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SERVICE DATE – MARCH 23, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35602

INDIANA SOUTHERN RAILROAD, LLC—TEMPORARY TRackage RIGHTS
EXEMPTION—NORFOLK SOUTHERN RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: March 22, 2012

By motion filed on March 9, 2012, Indiana Southern Railroad, LLC (ISRR) seeks a protective order under 49 C.F.R. § 1104.14 to protect the highly confidential and commercially sensitive terms and conditions of the unredacted Trackage Rights Agreement (Agreement) between ISRR and Norfolk Southern Railway Company (NSR) submitted by ISRR under seal in this proceeding. Included with the motion are a proposed protective order and undertaking.¹

ISRR submits that a protective order is necessary because the Agreement contains commercially sensitive and highly confidential information that could cause harm to the parties if those terms were made public.

Good cause exists to grant the motion for protective order. The motion 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. Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes. Accordingly, the motion for protective order will be granted, and the Agreement shall be subject to the Protective Order and Undertaking, 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.

¹ Concurrently, ISRR filed a notice of exemption under 49 C.F.R. § 1180.2(d)(8) to obtain temporary overhead trackage rights over approximately 4 miles of NSR's line of railroad between Oakland City Junction, Ind., and Enosville, Ind. ISRR also attached to the notice a redacted version of the Agreement. In addition, ISRR filed a request for waiver of the Board's regulations at 49 C.F.R. § 1180.4(g).

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. The unredacted Agreement submitted in Docket No. FD 35602 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached Undertaking is executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.
3. This decision is effective on its service date.

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

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “Highly Confidential Information” means the unredacted Temporary Trackage Rights Agreement submitted by Indiana Southern Railroad LLC (ISRR) in Docket No. FD 35602.

2. Highly Confidential Information may not be disclosed in any way, directly or indirectly, to any employee of a party to this proceeding or to any other person or entity except to an outside counsel or outside consultant to a party to this proceeding who, before receiving access to such Highly Confidential Information, has been given and has read this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form of the undertaking attached to this Protective Order.

3. Highly Confidential Information 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 35602, any related proceedings before the Board, and/or any judicial review proceedings in connection with Docket No. FD 35602 and/or with any related proceedings.

4. Any documents containing the Highly Confidential Information must be destroyed, and notice of such destruction must be served on ISRR at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom, whichever comes last.

5. If the Board retains the Highly Confidential Information, it shall, in order to keep it highly confidential, treat the information in accordance with the procedures set forth at 49 C.F.R. § 1104.14.

6. If any party intends to use Highly Confidential Information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any document setting forth or revealing such Highly Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such Highly Confidential Information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such Highly Confidential Information in accordance with the Protective Order.

7. A person must file simultaneously a public version of any highly confidential submission it files with the Board.

8. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

I, am outside [counsel] [consultant] for _____ for whom I am acting in this proceeding, have read the Protective Order governing the filing of Highly Confidential Information by Indiana Southern Railroad, LLC (ISRR) in Docket No. FD 35602, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any 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 35602, any related proceedings before the Board, or any judicial review proceeding taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of this Protective Order and has not executed an Undertaking 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 document 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 by employees of my client or its subsidiaries, affiliates, or owners and that at the conclusion of this proceeding (including any proceeding or administrative review, judicial review, or remand). I will promptly destroy any documents designated or stamped as “Highly Confidential” other than copies kept by outside counsel or outside consultants, or pleadings or 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 ISRR shall be entitled to specific performance and injunctive 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: _____

Position: _____

Affiliation: _____

Dated: _____