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SERVICE DATE – JULY 29, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42105

DAIRYLAND POWER COOPERATIVE
v.
UNION PACIFIC RAILROAD COMPANY

Decided: July 25, 2008

In this proceeding, Dairyland Power Cooperative (Dairyland) challenges fuel surcharges collected by Union Pacific Railroad Company (UP) between January 2006 and February 2008 as an unreasonable practice under 49 U.S.C. 10702(2). Dairyland seeks the prescription of reasonable fuel surcharge practices and monetary damages under 49 U.S.C. 11704(b). In this decision, we deny UP's motion to dismiss the complaint and clarify the permissible contours of such a complaint. We also issue a procedural schedule, lift a prior protective order granted to UP, and grant Dairyland a protective order to facilitate discovery.

BACKGROUND

The Board's General Policy Concerning Rail Fuel Surcharges

In 2006, the Board initiated an inquiry into rail carrier practices related to fuel surcharges.¹ At a public hearing held in May 2006, shippers expressed deep dissatisfaction with the railroad industry's methods of assessing fuel surcharges. Although shippers recognized that railroads are entitled to recover the increased costs they incur due to the rising price of fuel, most took issue with the manner in which railroads were assessing fuel surcharges—as a percentage of the base rate.

In August 2006, the Board tentatively concluded that “railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of fuel attributable to the movement involved.”² The Board sought comment on a proposed requirement that rail fuel surcharges be tied not to the level of the base rate, but rather to those attributes of a movement,

¹ Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Mar. 14, 2006).

² Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 4-5 (STB served Aug. 2, 2006).

such as mileage or mileage and weight, that directly affect the amount of fuel consumed or otherwise have “a reasonable nexus to the fuel consumption for the movement involved.”³

After considering numerous written comments, the Board issued a final decision in January 2007 in which it determined that it is an unreasonable practice to compute a fuel surcharge as a percentage of the base rate. Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 6 (STB served Jan. 26, 2007) (Fuel Surcharges). Noting that railroads employ differential pricing, under which rates depend on factors other than cost, we explained that a fuel surcharge that is tied to the base rate could not fairly be described as merely a cost recovery mechanism. Id. at 6. We explained that the term “fuel surcharge” most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. Id. at 6-7. If a “fuel surcharge” is used as a broader revenue enhancement measure, it is mislabeled. Id. at 7. In other words, if there is no “real correlation” between the surcharge and the increase in fuel costs for the particular movement to which the surcharge is applied, then it is a misleading and ultimately unreasonable practice. Id.

The Board acknowledged that many factors other than mileage and weight can affect fuel costs. Id. at 8. But the Board was satisfied that even a mileage-based fuel surcharge, “although not perfect, more closely tracks changes in fuel costs for an individual shipper than does a rate-based fuel surcharge.” Id. at 9. Moreover, railroads were free to incorporate into their fuel surcharge calculation as many factors affecting fuel consumption as they wished. Id. However, any fuel surcharge program “must be based upon attributes of a movement that directly affect the amount of fuel consumed. In other words, there must be a reasonable nexus to fuel consumption.” Id.

The Board explained that it was not limiting the total amount that a rail carrier can charge for providing rail transportation through a combination of base rates and surcharges. Id. Rather, it was only addressing “the manner in which railroads apply what they label a fuel surcharge.” Id. Moreover, the Board made clear that it was “not addressing any individual railroad’s fuel surcharge program.” Id. at 7-8. Instead, it was adopting rules of general applicability to govern future conduct. Id. at 8.

The Board specifically declined to make its findings retroactive. Given the long history of rate-based fuel surcharges and a decision by the Board’s predecessor in the 1970s not to mandate a mileage-based fuel surcharge, the Board observed that railroads could not be faulted for assuming that rate-based fuel surcharges were permissible. Id. The Board gave carriers 3 months to change their fuel surcharge programs.

³ Id.

This Case⁴

Dairyland is a not-for-profit generation and transmission utility based in La Crosse, WI, that provides wholesale electricity for 25 electric distribution cooperatives and 18 municipalities that, in turn, supply energy to more than half a million people in five Midwestern states. Dairyland owns and operates three coal-fired generating stations.

