

1. NAFCA filed its Complaint in this case on October 9, 2012. The defendants¹ filed their Answers to the Complaint on December 10, 2012 pursuant to the Board's decision of November 30, 2012 disposing of the defendants' request for an indefinite stay of the proceeding.

2. Pursuant to the Board's procedural regulations at 49 C.F.R. §1111.10, the parties conferred on discovery and procedural matters and, on December 28, 2012, submitted a Joint Report to the Board on the status of their discussions. In paragraph 3 of the Joint Report, the parties informed the Board that they had discussed, but had not yet agreed upon, all of the terms of a proposed protective order governing the exchange of confidential and highly confidential information in this case. The parties reported further that "they anticipated filing either a joint motion for protective order, or separate filings asking the Board to resolve certain issues on this matter, in the near future."

3. Subsequent discussions by the parties' counsel resulted in NAFCA and defendant Association of American Railroads ("AAR") reaching agreement on most of the terms of a protective order for this case. Some of the parties' discussions included the extent to which some in-house counsel or non-lawyer personnel of the parties would be able to review material designated Highly Confidential. However, final agreement between NAFCA and all defendants on such access could not be obtained. Accordingly, the attached protective order reflects certain issues on which the parties did reach agreement, namely that certain in-house counsel and technical personnel of AAR, and certain technical personnel of NAFCA member companies, would be permitted to have access to such material. NAFCA does not know if any of the individual railroad defendants will oppose or seek to modify the attached draft order.

¹ BNSF Railway Company, CSX Transportation, Inc., Canadian National Railway Company, The Kansas City Southern Railway Company, Norfolk Southern Railway, Canadian Pacific Railway Company, Union Pacific Railroad Company, and Association of American Railroads.

4. The attached draft protective order is modeled after and is therefore similar to protective orders routinely adopted and issued by the Board in complaint cases. *See, e.g.*, Docket NOR 42120, *Cargill, Incorporated v. BNSF Railway Company*, decision served June 24, 2010; Docket NOR 42127, *Intermountain Power Agency v. Union Pacific Railroad Company*, decision served January 27, 2011; and Docket NOR 42124, *State of Montana v. BNSF Railway Company*, decision served April 1, 2011. However, the attached draft modifies the Board’s typical language concerning disclosure of “Highly Confidential” material to enable certain in-house counsel and technical personnel of the AAR, and certain technical personnel of NAFCA member companies, to view such material. The technical personnel will be designated by agreement of NAFCA and AAR pursuant to the process set forth in the draft protective order. Additionally, the draft order contains a slight modification of the typical definition of “Highly Confidential” material to include the phrase “material containing shipper and/or private railcar owner car costs or pricing data,” to reflect the specific circumstances of this case.

5. Granting this Motion and the attached protective order will facilitate the exchange and use of the parties’ confidential, proprietary, or commercially sensitive material, including financial information, in the event that such materials are produced by the parties in this case. These materials, if publicly disclosed, could cause commercial or other harm to the disclosing party. The proposed protective order complies with governing STB rules and generally follows the format of the protective orders the Board has approved in other proceedings.

Discovery is already underway in this proceeding, as NAFCA has served discovery on all of the defendants, and AAR has served discovery on NAFCA. All parties have been collecting, and in some cases providing responsive materials. Accordingly, NAFCA requests that the

Board expeditiously grant this Motion so that there are no technical barriers to discovery by the parties.

WHEREFORE, for the reasons set forth above, Complainant requests that the Board issue an order granting this Motion and adopting the protective order attached hereto.

Respectfully submitted,



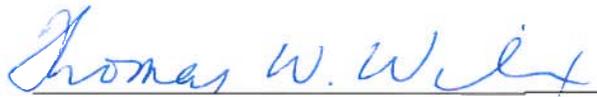
Thomas W. Wilcox
GKG Law, P.C.
1054 31st Street, N.W., Suite 200
Washington, DC 20007
(202) 342-5248

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
1825 K Street, N.W., Suite 700
Washington, DC 20006
(202) 775-5560

Attorneys for
North America Freight Car Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of Complainant's Motion for Protective Order has been served, this 27th day of February 2013, on counsel for each of the defendants by email and first class mail.



Thomas W. Wilcox

PROTECTIVE ORDER

STB Docket No. NOR 42137

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “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, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10.
 - (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 C.F.R. § 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 and/or private railcar owner car costs or pricing 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. Material that is so designated may be disclosed only to persons in the following categories 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 they 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: (i) outside counsel and outside consultants of the parties; (ii) the following inside counsel for the Defendant AAR:, Louis P. Warchot and Daniel Saphire; (iii) up to two (2) non-lawyer personnel employed by Defendant AAR/TTCI, provided Complainant is given seven-days advance notice of such persons' identities and an opportunity to object before any such person receives access to HIGHLY CONFIDENTIAL materials, with consent not to be unreasonably withheld; and (iv) up to two (2) non-lawyer personnel employed by member companies of Complainant NAFCA, provided Defendants are given seven-days advance notice of such persons' identities and an opportunity to object before any such person receives access to HIGHLY CONFIDENTIAL materials, with consent not to be unreasonably withheld. Notwithstanding the foregoing, the access by AAR in-house counsel and technical personnel to material designated Highly Confidential shall not include the following: (a) company financial projections, (b) number of cars operated or owned, and (c) any other material pertaining to the business plans of a NAFCA member. 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 designate 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 (including any and all copies) 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 herefrom, 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 Board, or the court, as appropriate, with a written request that 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 party rail transportation contracts or other documents or information 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 documents would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 8 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 to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly 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.

10. 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 “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the In-house Personnel of the reviewing party.
11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____ [date], governing the production of confidential documents in STB Docket No. NOR 42137, 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. NOR 42137 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, 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 counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

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 an authorized recipient of Highly Confidential materials (as outside counsel, outside consultant or [_____] for _____ in this proceeding, I have read the Protective Order served on _____ [date], governing the production of confidential documents in STB Docket No. NOR 42137, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. 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 herefrom, 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 herefrom, 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 and 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 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.

[NAME]

Dated: _____