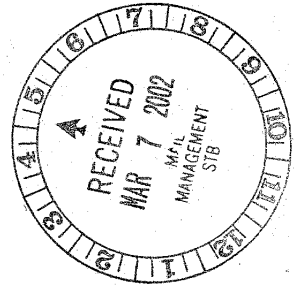


20912

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34040

**RIVERVIEW TRENTON RAILROAD COMPANY - PETITION FOR AN EXEMPTION
FROM 49 U.S.C. 10901 TO ACQUIRE AND OPERATE A RAIL LINE IN WAYNE
COUNTY, MI**

MOTION FOR PROTECTIVE ORDER

ENTERED
Office of the Secretary
MAR 08 2002
Part of
Public Record

J. William Koegel, Jr.
David H. Coburn
Carolyn D. Clayton
Michael A. Bishop
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for Riverview Trenton
Railroad Company

March 7, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34040

**RIVERVIEW TRENTON RAILROAD COMPANY – PETITION FOR AN EXEMPTION
FROM 49 U.S.C. 10901 TO ACQUIRE AND OPERATE A RAIL LINE IN WAYNE
COUNTY, MI**

MOTION FOR PROTECTIVE ORDER

Pursuant to 49 C.F.R. § 1104.14 (1996), Riverview Trenton Railroad Company (“RTRR”) moves for a protective order in this matter. In support of this Motion, RTRR states as follows:

RTRR is before the Board seeking an exemption from 49 U.S.C §10901 to operate a rail line that would provide common carrier service. In response to the Board's February 15, 2002 decision in this and a related proceeding, RTRR is this day submitting additional evidence in support of its Petition, including statements from prospective shippers and other entities that would benefit from the operations of RTRR.¹

The shipper support statements offered by RTRR are set forth as Highly Confidential Exhibit 1 to the Verified Statement of Mr. Arnold M. Mistura, RTRR's President,

¹ See *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, Docket No. 33980; *Riverview Trenton Railroad Company – Petition for an Exemption From 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, Docket No. 34040 (served February 15, 2002).

whose Statement is part of RTRR's submission in response to the February 15 decision. It is only the statements set forth in that exhibit that are the subject of this motion for protective order. The statements reveal both the identity of potential shippers and other beneficiaries on RTRR's lines and identify, to some extent, the nature of the cargo they contemplate would be tendered to RTRR.

Public disclosure of this commercially sensitive information could potentially harm the shippers' relationships with other carriers and prejudice RTRR's on-going and future negotiations with its prospective customers.² Further, in the politically charged atmosphere that has come to surround this proceeding, and in view of the close scrutiny that the proceeding has received in the Detroit area press, public disclosure of the identity of these supporting entities could prove detrimental to their business interests. For these reasons, RTRR submits that a protective order would ensure to the greatest extent possible that its supporters would not be subjected to any pressure or discrimination from parties opposing the RTRR. Because information such as the identity and plans of shippers supporting a politically charged project is not readily expunged from one's mind once it is obtained, we are asking that the material be treated as Highly Confidential with disclosure limited to outside counsel and consultants involved in the litigation. The Board on numerous occasions and in various types of cases has granted such a protective order. *See e.g., Duke Energy Corporation v. Norfolk Southern Railway Company*, Docket No. 42069 (served Feb. 4, 2002); *Arizona Electric Power Company v. The Burlington Northern and Santa Fe Railway Company*, Docket No. 42058 (served Feb. 15, 2001);

² In that regard, it bears note that Grand Trunk Western Railroad is a party to this proceeding and to date has been opposed to RTRR's Petition.

and *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, Finance Docket No. 33407 (served Aug. 3, 1998).

In prior decisions, the Board has recognized the need to protect confidential shipper-specific information and prevent prejudice to parties in business negotiations. *See e.g., SWKR Operating Co. – Abandonment Exemption In Cochise County, AZ*, Docket No. AB-441 (served Sept. 15, 1997); *Norfolk Southern Railway Corporation and Norfolk Southern Railway Company – Construction and Operation – In Indiana County, PA*, Docket No. 33928 (served February 8, 2001). Further, in assessing the need for a protective order, the Board has given consideration to both the needs of the public and the parties themselves to access competitively sensitive information. Where counsel for opposing parties have full access to the protected information, and the public disclosure is not found necessary to assist a party in establishing its case, the Board has upheld protective orders. *See e.g., The Central Illinois Railroad Co. – Lease and Operation Exemption – Lines of the Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL*, Docket No. 33960 (served March 2, 2001). The Board also has granted protection in the past even without specific findings that proprietary information was involved. *See Rio Grande Industries, Inc., SPTC Holding, Inc. and the Denver and Rio Grande Western Railroad Company – Control- Southern Pacific Transportation Co.*, Docket No. 32000 (served June 6, 2001). Here, granting the requested protective order will protect from public disclosure information about the parties with which RTRR is engaged in discussing business opportunities, and therefore will facilitate commercial discussions that RTRR will have with these and other parties who will benefit from RTRR's operations. It will also ensure that no shipper will be subjected to discrimination or harassment (intentional or unintentional) as a result of supporting RTRR's proposal in the face of local government opposition.