For many years, pursuant to negotiated contracts, UP transported coal for Dairyland from the Wyoming Powder River Basin (PRB) to Mississippi River terminals for movement beyond by barge to two of Dairyland's generating stations. When the last such contract expired in 2005, UP declined to extend the contract or negotiate a new one. Instead, UP offered only common carrier service with common carriage rates. Those rates included a fuel surcharge component that was originally calculated as a percentage of the base rate.

In response to the Fuel Surcharges decision, beginning on April 26, 2007, UP applied a mileage-based fuel surcharge to the line-haul freight charges paid by Dairyland for the transportation of PRB coal to the Mississippi River. The new fuel surcharge is calculated on the number of miles and number of cars used to handle traffic for Dairyland.

Between January 1, 2006, and February 2008, UP collected over \$4.5 million from Dairyland in fuel surcharge payments on its PRB traffic. Dairyland claims that these payments exceeded the incremental fuel cost increases UP actually incurred in handling this traffic during that time period, and it filed a complaint on March 5, 2008, challenging the surcharges as an unreasonable practice.

UP filed an answer on March 25, 2008. It also filed a motion to dismiss Dairyland's complaint, on March 31, 2008, on the grounds that (1) Dairyland cannot challenge the level of the surcharges through an unreasonable practice claim; and (2) the Board's decision in Fuel Surcharges precludes claims that a mileage-based fuel surcharge program constitutes an unreasonable practice and precludes claims for damages allegedly resulting from UP's former (rate-based) fuel surcharge program.

On April 2, 2008, Dairyland filed both a report on the parties' conference to discuss procedural and discovery matters and a motion for a protective order. Dairyland requested that the Board adopt its proposed procedural schedule and sought a protective order to facilitate the

⁴ In recounting the background of this dispute, we draw on Dairyland's complaint, assuming without deciding at this early stage of the proceeding that its factual allegations are true. See Philadelphia Belt Line Railroad Company v. Consolidated Rail Corporation, CP Rail System, and CSX Transportation, Inc., STB Finance Docket No. 32802, slip op. at 6 (STB served July 2, 1996). We note, however, that to obtain any relief, Dairyland will have to prove all of the relevant factual elements of its case under the guidelines set forth here.

potential exchange and use of commercially sensitive material in this case. On April 4, 2008, UP filed a response to Dairyland's report, asking the Board not to adopt a schedule before it rules on UP's motion to dismiss. On the same date, UP filed a motion for a protective order, asking the Board to quash Dairyland's discovery requests and to stay all further discovery pending the Board's decision on its motion to dismiss. On April 11, 2008, Dairyland replied in opposition to UP's motion to dismiss and to UP's request for a protective order.⁵

By decision served April 29, 2008, the Board granted UP's motion for a protective order to shield UP from discovery for the time being and held in abeyance action on Dairyland's requests for a procedural schedule and for a protective order that would facilitate discovery, pending the Board's ruling on UP's motion to dismiss.

Positions of the Parties

In its motion to dismiss, UP first argues that Dairyland may not challenge the level of UP's fuel surcharge through an unreasonable practice claim. UP maintains that, if Dairyland wishes to challenge the fuel surcharge levels, it must file a rate complaint, rather than attempting to frame a rate challenge as an unreasonable practice complaint, which the railroad argues is precluded by Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989) (Union Pacific). UP further argues that, to the extent Dairyland's complaint does challenge UP's fuel surcharge practice rather than the fuel surcharge levels, it still must be dismissed because of the Board's decision in Fuel Surcharges not to apply its findings retroactively. Finally, UP argues that its mileage-based fuel surcharge program cannot be found unreasonable because the Board indicated in Fuel Surcharges that mileage-based programs have a reasonable nexus to fuel consumption.

