

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42098

WILLIAMS OLEFINS, L.L.C. v. GRAND TRUNK CORPORATION

MOTION FOR PROTECTIVE ORDER

Decided: January 5, 2007

On January 4, 2007, Grand Trunk Corporation (GTC), the respondent, filed a motion for a protective order under 49 CFR 1104.14 to protect certain confidential information that the parties may be required to exchange as part of the mediation process provided by the Board in this proceeding. GTC states that it has been authorized by Williams Olefins, L.L.C., the complainant, and by Union Pacific Railroad Company to state that they have reviewed the protective order and consent to its entry by the Board. There are no other participants in the mediation process.

Good cause exists to grant the motion for protective order. 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 unredacted version of any confidential pleadings shall be subject to the Protective Order and Undertaking contained in the Appendix to this decision.¹

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

It is ordered:

1. GTC's motion for a protective order is granted.
2. The Protective Order and Undertakings contained in the Appendix to this decision are adopted.

¹ A proposed protective order and undertaking were included with the motion.

3. 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 (including, for purposes of this Order, Williams Olefins, L.L.C., Grand Trunk Corporation, Union Pacific Railroad Company, and third parties) producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material (Confidential Material) must be treated as confidential. Confidential Material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such material who have a need to know, handle, or review the material for purposes of STB Docket No. 42098, any mediation provided by the Board in connection with STB Docket No. 42098, or any court litigation or judicial review proceeding arising from STB Docket No. 42098 (together, the Proceeding), 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 material.
2. Any party producing material in discovery to another party to this Proceeding, or submitting material in pleadings or evidence, 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.” Material that is so designated (Highly Confidential Material) may be disclosed only to another party’s outside counsel of record in this Proceeding, and to those individuals working with or assisting such counsel, including testifying and consulting experts and their support personnel, who are not regular employees of the party and have a need to know, review, or handle the Highly Confidential Material for purposes of the Proceeding, provided each such person 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 Highly Confidential Material prior to receiving access to such materials.
3. Each Undertaking for Confidential Material and Undertaking for Highly Confidential Material executed by a person authorized to receive access to Confidential Material or Highly Confidential Material must be kept for the duration of this Proceeding, and a copy of each such Undertaking must be served upon counsel of record for each party no later than 10 days after such Undertaking is executed.
4. Confidential Material and Highly Confidential Material may be used by a receiving party solely for the purpose of this Proceeding and may not be used for any other business, commercial, or competitive purpose.

5. Confidential Material and Highly Confidential Material that is not the receiving party's own data, information, or documents, and any data or notes derived therefrom, must be destroyed by the receiving party, its employees, counsel, and agents at the completion of this Proceeding, except that: (1) outside counsel for each party may retain file copies of all pleadings and evidence filed with the Board (including any mediator conducting mediation under authority of the Board); and (2) in-house counsel for each party may retain file copies of all pleadings and evidence which they received during the course of this Proceeding.
6. If a party files any pleading or evidence with the Board that contains Confidential Material or Highly Confidential Material, the party must file the pleading or evidence in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" or "Highly Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.
7. 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 parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation must 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, and must make all reasonable efforts to recover such material from any third parties to which it may have been disclosed, and any copies made by such third parties. The producing party must promptly furnish the receiving party with properly designated material.
8. 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 must 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.
9. If any party intends to use Confidential Material and/or Highly Confidential Material at a hearing or mediation session in this Proceeding, the party so intending must submit any proposed exhibits or other documents setting forth or revealing such Confidential Material and/or Highly Confidential Material to the Administrative Law Judge presiding at the hearing, the Board, the court, or the mediator, with a written request that the Administrative Law Judge, the Board, the court, or the mediator: (a) restrict attendance at the hearing during discussion of such Confidential Material and/or Highly Confidential Material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such

Confidential Material and/or Highly Confidential Material in accordance with the terms of this Protective Order.

10. If any party intends to use Confidential Material and/or Highly Confidential Material in the course of any deposition in this Proceeding, the party so intending must so advise counsel for the party producing the material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any such Confidential Material 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 consist of or disclose Confidential Material and/or Highly Confidential Material shall be kept under seal and treated as Confidential Material and/or Highly Confidential Material in accordance with the terms of this Protective Order.
11. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a party in this Proceeding 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 shall be deemed essential for the disposition of this Proceeding and shall not be deemed a violation of 49 U.S.C. 11904.
12. If a party is required by law or order of a governmental or judicial body, other than in this Proceeding, to release Confidential Material 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 must notify the producing party in writing 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.
13. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.
14. Information that is publicly available or obtained outside of this Proceeding from a person with a right to disclose it is not subject to this Protective Order, even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this Proceeding.
15. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate decision of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.
16. Each party has a right to view its own data, information, and documentation (*i.e.*, information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY

CONFIDENTIAL” by a producing party, without securing prior permission from the producing party.

17. If a party (the filing party) files and serves upon the other party (the reviewing party) a pleading or evidence containing the filing party’s Confidential Material and Highly Confidential Material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “NON-CONFIDENTIAL” version from which the filing party’s Confidential Material and Highly Confidential Material has been redacted, and a “CONFIDENTIAL” version from which the filing party’s Highly Confidential Material has been redacted. The “NON-CONFIDENTIAL” and “CONFIDENTIAL” versions may be provided in hard copy or electronic format at the option of the filing party. The “CONFIDENTIAL” version may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (In-House Personnel).
18. Any party filing a pleading with the Board that contains Confidential Material or Highly Confidential Material must simultaneously file with the Board a public version of the pleading.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on January 5, 2007, governing the production of confidential documents in STB Docket No. 42098 (including the mediation provided by the Board), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to 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 Docket No. 42098, in a mediation provided by the Board in connection with STB Docket No. 42098, or in a judicial review proceeding arising from STB Docket No. 42098. I further agree not to disclose any confidential 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 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 may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. 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 January 5, 2007, governing the production of confidential documents in STB Docket No. 42098 (including the mediation provided by the Board), 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 the preparation and presentation of evidence and argument in STB Docket No. 42098, in a mediation provided by the Board in connection with STB Docket No. 42098, or in a judicial review proceeding arising from STB Docket No. 42098, that I will take all necessary steps to ensure 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, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy 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 may retain file copies of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party 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 a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. 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: _____