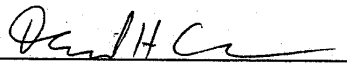
The mere desire of specific constituencies to access confidential information is not a sufficient basis to require disclosure. *See Rio Grande Industries, Inc, et. al. – Trackage Rights – Burlington Northern Railroad Company Lines Between Kansas City, MO and Chicago, IL, et. al.*, Docket Nos. 31730, 31731 (October 25, 1990). Thus, the Board has resolved “any doubts as to the need for confidentiality in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.” *The Central Illinois Railroad Co. – Lease and Operation Exemption – Lines of the Burlington Northern and Sante Fe Railway Company at Chicago, Cook County, IL*, Docket No. 33960 (served March 2, 2001). None of the exceptions are present here. Counsel for those interests opposing RTRR's Petition, as well as counsel for other parties of record, will be able to gain full access, through the protective order procedures, to the statements being submitted by RTRR's potential shippers. The protective order therefore will not prevent Wayne County or other local governments from preparing and filing an appropriate reply, provided of course that their counsel executes the protective order and respects the confidentiality of the documents at issue. Thus, a protective order will not undermine the Board's ability to enjoy the viewpoints all parties, without commercial harm to RTRR or its potential shippers. In addition, given the intense political and media scrutiny of this matter, a protective order will allow shippers to participate and assist the Board in its analysis of public benefits without concern for their business interests.

RTRR is submitting a proposed Protective Order and an Undertaking that it requests the Board to adopt. The Order and Undertaking provide standard procedures akin to those that the Board has adopted in other proceedings to protect the subject shipper statements from disclosure to the public while allowing counsel for other parties to access the exhibits, for

the purposes of this proceeding, upon execution of the undertaking. Pursuant to the Board's rules at 49 C.F.R. § 1104.14(a), the shipper statements are being submitted separately to the Board in a package marked "Highly Confidential Materials Subject to a Request for a Protective Order," and the shipper statements themselves are marked "Highly Confidential."

For the above reasons, RTRR urges the Board to grant this motion and adopt the protective order submitted with this motion.

Respectfully,



J. William Koegel, Jr.
David H. Coburn
Carolyn D. Clayton
Michael A. Bishop
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
202.429.3000

Attorneys for Riverview Trenton Railroad
Company

March 7, 2002

PROPOSED PROTECTIVE ORDER

1. For the purpose of this Protective Order, "HIGHLY CONFIDENTIAL" information refers to shipper statements attached to pleadings or other confidential or proprietary information submitted in STB Finance Docket No. 34040.

2. Any party submitting material in pleadings in STB Finance Docket No. 34040 that believes in good faith reflects either a shipper statement, or proprietary or confidential information, may designate and stamp such material as "HIGHLY 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 the outside counsel or outside consultants 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 counsel or consultant 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.

(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 therefrom. However, outside counsel (but not outside consultants) for a party are permitted to retain file copies of all pleadings and evidence filed with the Board as well as work product.

(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 "Highly Confidential Materials Subject to Protective Order." See 49 C.F.R. § 1104.14.

3. If any party intends to use highly confidential information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such highly confidential information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or court to (i) restrict attendance at the hearing during discussion of such highly confidential information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such highly confidential information in accordance with this Protective Order.

4. 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 "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 "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.

3. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board warrants suspension of any of the provisions herein.

4. A "HIGHLY CONFIDENTIAL" designation may be removed by agreement of the parties, or, absent such agreement, by appropriate Board order, upon application of a party seeking to remove such designation, where there is a failure by the party seeking to preserve confidentiality to demonstrate that the material is properly deemed "HIGHLY CONFIDENTIAL" as defined herein.

**UNDERTAKING HIGHLY
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on _____, 2001, governing the production of highly confidential documents in STB Docket No. 34040, 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. 34040 or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under the Protective Order to any person who is not 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 (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 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.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2002, a copy of this Motion for Protective Order was served by hand delivery (to persons in Washington, DC) or federal express upon counsel for all parties of record.


David H. Coburn