In response, Dairyland maintains that it is not challenging the total amount UP is collecting but, rather, is alleging that UP is collecting fuel surcharges that misleadingly exceed actual fuel cost increases. According to complainant, railroads cannot lawfully collect rail fuel surcharges that exceed "movement-specific incremental fuel cost increases." Dairyland reads Fuel Surcharges as allowing it to challenge UP's past fuel surcharge program on grounds other than those proscribed in the decision, and as permitting it to challenge UP's current mileage-based fuel surcharge as an unreasonable practice.

⁵ On May 20, 23, and 28, 2008, UP filed letters supplementing its motion to dismiss. On May 27, 2008, Dairyland also filed a letter supplementing its position. Because these filings constitute impermissible replies to replies under Board rules at 49 CFR 1104.13(c), they will not be accepted or considered.

DISCUSSION AND CONCLUSIONS

Motions to dismiss are disfavored and rarely granted.⁶ Under 49 U.S.C. 11701(b), the Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” On the record before us, UP has not shown that Dairyland’s complaint offers no reasonable basis for further Board consideration. At page 2 of its April 11 reply, Dairyland states that it plans to “present substantial evidence demonstrating that UP is unlawfully utilizing its rail fuel surcharge procedures to extract substantial profits on the issue traffic.” If so, that could in turn call into question the reasonableness of UP’s fuel surcharge program, and thus we cannot find at this point that there are no reasonable grounds for further investigation. We therefore will deny the motion to dismiss. But because Dairyland’s underlying rationale as initially presented is not properly developed, we will take this opportunity to clarify the permissible issues in this proceeding for guidance to the parties.

Dairyland’s principal argument is that UP’s fuel surcharge programs—both the rate-based version and the mileage-based version—constitute unreasonable practices because they resulted in fuel surcharge revenues charged to Dairyland that exceed UP’s incremental fuel cost increases incurred in providing rail service to Dairyland. But to demonstrate an unreasonable practice, Dairyland may not base its case only on the *level* of the fuel surcharge as applied to itself. As the court explained in Union Pacific, where “the so-called ‘practice’ is manifested *exclusively* in the level of rates . . . ,” it must be regulated under the Board’s jurisdiction over unreasonable rates, rather than its jurisdiction over unreasonable practices.⁷ Union Pacific, 867 F.2d at 649. To order a refund only because the fuel surcharge payments collected from Dairyland exceeded the carrier’s incremental fuel costs incurred in handling Dairyland’s traffic would cross that boundary and impermissibly regulate rate levels, contrary to Union Pacific.

There are also practical reasons why we cannot expect a precise match between fuel surcharge revenues and increased fuel costs for any one shipper. Practicably, we cannot require railroads to incorporate every conceivable factor that could affect fuel costs into a formula that would yield an exact match. Fuel Surcharges at 9. We require only that any fuel surcharge program a railroad uses “must be based on attributes of a movement that directly affect the amount of fuel consumed.” Id.

⁶ See Garden Spot & Northern Limited Partnership and Indiana 4 Rail Corp. – Purchase and Operate – Indiana Rail Road Co. Line Between Newton and Browns, IL, Finance Docket No. 31593, slip op. at 2 (ICC served Jan. 5, 1993).

⁷ Dairyland makes clear that it is not invoking the Board’s maximum rate jurisdiction (and thus has not made any attempt to establish UP’s market dominance), but rather is seeking relief under the Board’s unreasonable practice jurisdiction. Dairyland’s Reply in Opposition to UP’s Motion to Dismiss at 8, n.8.

Accordingly, when a complainant challenges a carrier's fuel surcharge program as an unreasonable practice, it must show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied. By way of example, a complainant might challenge the factors used to calculate the surcharge on the ground that they are not attributes of a movement that directly affect the amount of fuel consumed. A complainant also could seek to challenge the weights given to those factors. That is, a complainant might try to show that the general formula produces fuel surcharges that do not reasonably track changes in aggregate fuel costs incurred. We offer these examples to illustrate the kinds of evidence a complainant could present to challenge a carrier's fuel surcharge practice. There may be other features in a particular case that would bear on the reasonableness of a particular fuel surcharge program. But we reiterate that evidence that the fuel surcharge collected from a complainant exceeds the actual incremental cost of fuel incurred in providing rail service to a complainant will not *by itself* demonstrate an unreasonable practice.

