

**BEFORE THE  
SURFACE TRANSPORTATION BOARD****ENTERED  
Office of Proceedings  
May 22, 2012  
Part of Public Record**

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**STB Finance Docket No. 35622****STEELRIVER INFRASTRUCTURE PARTNERS LP,  
STEELRIVER INFRASTRUCTURE ASSOCIATES LLC,  
STEELRIVER INFRASTRUCTURE FUND NORTH  
AMERICA LP and PATRIOT FUNDING LLC****—CONTROL EXEMPTION—****PATRIOT RAIL CORP., ET AL.**

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**SIERRA'S OPPOSITION TO MOTION TO MODIFY PROTECTIVE ORDER  
AND REQUEST FOR HOUSEKEEPING STAY TO RESOLVE  
PROTECTIVE ORDER ISSUES**

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Sierra Railroad Company and Sierra Northern Railway (“SERA”) (collectively, “Sierra”) hereby file this opposition to the Motion to Modify Protective Order filed on May 21, 2012, by SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, Steel River Infrastructure Fund North America LP, and Patriot Funding LLC (collectively “SteelRiver”) and Patriot Rail Corp. (“Patriot”). For the reasons set out below, the restrictions proposed by SteelRiver and Patriot on access to Highly Confidential Information would make it impossible for Sierra to obtain informed advice from counsel regarding the position Sierra should take on the proposed acquisition of control that is the subject of this proceeding. As an alternative to the overly restrictive access conditions proposed by SteelRiver and Patriot, Sierra proposes a procedure for determining what portions of the unredacted May 4, 2012 Stock Purchase Agreement (the “SPA”) can be treated as Confidential and shared with Sierra’s management and what portions should be treated as Highly Confidential. That procedure should include a short

housekeeping stay to give the Board and the parties an opportunity to resolve the protective order issues and to make appropriate filings regarding issues related to the proposed exemption after the protective order issues have been resolved.

## **I. BACKGROUND**

On May 7, 2012, SteelRiver and Patriot filed with the Board a Verified Notice of Exemption, seeking to exempt from the prior approval requirements of 49 U.S.C. §§ 11323-11325 a transaction in which SteelRiver would acquire control of Patriot and its rail carrier subsidiaries. One of those subsidiaries is Sacramento Valley Railroad, LLC (“SAV”), which is a competitor of SERA. The Notice indicates that the transaction will be consummated on or after June 6, 2012, which is the effective date of the exemption. SteelRiver and Patriot filed under seal in support of their Notice an unredacted version of the May 4, 2012 Stock Purchase Agreement governing the acquisition of Patriot and its rail carrier subsidiaries. The public version of the SPA is heavily redacted and does not contain any of the attachments to the SPA. SteelRiver and Patriot also filed with the Board a proposed Protective Order that designated the SPA as Confidential Information and would have allowed any party to access the unredacted SPA so long as the party signed the Undertaking attached to the Protective Order. The original Protective Order proposed by SteelRiver and Patriot did not include a provision for Highly Confidential Information.

On May 18, 2012, Sierra filed a Motion for Access to Materials Filed Under Seal (“Motion for Access”). Sierra explained in its Motion for Access that, since 2008, Sierra and Patriot have been involved in a dispute in federal court in California as to whether Patriot wrongfully used Sierra’s confidential information to unfairly compete with SERA for business serving the McClellan Business Park, an industrial business park in California. Sierra is seeking

damages from Patriot that could amount to \$100 million and Sierra is also seeking injunctive relief that would enable Sierra to continue serving McClellan Business Park. When Sierra learned of the proposed acquisition of Patriot by SteelRiver, Sierra became concerned that Patriot may be misusing the Board's exemption procedures to preclude effective review by both the California federal court and the Board of the impact of Patriot's anti-competitive conduct on SERA's common carrier rights. Sierra explained to the Board in its Motion for Access that access to the unredacted SPA was necessary for Sierra to determine whether Sierra's concerns are justified and, if so, whether to seek to stay or revoke the exemption.

