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SERVICE DATE - MAY 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-104

TRAILER BRIDGE, INC.

v.

SEA STAR LINES, LLC

(Motion For A Protective Order)

Decided: May 5, 2000

By complaint filed on July 1, 1999, Trailer Bridge, Inc. (Trailer Bridge or complainant) alleges that Sea Star Lines, LLC (Sea Star or defendant) has engaged in certain unreasonable practices in violation of 49 U.S.C. 13701(a)(1)(B).¹ Complainant contends that defendant's continuing violation of the statute has caused, and is continuing to cause, economic injury to Trailer Bridge in an as yet undetermined amount. Sea Star filed an answer to the complaint on July 26, 1999, in which it denied these allegations.

On February 22, 2000, Trailer Bridge filed a motion for leave to file out of time and a motion to compel discovery in the form of responses to complainant's first set of interrogatories and request for document production.² Sea Star replied on March 13, 2000, and also moved for a protective order barring anyone except outside counsel or consultants retained for the purposes of this proceeding from access to proprietary information and commercially sensitive materials. Trailer Bridge replied to the motion for protective order on April 3, 2000.³

DISCUSSION AND CONCLUSIONS

¹ Originally, Trailer Bridge also alleged a violation of the National Transportation Policy (NTP) set forth at 49 U.S.C. 13101(a)(1)(C) and (D) as a separate count of its complaint. In a decision served on December 10, 1999, the Board agreed with defendant that the NTP does not give rise to a separate cause of action. Thus, the Board dismissed Count I of the complaint, but noted that the policy guidelines set forth at 49 U.S.C. 13101 will necessarily impact its consideration of the remaining unreasonable practice count.

² Trailer Bridge's motion for leave to file out of time and its motion to compel discovery will be dealt with in a subsequent decision. Trailer Bridge's alleged failure to comply with discovery requests is also the subject of a motion to compel filed by Sea Star on April 19, 2000. That motion will also be dealt with in a subsequent decision.

³ Each party attached a proposed protective order and undertaking to its pleading.

Sea Star, describing itself as a direct competitor of complainant, seeks a protective order restricting disclosure of highly confidential information to Trailer Bridge's outside counsel and third-party consultants and denying Trailer Bridge employees (including in-house counsel) access to such commercially sensitive material. Sea Star's proposed order also seeks to direct the sequence of discovery, making the continuation of discovery contingent on complainant furnishing responses to defendant's first set of interrogatories and request for production of documents, then limiting complainant to discovering information that could lead to a finding of market failure or lack of effective competition in the U.S.-Puerto Rico trade. Defendant's proposed order would then allow Trailer Bridge to discover information relating to Sea Star's operating costs and revenues only if complainant demonstrates market failure and that defendant's rates fall outside the Zone of Reasonableness (ZOR) at 49 U.S.C. 13701(d)(1).

Trailer Bridge opposes the adoption of Sea Star's proposed protective order. Complainant concedes the need for a protective order in this proceeding, but objects to the provisions of the proposed order that would bar its in-house general counsel from sensitive materials. Trailer Bridge's in-house counsel, complainant argues, is the attorney of record in this proceeding and thus should be allowed access to all relevant materials in the proceeding. Complainant also objects to the provisions of Sea Star's proposed order which seek to sequence discovery. Trailer Bridge states that it has made an unreasonable practice rather than an unreasonable rates complaint here and that it is not challenging any specific Sea Star rate but, rather, defendant's overall rate structure. According to Trailer Bridge, Sea Star has no right to dictate how complainant builds its case.

Good cause exists here to grant Sea Star's 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 discovery requests or otherwise, will be used in connection with this proceeding and not for any other business or commercial purpose.

Trailer Bridge's request that its in-house counsel, as the attorney of record in this case, have access to highly confidential material will, however, be denied. In-house counsel has obligations to his employer and has interests as an employee which necessarily jeopardize the confidentiality of a competitor's commercially sensitive information entrusted to him. The obligations of outside counsel to the complainant are far more narrowly circumscribed. PSI Energy, Inc. v. CSX Transportation, Inc. and Soo Railroad Company, STB Docket No. 42034 (STB served Sept. 11, 1998).⁴

⁴ There have been occasions in the past when the Board has issued protective orders that have allowed in-house counsel to have access to highly confidential information. See, e.g., Pennsylvania Power and Light Company v. Consolidated Rail Corporation, Inc. and Norfolk Southern Corporation, STB Docket No. 41295 (STB served Feb. 12, 1997); Northern Indiana Public Service Company v. Consolidated Rail Corporation, STB Docket No. 42027 (STB served May 21, 1998). The issue of access by in-house counsel did not arise in those proceedings because

This is not a case where it would be an undue financial burden to require a party to acquire outside counsel. Indeed, Trailer Bridge already has retained competent outside counsel who is already participating in this proceeding. As such, any burden placed on Trailer Bridge by this protective order is outweighed by Sea Star's legitimate confidentiality concerns.