We next address UP's argument that our decision in Fuel Surcharges precludes any challenge to a mileage-based fuel surcharge program. This is incorrect. Because mileage is one of the primary factors that affects fuel consumption, we explained that a mileage-based fuel surcharge program should more closely track changes in fuel costs for individual shipments than a rate-based fuel surcharge. Id. at 9. But, while we stated that mileage was a better indicator of fuel consumption than is a percentage of the rate, we did not rule out the possibility that a mileage-based fuel surcharge could be unreasonable if it is calculated in a manner that bears no reasonable relation to fuel consumption. While some fuel surcharge programs based on mileage may be reasonable, a fuel surcharge program is not automatically reasonable merely because it is mileage-based.

In Fuel Surcharges we specifically declined to make our findings with respect to rate-based fuel surcharges retroactive in view of the long history of rate-based fuel surcharges in the rail industry. Id. at 10. But it is possible that the same fuel surcharge program could be challenged as an unreasonable practice on other grounds, subject to the 2-year limitations period set forth in 49 U.S.C. 11705(c). For example, if UP had engaged in "double dipping"—by both imposing a rate-based fuel surcharge and raising the base rate by an index that incorporated changes in fuel costs—Dairyland could challenge the surcharge on that ground.

With these clarifications, we will deny UP's motion to dismiss and allow this proceeding to go forward. We will also adopt a procedural schedule that largely incorporates the time frames proposed by Dairyland, as set forth in Appendix A. Also, in light of our action here, we will lift the protective order granted in the April 29, 2008 decision that quashed Dairyland's discovery requests and stayed discovery pending a ruling on the motion for dismissal. Dairyland is reminded, however, that it may only "obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter" involved in this proceeding, as clarified here. See 49 CFR 1114.21.

Finally, we will grant Dairyland's motion for a protective order to facilitate discovery. The motion 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 solely for this proceeding and not for other purposes. Accordingly, the motion for protective order will be granted, and the protective order and undertakings contained in Appendix B to this decision will be adopted.⁸

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

It is ordered:

1. UP's motion to dismiss is denied.
2. The procedural schedule set forth in Appendix A to this decision is adopted.
3. The protective order in the decision served April 28, 2008, in this proceeding is lifted to permit discovery to proceed.
4. Dairyland's motion for a protective order is granted, as modified here, and the protective order and undertakings in Appendix B to this decision are adopted.
5. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

⁸ A proposed protective order and undertakings were included with the motion.

APPENDIX A

PROCEDURAL SCHEDULE

August 5, 2008	Discovery Begins
September 12, 2008	End of Discovery
October 14, 2008	Dairyland Opening Statement Due
November 12, 2008	UP Reply Statement Due
December 1, 2008	Dairyland Rebuttal Statement Due

APPENDIX B

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes 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 herefrom, 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 herefrom, 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) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.
 - (d) If contained in any pleading 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 over 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 herefrom, 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 nondesignated 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 “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, as appropriate, 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 “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 the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other rail transportation and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts are relevant in preparing their evidence in this proceeding. Any such contracts shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. 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 “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 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 the opportunity 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, warrants 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.
11. 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. 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 “HIGHLY CONFIDENTIAL” material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party's “HIGHLY CONFIDENTIAL” material has been redacted. The “CONFIDENTIAL” version may be provided in hardcopy or electronic format at the option of the filing party, and 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”). Alternatively, in lieu of preparing and serving a “CONFIDENTIAL” version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party's own “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by the reviewing party's In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the “HIGHLY CONFIDENTIAL” version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

12. When a Confidential Document or Confidential Information is filed with the Board, the filing party must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all “highly confidential” information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review submission.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on July 29, 2008, governing the production of confidential documents in STB Docket No. 42105, 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 Docket No. 42105 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 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 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 July 29, 2008, governing the production of confidential documents in STB Docket No. 42105, 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 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 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 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.

OUTSIDE [COUNSEL][CONSULTANT]

Dated: _____