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SEC

SERVICE DATE – LATE RELEASE JUNE 19, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35008

UTAH TRANSIT AUTHORITY—ACQUISITION EXEMPTION—UNION
PACIFIC RAILROAD COMPANY

STB Finance Docket No. 35002

SAVAGE BINGHAM & GARFIELD RAILROAD COMPANY—ACQUISITION
AND OPERATION EXEMPTION—UNION PACIFIC RAILROAD COMPANY¹

MOTION FOR PROTECTIVE ORDER

Decided: June 19, 2007

On February 27, 2007, Savage Bingham & Garfield Railroad Company (SBGR), a noncarrier, invoked the class exemption under 49 CFR 1150.31 to acquire from Union Pacific Railroad Company (UP) and operate freight easements over a number of rail lines and track, including the portion of the Bingham Industrial Lead (Lead) extending westerly from milepost 0.00 at Midvale to milepost 6.60 at Bagley, in Salt Lake County, UT. See Savage Bingham & Garfield Railroad Company—Acquisition and Operation Exemption, STB Finance Docket No. 35002 (served and published at 72 FR 12261 on March 15, 2007).² On April 16, 2007, Utah Transit Authority (UTA) invoked the class exemption under 49 CFR 1150.31 to acquire from UP the “remaining width” of the same portion of the Lead.³ See Utah Transit Authority—Acquisition Exemption—Union

¹ These proceedings are not consolidated; they are being handled together for administrative convenience.

² The exemption in STB Finance Docket No. 35002 was scheduled to become effective on March 29, 2007, but was stayed by Chairman Nottingham in a decision served on March 28, 2007, pending further action by the Board. The decision indicated that Utah Transit Authority must obtain Board approval to acquire the Lead or a finding that such approval was unnecessary before SBGR could proceed with its acquisition.

³ According to UTA, the remaining width is a 35-foot wide strip of land, the portion of the right-of-way on which the rail and supporting operating infrastructure are located. UTA previously acquired a 35-foot wide strip of the Lead right-of-way. See Utah Transit Authority—Acquisition Exemption—Certain Assets of Union Pacific

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Pacific Railroad Company, STB Finance Docket No. 35008 (served on Apr. 24, 2007, and published at 72 FR 21069 on Apr. 27, 2007). UTA seeks to acquire the Lead to provide light rail passenger service in the Salt Lake City, UT area.

UTA filed a motion to dismiss the notice of exemption for lack of Board jurisdiction on April 20, 2007, and filed supplements to the motion to dismiss on May 11 and 15, 2007. On April 23, 2007, Utah Shipper Coalition (Coalition)⁴ filed a letter requesting that: (1) the proceeding in STB Finance Docket No. 35008 be consolidated with the proceeding in STB Finance Docket No. 35002; and (2) a modified procedure schedule with 60 days for Coalition's opening evidence to allow time for discovery to examine whether affected rail freight shippers would receive adequate rail service if the transactions are implemented. Coalition also requested (for the first time on April 17, 2007) that the notice of exemption in STB Finance Docket No. 35008 be stayed. UTA filed a letter in opposition to the stay request on April 20, 2007. UTA, UP, and SBGR (transaction parties) filed a joint reply on April 26, 2007, agreeing that the proceedings should be consolidated but objecting to Coalition's proposed modified procedure schedule. Coalition filed a reply on April 27, 2007, and SBGR filed a reply in support of UTA's motion to dismiss on May 2, 2007.

On June 1, 2007, Coalition and SBGR separately notified the Board that the parties have reached a settlement agreement that satisfies Coalition's objections and concerns in these proceedings. Coalition requests leave to withdraw its petition to stay the transactions and advises that it now supports the exemption in STB Finance Docket No. 35002 and no longer opposes the motion to dismiss in STB Finance Docket No. 35008. SBGR requests that the Board dissolve the stay in STB Finance Docket No. 35002, subject to the terms of the settlement agreement, and grant the motion to dismiss in STB Finance Docket No. 35008.

The stay in STB Finance Docket No. 35002 will be vacated at the request of SBGR and Coalition, and Coalition will be granted leave to withdraw its petition for stay in STB Finance Docket No. 35008. The requests to consolidate these proceedings and to adopt a modified procedure schedule will be denied as moot.

The transaction parties filed a motion for a protective order on April 27, 2007, contending that the information and documents sought in discovery may include highly confidential and commercially sensitive, proprietary information whose disclosure could

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Railroad Company, STB Finance Docket No. 34170 (STB served May 22, 2002). That notice was subsequently dismissed by the Board as not requiring regulatory approval.

⁴ The Coalition is composed of the following shippers: American Welding & Tank; Frito-Lay, Inc.; Mastercraft Cabinets; SME; BMC Lumber; Interstate Brick; and US Navy—Alliant Techsystems.

be competitively damaging. The transaction parties state that the draft protective order they submitted with the motion is consistent with recently approved protective orders in other proceedings. In a letter filed on June 7, 2007, SBGR advised the Board that the settlement agreement did not moot the transaction parties' request for a protective order. SBGR states that, in anticipation of the Board ruling favorably on the motion for a protective order, it already produced documents to counsel for Coalition.

Good cause exists to grant the transaction parties' motion for a protective order. The motion 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 the protective order will ensure that confidential information will be used solely for these proceedings and not for other purposes. Accordingly, the transaction parties' motion for a protective order will be granted. Unredacted confidential and highly confidential information will be subject to the Protective Order and Undertakings contained in the Appendix to this decision.

On June 15, 2007, UTA filed a petition requesting that the Board issue a decision by June 21, 2007, that would vacate the stay in STB Finance Docket No. 35002, grant the motion to dismiss in STB Finance Docket No. 35008, and grant the motion for a protective order in both proceedings. UTA asserts that it cannot complete the acquisition that is the subject of STB Finance Docket No. 35008 until the stay in STB Finance Docket No. 35002 is vacated and its motion to dismiss in STB Finance Docket No. 35008 is granted. As previously noted, the stay in STB Finance Docket No. 35002 will be vacated in this decision and Coalition will also be permitted to withdraw its request for stay in STB Finance Docket No. 35008. The Board will address UTA's motion to dismiss in that proceeding in a separate decision as soon as possible.

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

It is ordered:

1. The stay in STB Finance Docket No. 35002 is vacated.
2. Coalition is granted leave to withdraw its petition for stay in STB Finance Docket No. 35008.
3. The requests to consolidate these proceedings and to adopt a modified procedure schedule are denied as moot.
4. The transaction parties' motion for a protective order is granted. The Protective Order and Undertakings contained in the Appendix to this decision are adopted.

5. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
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 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” 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) concerning the Notices of Exemption filed in STB Finance Docket No. 35002 and STB Finance Docket No. 35008 and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008 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 of 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 hereinafter.

3. 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 shipper-specific rate or cost data; trackage rights compensation levels; or other competitively 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 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.

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 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 B to this Protective Order.

6. 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 challenge(s).

7. 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 STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008 and/or with any related proceedings.

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 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.

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 the terms of 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. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All 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 submission.

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 June 19, 2007, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008, 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 Finance Docket No. 35002 and/or STB Finance Docket No. 35008, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008 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. 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.

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 June 19, 2007, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008, 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 Finance Docket No. 35002 and/or STB Finance Docket No. 35008, or any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Finance Docket No. 35002 and/or STB Finance Docket No. 35008 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 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 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.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____