The sequencing of discovery provisions of defendant's proposed protective order at paragraph 2 will not be adopted. The Board's Rules of Practice state that unless an order is entered in the interest of justice, "methods of discovery may be used in any sequence." 49 CFR 1114.21(d). No reason to depart from the Board's rules has been demonstrated here. It is not necessary for complainant to first demonstrate market failure or lack of effective competition in the U.S.-Puerto Rico trade, or that Sea Star's rates are outside the ZOR, before obtaining information that could be relevant to whether or not Sea Star is engaged in below-cost pricing. Trailer Bridge has stated that this is not a rates complaint where the focus would be on whether specific Sea Star rates are unreasonably low. Rather, Trailer Bridge has asserted that Sea Star is engaged in an unreasonable practice by implementing a pricing structure that cannot, under any circumstances, cover its operating costs. In any event, unlawful use of confidential information will be prohibited under the protective order. For these reasons, Sea Star's request to sequence the order of discovery in this matter will be denied.

In sum, the Board will adopt the protective order proposed by Sea Star, except as discussed herein. That order appears in the Appendix hereto.

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

It is ordered:

1. The protective order and confidentiality undertaking in the Appendix hereto are adopted.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

the protective orders were the subject of agreement between the parties. That is not the case here.

APPENDIX

Protective Order And Confidentiality Undertaking Adopted by Board

1. This Order shall apply to all documents, information and other products of discovery (including testimony and transcripts of testimony taken at deposition) obtained by any party to this proceeding pursuant to discovery requests (including workpaper requests), whether directed to another party or to a person not a party to this proceeding, or submitted through evidentiary filings in this proceeding.

2. Any party or person responding to a discovery request (including a workpaper request) may designate as “Confidential Information” any response (including production of documents) or portion thereof that it in good faith contends contains confidential, proprietary or commercially sensitive information. Any party or person responding to such a request may also designate as “Highly Confidential Information” any “Confidential Information” that it in good faith contends contains such highly sensitive information (e.g., the non-public terms of transportation agreements involving any of the parties, customer-specific traffic, revenue, price or cost information, or traffic and revenue projections) that disclosure to employees or agents of another party, even subject to the restrictions of this Order governing the use and dissemination of “Confidential Information,” could reasonably threaten significant economic or competitive harm to the producing party or person. Except as provided by Paragraph 5, “Confidential Information” and “Highly Confidential Information” as used herein include all such designated responses, any copies, extracts, abstracts or summaries or all or part of such responses, and all or any portion of information contained in such responses.

3. Responses to discovery requests (including workpaper requests) may be designated as “Confidential Information” or “Highly Confidential Information” as follows:

(a) Responses or portions of responses to interrogatories, written deposition interrogatories, requests for admission or workpaper requests may be designated by stamping or printing “Confidential” or “Confidential Information.” or “Highly Confidential” or “Highly Confidential Information,” in the front thereof and, if only portions of the response are to be so designated, clearly marking the confidential or highly confidential portions.

(b) Prior to the production of documents to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they contain “Confidential Information” or “Highly Confidential Information.” Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing “Confidential Information” or “Highly Confidential Information” or stamping “Confidential” or “Confidential Information” on each page containing “Confidential Information,” or stamping “Highly Confidential” or “Highly Confidential Information” on each page

containing “Highly Confidential Information,” and, if only portions of a document page are to be so designated, clearly marking the confidential portions.

(c) A deponent or the attorney for a deponent may designate the deponent’s entire testimony and the transcript thereof to be treated as “Confidential Information” or “Highly Confidential Information” by so requesting on the record prior to the conclusion of the deposition. Such designation shall be effective only until 15 days after the availability of the transcript of the deposition, after which portions of the deposition testimony may be designated “Confidential Information” or “Highly Confidential Information” only by informing each party in writing of the pages, and the portions thereof, that contain “Confidential Information” or “Highly Confidential Information.”

4. If a party or person inadvertently fails to designate discovery or other material as “Confidential Information” or “Highly Confidential Information” in a timely fashion as provided herein, it may make such a designation subsequently by notifying the parties in writing. After receipt of such information, such materials and information shall be treated as if they had been designated in a timely fashion.

5. Any party at any time may by written notice request that the producing party or person cancel the “Confidential Information” or “Highly Confidential” designation of any transcript, document or discovery response or portion thereof. Such request should identify particularly the designated responses it contends should not be treated as “Confidential Information” or “Highly Confidential Information,” provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted ten (10) days after receipt of the request, unless the producing party or person, prior to the end of the ten-day period, sends the requesting party a written denial of the request by telecopier or hand delivery. If such request is denied in whole or in part, the requesting party may file a motion with the Board to have the “Confidential Information” or “Highly Confidential Information” designation removed as to the discovery responses listed in the request. The burden of establishing that the responses should not be afforded the protections of this Order shall be on the moving party.

6. Other than as provided in Paragraph 7 below, “Confidential Information” and “Highly Confidential Information” may only be disclosed to “Authorized Persons.” An “Authorized Person” is a person who, prior to the receipt of any “Confidential Information” or “Highly Confidential Information,” has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and is:

(a) an attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney’s supervision;

(b) a person who is an employee or agent of a party and is actively involved in this proceeding;

(c) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(d) a reporter employed to record depositions;

or who, in the case of "Highly Confidential Information," is:

(x) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(y) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(z) a reporter employed to record depositions.