On May 18, 2012, the Board issued the Protective Order that had been proposed by SteelRiver and Patriot. The Board also granted Sierra's request for access to the unredacted SPA under the terms of the Protective Order. On May 21, 2012, SteelRiver and Patriot filed their Motion to Modify Protective Order, which seeks to include new provisions for access to Highly Confidential Information. Under the proposed modification, the redacted portions of the SPA would be treated as Highly Confidential Information, and the only persons to whom access would be provided are a party's "outside STB counsel or outside STB consultant." Mot. to Modify Prot. Order, Ex. 1, ¶ 5. Under the proposed modification, Sierra's outside counsel in the federal court action, Sierra's inside counsel, and all of Sierra's other executive management personnel who need to provide instructions to Sierra's counsel, including its STB counsel, would be denied access to the unredacted portions of the SPA. Sierra's outside counsel, including its STB counsel, would also under the proposed modification be prohibited from explaining to Sierra's executive management the basis for any recommendations they might make as to this matter.

## **II. ARGUMENT**

Sierra explained in its Motion for Access the grounds for its concern that Patriot may be misusing the Board's exemption procedures to insulate Patriot's anti-competitive conduct from any review by either the California federal court or the Board. Patriot has argued in the federal court proceedings in California that the court lacks jurisdiction to protect Sierra's common carrier rights in any sale of Patriot because the Board has exclusive jurisdiction over the transaction. At the same time, Patriot and SteelRiver, through their new proposed restrictions, also seek to preclude a full review by the Board of the impact of the sale of Patriot on Patriot's competitor SERA by preventing Sierra from having full access to the information it needs to address the competitive issues raised by the proposed sale.

Patriot's Motion asks the Board to treat all of the redacted portions of the SPA as Highly Confidential Information that would be available only to Sierra's outside STB counsel. But Sierra's STB counsel is not in a position to advise Sierra on the impact of the sale of Patriot on the rights that Sierra is pursuing in the California federal court action. Sierra's STB counsel is not involved in the federal court action. Indeed, there is a protective order in the federal court action that prevents Sierra's STB counsel from accessing any confidential information from the federal court action. The protective order from the California action is attached as Exhibit 1 to this pleading. At a minimum, Sierra's outside counsel in the federal court action would need access to the SPA in order to understand the impact of the proposed sale of Patriot on Sierra's rights in the federal court action.

However, even if Sierra's outside STB and California counsel are permitted to have access to the unredacted SPA, Sierra's inside counsel, Torgny Nilsson, and members of Sierra's executive management need information about the proposed sale to be able to assess the impact of the sale on Sierra's rights as a competitor to one of Patriot's rail carrier subsidiaries and to be

in a position to take an appropriate position regarding the sale of Patriot in this proceeding before the Board. The Board has adopted protective orders in the past that include provisions barring employees of a party from accessing Highly Confidential Information, but in those cases the employees did not generally need to access the Highly Confidential Information to make litigation decisions in the STB proceeding. Here, the protected information goes to the core of the issue in this proceeding, which is whether the proposed sale is being used to shield Patriot/SAV from responsibility for anti-competitive conduct or whether the transaction will otherwise permanently frustrate Sierra's ability to compete for business of the McClellan Business Park. Sierra emphasizes that the purpose of allowing its management personnel to review relevant unredacted portions of the SPA is not so that the information can be used in the federal court action. Instead, Sierra's management needs access to information contained in the SPA to decide whether to seek relief in this proceeding and, if so, what relief to pursue.

It is possible that some of the redacted information in the SPA warrants treatment as Highly Confidential Information, and that the proposed restrictions on access to that Highly Confidential Information would not interfere with Sierra's ability to make decisions about how to litigate in this proceeding. However, Patriot's proposed modification to the Protective Order would treat the entirety of the redacted portions of the SPA as Highly Confidential Information. Therefore, Sierra proposes that the Board establish a procedure that will enable the parties jointly to determine the proper classification of the redacted SPA materials as either Confidential Information or Highly Confidential Information.

First, the Board should modify the Protective Order as proposed by SteelRiver and Patriot but specify that Sierra's outside counsel in both the STB proceeding and the California federal court action will be entitled to access Highly Confidential Information.

