

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 679

ASSOCIATION OF AMERICAN RAILROADS – PETITION REGARDING
METHODOLOGY FOR DETERMINING RAILROAD REVENUE ADEQUACY

MOTION FOR PROTECTIVE ORDER

Decided: May 23, 2008

By a motion filed on May 1, 2008, the Association of American Railroads (AAR), seeks a protective order under 49 CFR 1104.14 in connection with a petition to institute a rulemaking proceeding. The proposed protective order would be applicable to materials submitted with AAR's petition and materials that may be filed in proceedings related to or arising from that petition. According to AAR, these materials contain commercially sensitive cost data and information on railroad assets, including bridges and tunnels that could raise concerns of potential security threats. AAR asserts that a protective order will also allow other parties to submit confidential information in connection with or in response to AAR's petition.

Good cause exists to grant the motion for a protective order. The proposed protective order 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 only in connection with this proceeding and not for any other purposes. Accordingly, the motion for protective order will be granted.

This action 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 Undertaking in the Appendix to this decision are adopted.

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

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting 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 confidential financial and cost data and other confidential or proprietary business information, including information that has national security implications.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL – UNDER SEAL” 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 the Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Adopt a Replacement Cost Methodology to Determine Railroad Revenue Adequacy on May 1, 2008, and any related proceedings before the Board, and any judicial review proceedings arising from such proceedings.

2. If any party to these Proceedings determines that any part of a document, 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 – UNDER SEAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

3. Information and documents designated or stamped as “CONFIDENTIAL – UNDER SEAL” 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 A to this Order.

4. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL – UNDER SEAL” 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).

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 the Proceedings defined above in Paragraph 1(d).

6. Any person who receives Designated Material that contains Confidential Information of an entity other than the entity that person represents in connection with this Proceeding 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 represented by the person receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals or remands.

7. No party may include Designated Material in any pleading, brief, 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.

8. No party may include Designated Material in any pleading, brief, 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.

9. 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.

10. 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 paragraphs 1 or 2 above, 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.

11. All parties must file simultaneously a public version of any CONFIDENTIAL – UNDER SEAL submission filed with the Board. It shall not be necessary to prepare a public

version of CONFIDENTIAL – UNDER SEAL exhibits that are filed in and are primarily useful in their native electronic format, such as Microsoft Excel spreadsheets used to perform calculations, nor shall it be necessary to prepare public versions of materials submitted solely as work papers.

12. 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.

13. 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 – MATERIAL FILED AS “CONFIDENTIAL – UNDER SEAL”

I, _____, am outside [counsel][consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on May 23, 2008, governing the production and use of Confidential Information and Confidential Documents in STB Ex Parte No. 679, 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 Ex Parte No. 679, or any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Ex Parte No. 679 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 “CONFIDENTIAL – UNDER SEAL,” 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 “CONFIDENTIAL – UNDER SEAL” and containing Confidential Information of an entity other than the Party I represent in this Proceeding, 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: _____