Each such undertaking by an "Authorized Person" shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such undertaking shall be served upon counsel of record for each party no later than ten (10) days after such undertaking is executed.

7. "Confidential Information" and "Highly Confidential Information" may also be disclosed to:

(a) an employee of the producing party during a deposition of such employee;

(b) a deponent employed by an organization that also employs the person who produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to the deponent; or

(c) any person so authorized either (i) in writing by the party or person that produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to such person, or (ii) by the Board upon motion by any party for good cause.

8. Storage, transmission or communication of "Confidential Information" and "Highly Confidential Information" must be such as to reasonably ensure that the "Confidential Information" and "Highly Confidential Information" will not be disclosed, accidentally or otherwise, to non-authorized persons.

9. No person may be present at a deposition during the discussion of “Confidential Information” or “Highly Confidential Information” who has not been authorized by this Order to review the “Confidential Information” or “Highly Confidential Information” to be discussed. 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.

10. “Confidential Information” and “Highly Confidential Information” may be used by the receiving party, and by any “Authorized Person,” solely for purposes of this proceeding and any directly related proceedings involving judicial review of any Board decision or order in this proceeding, and not for any other purpose whatsoever (including any business or commercial purpose). “Confidential Information” and “Highly Confidential Information” may not be used in any other litigation unless obtained in that litigation.

11. All “Confidential Information” and “Highly Confidential Information” filed with the Board, and any pleading, motion, or other paper filed with the Board that contains or discloses “Confidential Information” or “Highly Confidential Information” shall be filed under seal and kept under seal until further order of the Board. 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 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 this Protective Order.

12. All documents containing “Confidential Information” or “Highly Confidential Information” shall, at the option of the producing party/person, be destroyed or returned to the producing party/person at the termination of this proceeding, including all appeals; provided, however, that outside counsel may retain file copies of any unredacted pleadings and materials filed with the Board or a court.

13. The provisions of this Order that restrict the handling, communication and use of “Confidential Information” and “Highly Confidential Information” shall continue to be binding after the termination of this proceeding, including any related court litigation or judicial appeals, unless the Board or the producing party/person authorizes in writing alternative handling, communication or use of the information.

14. This Order shall not bar or otherwise restrict:

(a) a party or producing person from opposing production of any information under the Board's Rules of Practice;

(b) an "Authorized Person" from making copies, abstracts, digests and analyses of "Confidential Information" and "Highly Confidential Information" for use in connection with this proceeding subject to the requirement that all such copies, abstracts, digests and analyses be treated as "Confidential Information" or "Highly Confidential Information," as the case may be, and clearly marked as such;

(c) an "Authorized Person" from rendering advice or opinions with respect to this proceeding to his or her client or employer based upon his or her examination of "Confidential Information" or "Highly Confidential Information" as long as such person does not disclose the "Confidential Information" or "Highly Confidential Information" itself to a person not authorized by this Order to have access to the "Confidential Information" or "Highly Confidential Information," as the case may be;

(d) a party from using any "Confidential Information" or "Highly Confidential Information" during hearings in this proceeding, subject to any further order of the Board;

(e) a party or purchasing person from using its own "Confidential Information" or "Highly Confidential Information" in any manner it sees fit, or from revealing such "Confidential Information" or "Highly Confidential Information" to whomever it chooses, without the prior consent of any other party or of the Board; and

(f) a party or producing person from applying to the Board at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires.

15. If "Confidential Information" or "Highly Confidential Information" in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such "Confidential Information" or "Highly Confidential Information" on less than four (4) business days' notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

16. Information that is obtained outside of this proceeding shall not be subject to this Order even if the same information is produced and designated as "Confidential Information" or "Highly Confidential Information" in this proceeding.

17. To the extent that “Confidential Information” or “Highly Confidential Information” is produced by a party or other person in this proceeding and held and used by the receiving party in compliance with the terms of this Order, such production, disclosure and use of such “Confidential Information” or “Highly Confidential Information” are deemed essential for the disposition of this proceeding and shall not be deemed a violation of 49 U.S.C. § 11904.

18. This Order shall be effective on the date served.

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____)	
TRAILER BRIDGE, INC.)	
)	
Complainant,)	
)	
v.)	STB Docket No. WCC-104
)	
SEA STAR LINES, LLC)	
)	
)	
Defendant.)	
_____)	

CONFIDENTIALITY UNDERTAKING

I, [Name], am [Position or Job Title], of [Company, Firm or Employer], [Address of Company, Firm or Employer]. I am:

- () an outside attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney’s supervision;
- () an attorney who is a regular employee of a party and is actively involved in this proceeding;
- () a person who is an employee or agent of a party and is actively involved in this proceeding;
- () a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person’s supervision;
- () a court reporter employed to record depositions in the captioned proceeding,

and affirm that I have read and understand the Protective Order served May 10, 2000 in the captioned proceeding, and that I agree to abide by the terms of such Protective Order.

Dated: _____