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SEC

SERVICE DATE - SEPTEMBER 5, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34236

BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.

v.

CSX TRANSPORTATION, INC.

MOTION FOR PROTECTIVE ORDER

Decided: September 4, 2002

In a formal complaint filed, and served on defendant CSX Transportation, Inc. (CSXT), on July 19, 2002, Bolen-Brunson-Bell Lumber Company, Inc. (BBB) alleges that CSXT has failed to provide transportation and service to BBB on reasonable request in violation of 49 U.S.C. 11101(a).<sup>1</sup> BBB seeks a Board order requiring CSXT to cease and desist from such violation and to pay BBB damages in an amount to be determined plus interest to be calculated pursuant to 49 CFR 1141.1.<sup>2</sup>

By joint motion filed on August 16, 2002,<sup>3</sup> CSXT and BBB seek a protective order with respect to evidentiary submissions and in aid of discovery. The proposed order, as set out in the appendix, includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion. 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 a discovery request or otherwise,

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<sup>1</sup> BBB simultaneously filed a petition under 49 U.S.C. 10502(d) for the partial revocation of the exemption for rail shipments of lumber or wood products in Rail Exemption—Lumber or Wood Products, 7 I.C.C.2d 673 (1991).

<sup>2</sup> BBB is located on a line that is the subject of a discontinuance application filed by CSXT on July 10, 2002, in CSX Transportation, Inc.—Discontinuance—at Memphis, in Shelby County, TN, STB Docket No. AB-55 (Sub-No. 618). Notice of that filing was served and published in the Federal Register on July 30, 2002 (67 FR 49387).

<sup>3</sup> A proposed protective order and undertaking were included with the motion.

will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain the confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

On August 16, 2002, CSXT and BBB filed a joint report on their conference, held pursuant to 49 CFR 1111.10(a). They have agreed to the procedural schedule set out below. The procedural schedule will be adopted.

It is ordered:

1. The joint motion for a protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The procedural schedule in this proceeding is as follows:

October 1, 2002	End of discovery period.
October 28, 2002	Opening statements due.
November 18, 2002	Reply statements due.
December 3, 2002	Rebuttal statements due.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

APPENDIX

**PROTECTIVE ORDER**

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party believes in good faith reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

(a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

(b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

(c) At the producing party’s option, must be returned to the producing party or must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, outside counsel (but not outside consultants) for a party are permitted to retain file copies of all pleadings filed with the Board.

(d) If contained in any pleadings filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding in this proceeding. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound

by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use material designated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” 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 any Administrative Law Judge, the Board, or the court with a written request that the Judge, the Board, or the court: (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 the terms of this Protective Order.

6. If any party intends to use material designated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” 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 the material under this Protective Order. All portions of deposition transcripts and/or exhibits that include or disclose such

Confidential and/or Highly Confidential materials shall be kept under seal and treated as Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party, or copies or notes thereof, as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of receipt of actual notice of the release order or within 3 working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.

9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, is shown by any party to warrant suspension of any of the provisions herein.

10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

**UNDERTAKING  
CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on September 5, 2002, governing the production of confidential documents in STB Finance Docket No. 34236, 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 purposes other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34236 or any judicial review proceeding arising therefrom. 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 the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy or return to counsel for the originating party any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided however, that outside counsel (but not outside consultants) may retain file copies of pleadings 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 documents 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.

\_\_\_\_\_

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

**UNDERTAKING  
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served on September 5, 2002, governing the production of confidential documents in STB Finance Docket No. 34236, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising therefrom, that I will take all necessary steps to assure that said documents and information will 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 documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy or return to counsel for the originating party any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided however, that outside counsel (but not outside consultants) may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing highly confidential documents 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.

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OUTSIDE [COUNSEL] [CONSULTANT]

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