Second, the Board should instruct the parties to participate in a technical conference sponsored by the Board for the purpose of determining whether some portions of the Highly Confidential Information in the SPA need to be reclassified as Confidential Information so that Sierra's management can make an informed decision as to whether Sierra should seek to revoke or stay the exemption. The technical conference should be held a week after the Highly Confidential Information is provided to Sierra's outside counsel. Participation by the Board in the technical conference will facilitate discussion and prompt resolution of any disputes.

Third, the Board should enter a housekeeping stay to give the Board and the parties an opportunity to resolve the protective order issue and for the parties to make appropriate filings regarding issues related to the proposed exemption after the protective order issues have been resolved. Under the Board's regulations, a petition to stay the proposed sale of Patriot would be due by May 30, 2012. It is highly unlikely that the parties will be able to resolve the protective order issues quickly enough to meet that regulatory deadline. A short housekeeping stay will give the Board and the parties time to address the issues raised by Patriot's proposed modification of the protective order.<sup>1</sup>

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<sup>1</sup> SteelRiver and Patriot assert that a housekeeping stay is inappropriate because "Sierra is solely to blame" for any delay. Mot. to Modify Prot. Order at 4. In fact, the delay in resolving issues related to access to confidential information is not caused by Sierra but by Patriot's pending request to modify the protective order that Patriot itself originally asked the Board to enter and with which Sierra is prepared to abide. Moreover, Patriot's claim that Sierra could have gained immediate access to the unredacted SPA is belied by Patriot's current efforts to restrict access to the SPA.

### III. CONCLUSION

For the reasons stated above, the Board should deny SteelRiver and Patriot's Motion to Modify Protective Order. Instead, the Board should establish a procedure for resolving disputes over the proper classification of information contained in the SPA and enter a housekeeping stay to give the Board and the parties time to resolve the Protective Order issues.

Respectfully submitted,

Torgny R. Nilsson  
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(202) 429-3000

Dated: May 22, 2012

*Attorneys for Sierra Railroad Company and  
Sierra Northern Railway*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2012, I caused a copy of the foregoing to be served by e-mail and first-class mail, postage prepaid, upon all parties of record in this case as follows:

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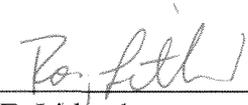
  
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Roy E. Litland

Exhibit 1

1 GREENBERG TRAUIG, LLP  
 2 GRACE J. BERGEN (SBN 114649)  
 3 LISA L. HALKO (SBN 148873)  
 4 SARAH W. ASPLIN (SBN 260851)  
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6 Attorneys for Plaintiff and Counter defendant  
 7 PATRIOT RAIL CORP.

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 9 **UNITED STATES DISTRICT COURT**  
 10 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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 12 PATRIOT RAIL CORP., a Delaware  
 13 Corporation,

14 Plaintiff,

15 v.

16 SIERRA RAILROAD COMPANY, a  
 California corporation

17 Defendant.

18 And related Counterclaim.  
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CASE NO. 2:09-CV-00009-MCE-EFB

**STIPULATION FOR  
 PROTECTIVE ORDER**

20 PATRIOT RAIL CORP., the plaintiff and counter defendant and SIERRA  
 21 RAILROAD COMPANY, the defendant and counterclaimant enter into this stipulation,  
 22 through their counsel, so that the parties may exchange information that contains trade  
 23 secret, commercially sensitive, and confidential information.

24 **THE PARTIES AGREE AND IT IS HEREBY ORDERED** that a protective  
 25 order is granted on the following terms:

26 1. Litigation Information produced or exchanged in the course of this case  
 27 may be used only for the purposes of this litigation.

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1           2.     “Litigation Information” includes, without limitation, any information  
2 obtained by either party from the other party in the course of this litigation. Litigation  
3 Information includes, but is not limited to, information produced during formal or  
4 informal discovery, including depositions, and information produced during formal or  
5 informal settlement discussions. Litigation Information does not include information in  
6 the public domain or information that is not obtained through litigation in this action. A  
7 party need not designate Litigation Information produced or exchanged, either by  
8 stamping, marking, or otherwise identifying the document or information as  
9 “Confidential” or “Litigation Information” for the protections of this Stipulation to  
10 apply to it.

