, the motion for a protective order will be granted, and the Joint Use Operating Agreement will be subject to the Protective Order and Undertaking, 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.

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<sup>1</sup> A proposed Protective Order and Undertaking were included with the motion.

<sup>2</sup> On July 2, 2013, Applicants filed Section 4 of Attachment C to the Joint Use Operating Agreement. Applicants submitted a public version and an unredacted copy of this section under seal.

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. This decision is effective on the service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**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” in accordance with Paragraph 2 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (“Board”) concerning Docket No. FD 35523 and any related proceedings before the Board, and any judicial review proceedings arising from Docket No. FD 35523 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, discovery response it produces, transcript of a deposition or hearing in which it participates, or 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. 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 Protective Order.

4. Any party to these Proceedings may challenge the designation by any other party of information or documents as “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.

5. 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 35523, any related proceedings before the Board, and/or any judicial review proceedings in connection with Docket No. FD 35523 and/or with any related proceedings.

6. Personnel of CSXT and L&I and their affiliates, including outside consultants and attorneys for any of them (representatives), may exchange Confidential Information for the purpose of participating in these Proceedings, but not for any other business, commercial, or other competitive purpose, unless and until the application in the Proceedings is approved.

7. If the Application is disapproved by the Board, then all Confidential Documents (other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings) that are exchanged between CSXT, L&I, and their affiliates but which are not otherwise available to them as a result of their existing affiliation and pursuant to their reporting responsibilities for securities, tax and other purposes, must be destroyed, or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents. With respect to parties other than CSXT, L&I, and their affiliates, if the Application is disapproved by the Board, or if the Application is approved but Applicants do not commence operations under the Joint Use Operating Agreement, or if no Application is filed, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

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 or 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 an 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 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 this and any related 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.

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 Confidential submission filed with the Board. The Confidential Version may be served on other parties in electronic format only.

**Exhibit A**

**UNDERTAKING – CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on July 11, 2013, governing the production and use of Confidential Information and Confidential Documents concerning Docket No. FD 35523, 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 35523, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with Docket No. FD 35523 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 Applicants or 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.

Signed: \_\_\_\_\_

Affiliation: \_\_\_\_\_

Dated: \_\_\_\_\_