

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42006

OMAHA PUBLIC POWER DISTRICT
v.
UNION PACIFIC RAILROAD COMPANY

Decided: July 18, 1997

In a verified complaint filed, and served on defendant, Union Pacific Railroad Company (UP), on June 20, 1997, Omaha Public Power District (OPPD) alleges that a switching charge assessed by UP to move OPPD's unit trains of coal from an alleged interchange with The Burlington Northern and Santa Fe Railway Company (BNSF)¹ to OPPD's North Omaha Power Station, a distance of approximately 5 miles, exceeds a maximum reasonable level.² OPPD alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed, along with related rules and service terms for the switch movement. On July 10, 1997, UP filed a timely answer, and on July 9, 1997, the parties filed a joint motion for the approval of a stipulated protective order.

The proposed protective order, set out in the appendix, contains provisions substantially similar to those used recently in connection with a number of cases involving railroad rate complaints and the submission of traffic, cost, and property valuation evidence. It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion for a protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this complaint and not for any other business or commercial purpose. The requested protective order will also help to minimize potential discovery disputes and facilitate the more speedy and efficient resolution of this complaint.

It is ordered:

1. The joint motion for a protective order is granted; the parties are directed to comply with the protective order in the appendix.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

¹ The coal movements are transported by BNSF from origin coal mines in the Powder River Basin of Wyoming to the UP interchange point under a rail transportation contract denominated ICC-BN-C-2205. BNSF absorbs a portion of the UP switching charge.

² UP provides the switching service as a common carrier, pursuant to the applicable rates and terms in Freight Tariff UP 8005-D.

APPENDIX

PROTECTIVE ORDER

1. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this proceeding, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as “CONFIDENTIAL” and 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) Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Board or the Administrative Law Judge presiding in this proceeding, except to employees, counsel or agents of the party requesting such materials, solely for use in connection with this proceeding, and any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials.

(c) If produced through discovery, must be destroyed by the requesting party, its employees, counsel and agents, and notice of such destruction served on the Board and the presiding Administrative Law Judge and the party producing the materials, at the completion of this proceeding and any judicial review proceeding arising therefrom. 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— OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or the Administrative Law Judge presiding in this proceeding. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this proceeding, and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order and agree to be bound by its terms 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. 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 reviewing court, with a written request to the Administrative Law Judge, the Board or the court to (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 this Protective Order.

4. 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 that 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.

5. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraph 1 or 2 above, such production, disclosure and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

6. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order dated July 18, 1997, governing the production of confidential documents in STB Docket No. 42006, 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. 42006 or any judicial review proceedings taken or filed in connection therewith. 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.

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 dated July 18, 1997, governing the production of confidential documents in STB Docket No. 42006, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL— OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY,” I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, 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, that at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, *provided, however*, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all other 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— OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY” 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: _____