11           3.     This Stipulation will remain in place in full force and effect unless  
12 modified by Court Order, or written agreement of the Parties. The provisions of the  
13 Stipulated Protective Order shall survive and remain in full force and effect after the  
14 conclusion of this case (including any appellate proceedings) in this case, whether by  
15 settlement or entry of final judgment.

16           4.     Litigation Information must be made available only to:  
17           a.     Parties to this action;  
18           b.     Attorneys of record in this litigation and employees of such counsel  
19                 to whom it is necessary that the material be shown for the purposes  
20                 of this litigation;  
21           c.     Third parties employed by a party, or its attorneys of record, solely  
22                 for the purpose of assisting in preparation for trial (e.g., retained  
23                 experts) after executing the Stipulation to be bound by the  
24                 Stipulated Protective Order attached hereto as Exhibit A;  
25           d.     Court personnel and any stenographic reporters engaged in this  
26                 action; or  
27           e.     A mediator or neutral person hired by the parties or appointed by  
28                 the Court to assist in resolution of this litigation.

1           5.       Subject to the Federal Rules of Evidence, the parties may offer Litigation  
2 Information in evidence in the course of this litigation.

3           6.       The parties do not waive their rights to object to producing any document,  
4 responding to any interrogatory, or request for admission, or the disclosure of any  
5 information by any means in discovery in this matter.

6           7.       Counsel for each party must take reasonable precautions with regard to  
7 storage, custody, and use to prevent the unauthorized or inadvertent disclosure of any  
8 Litigation Information.

9           8.       This Stipulation for Protective Order may be executed in counterparts, and  
10 by means of facsimile or portable document format (.pdf), which taken together shall be  
11 deemed to constitute one document.

12          9.       This Stipulation shall apply to all Litigation Information produced or  
13 exchanged prior to the date of execution of this Order, on that date and after that date.

14          10.      A Party may seek an order of the Court to enforce the terms of this  
15 Stipulation. Even if no such Court order is sought, the Stipulation shall be binding on  
16 all Parties.

17          11.      This Court retains jurisdiction, both before and after the entry of final  
18 judgment in this case (whether by settlement or litigation), to construe, enforce and  
19 amend the provisions of this order.

20                 The undersigned, acting for, on behalf of, and with the full authorization of his or  
21 her client identified below, joins in the attached Stipulation for Protective Order.

22 Dated: May 14, 2009

GREENBERG TRAURIG, LLP

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By: Sarah W. Asplin (as authorized on 5/14/09)

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Sarah W. Asplin

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Attorneys for Plaintiff and Counter defendant,  
PATRIOT RAIL CORP.

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Dated: May 14, 2009

WEINTRAUB GENSHLEA CHEDIAK

By: Louis A. Gonzalez, Jr. (as authorized on  
5/14/09)

Louis A. Gonzalez, Jr.

Anthony B. Daye

W. Scott Cameron

Attorneys for Defendant and Counterclaimant,  
SIERRA RAILROAD COMPANY

**IT IS SO ORDERED:**

**DATED:** May 20, 2009

  
MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE

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**EXHIBIT A**  
**STIPULATION TO BE BOUND BY**  
**STIPULATION FOR PROTECTIVE ORDER**

I hereby certify that I have reviewed and understand the attached Stipulation for Protective Order entered into between Plaintiff Patriot Rail Corp. and Defendant Sierra Railroad Company and that I, being a person covered under paragraph 5(c) or 5(f) of that Stipulation, agree to comply with the terms of the Stipulation and to submit to the jurisdiction of the United States District Court for the Eastern District of California should I violate the terms of that Stipulation.

I further certify that I am authorized to sign this Stipulation on behalf of any entity listed below in which I am employed and, in doing so, bind not only myself, but also all other personnel of such entity to whom it is necessary that the material be shown and/or shared for the purposes of this litigation, and that I will take reasonable steps to ensure compliance by such other personnel with this Stipulation.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name of Signatory

\_\_\_\_\_  
Name of Employer

\_\_\_\_\_  
Address