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SERVICE DATE – DECEMBER 7, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36077

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD  
COMPANY—PETITION FOR DECLARATORY ORDER

Decided: December 7, 2016

By motion filed November 23, 2016, North Coast Railroad Authority and Northwestern Pacific Railroad Co. (collectively Petitioners), seek a protective order under 49 C.F.R. § 1104.14(b) for approval to file under seal certain unredacted waybills, which Petitioners state contain “information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to [Petitioners] for transportation.” (Petitioners Motion 2.) The motion for a protective order accompanied Petitioners’ brief, which cited the redacted waybills attached to the motion.

By reply filed November 30, 2016, Sonoma-Marin Area Rail Transit District (SMART), seeks an alternative protective order under 49 C.F.R. §§ 1104.13(a) and 1104.14(b), “in order to facilitate the exchange of any information designated as “Confidential” or “Highly Confidential” by the parties . . . and to enable [the parties] to file such information under seal in any pleadings submitted in this proceeding.” (SMART Reply 1, Nov. 30, 2016.) SMART explains that its proposed protective order is distinguished from Petitioners’ proposed order in that it designates two levels of confidentiality and would facilitate the development of the full factual record. (Id. at 2.)

Good cause exists to issue a protective order to ensure that confidential information will be used solely for this proceeding and not for other purposes. Because there is outstanding factual information necessary to complete the record,<sup>1</sup> the Board will adopt a protective order substantially similar to the sample order accompanying SMART’s reply and broader than NCRA’s, which by its terms would have applied only to four waybills already in the record. The protective order will include two levels of confidentiality and apply to any documents or information that meet the definitions in the order.

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<sup>1</sup> On December 2, 2016, the Board vacated the December 5, 2016 due date for replies to Petitioners’ brief, noted that “there is outstanding factual information necessary to complete the record and to decide the issues raised in this proceeding,” and scheduled a conference call with Board staff to discuss the need for additional information. N. Coast R.R. Auth.—Pet. for Declaratory Order, FD 36077, slip op. at 3-4 (STB served Dec. 2, 2016).

Accordingly, SMART's motion for protective order will be granted, and the protective order and undertakings, as modified, attached in the Appendix to this decision will be adopted.

It is ordered:

1. Petitioners' motion for a protective order is denied.
2. SMART's motion for an alternative protective order is granted, and the protective order and undertakings as modified in the appendix to this decision are adopted.
3. Materials designated as "confidential" or "highly confidential" will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached undertakings are executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.
4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

**APPENDIX**  
**PROTECTIVE ORDER**

1. For purposes of this Protective Order:
  - (a) “Board” means the Surface Transportation Board.
  - (b) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
  - (c) “Confidential Information” means confidential freight traffic data, waybills, confidential financial and cost information, confidential personnel information, confidential agreements, and other confidential or proprietary information.
  - (d) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
  - (e) “Proceedings” means the proceedings before the Board in Docket No. FD 36077 or Docket No. NOR 42148, and any related proceedings before the Board, and any proceeding for enforcement of any order or ruling entered in Docket No. FD 36077 or Docket No. NOR 42148, any judicial review proceeding arising from Docket No. FD 36077 or Docket No. NOR 42148, any appeals of such proceedings, and any proceeding on remand from such judicial review proceeding.
2. If any party of record to these Proceedings or any third party responding to a discovery request in Docket No. FD 36077 or Docket No. NOR 42148 determines in good faith that any part of a document it submits, a discovery request it propounds, a discovery response it produces, a transcript of a deposition or hearing in which it participates, or a pleading or other paper submitted, filed, or served by it in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.
3. If any party of record to these Proceedings or any third party responding to a discovery request in Docket No. FD 36077 or Docket No. NOR 42148 determines in good faith that Confidential Information in any part of a document it submits, a discovery request it propounds, a discovery response it produces, a transcript of a deposition or hearing in which it participates, or a pleading or other paper submitted, filed, or served by it in these Proceedings contains individual personnel information, shipper-specific rate or cost data, trackage rights, compensation levels, certain other confidential financial or cost information, or other competitively sensitive or proprietary information, then that party may designate and stamp such document, discovery request, discovery response, transcript, or pleading or other paper as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. In the event that a party of record to these Proceedings or any third party responding to a discovery request in Docket No. FD 36077 or Docket No. NOR 42148 produces material which that party believes contains Confidential Information or consists in whole or in part of Confidential Documents, but inadvertently fails to designate or stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may so notify the receiving party in writing within five calendar days of the producing party’s discovery of its inadvertent failure to make the confidentiality designation. The receiving party shall return or destroy the non-designated material (including any and all copies within its possession or control), as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party shall promptly furnish the receiving party with properly designated material.

5. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order. A copy of each such confidentiality undertaking shall be kept on file for the duration of these Proceedings by counsel for the party on whose behalf the undertakings are executed.

6. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party of record to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order. A copy of each such confidentiality undertaking shall be kept on file for the duration of these Proceedings by counsel for the party on whose behalf the undertakings are executed.

7. Notwithstanding the provisions of paragraphs 5 and 6 of this Protective Order, Designated Material may be disclosed to the Board or its personnel in accordance with the provisions of paragraphs 11, 13, and 16 of this Protective Order, and to court reporters or notaries public with official responsibilities related to these Proceedings. Such reporters and notaries shall not be required to execute the confidentiality undertakings provided for in paragraphs 5 and 6 of this Protective Order, but persons disclosing such Designated Materials must receive assurances that such reporters and notaries will comply with the restrictions on disclosure of Designated Material set forth in this Order on the understanding that such persons will comply with the restrictions on disclosure of Designated Material set forth in this Order.

8. Any party to these Proceedings may challenge the designation by any other

party (including a third party responding to a discovery request or participating in a deposition or hearing) of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

9. Designated Material may not be used by any person, other than the person providing it, for any purposes, including without limitation any business, commercial, strategic, or competitive purpose, other than the preparation and presentation of evidence and argument in these Proceedings.

10. Any party who receives Designated Material in discovery or in papers served upon it in these Proceedings shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the completion of these Proceedings. Notwithstanding the foregoing, any portions of backup tapes containing Designated Material may be destroyed in accordance with standard retention policies, and any Designated Material contained on such backup tapes shall remain subject to the terms of this Order until such destruction.

11. No party may include Designated Material in any pleading, brief, or other document submitted in hard copy form to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR § 1104.14. No party may include Designated Material in any pleading, brief, or other document submitted to the Board electronically, under the e-filing option provided in 49 C.F.R. § 1104.1(e), unless the filing party submits the pleading or other document as “Confidential” under such options as are provided on the Board’s Web site for electronic filing of documents. Each pleading or other document submitted pursuant to the terms of this paragraph and containing information designated as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” shall bear a prominent designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” as appropriate on the cover or cover page, if any, and first page of such pleading or document. All such pleadings and documents shall be kept confidential by the Board; they shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

12. No party may include Designated Material in any pleading, motion, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting (a) issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding,

and (b) that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

13. No party may present or otherwise use any Designated Material at a hearing or argument before the Board in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge, or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge, or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

14. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition, and shall indicate whether it anticipates using material designated or stamped as "HIGHLY CONFIDENTIAL" pursuant to paragraph 3 of this Protective Order. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who are entitled to review that material under the terms of this Protective Order and who execute such confidentiality undertakings as are appropriate. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraphs 9-13 of this Protective Order.

15. If a party to these Proceedings is required by law or order of a governmental or judicial body in any other administrative or judicial proceedings to release Confidential Documents or Confidential Information produced by the other party or copies or notes thereof as to which the first party obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing by the earlier of (1) three working days after the determination that the Confidential Documents or Confidential Information, or copies or notes thereof, are to be released, or (2) three working days before such release, so as to permit the producing party the opportunity to contest the release.

16. Simultaneously with the submission of any document to the Board that is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the submitting party must also submit a public version of that document to the Board, from which all Confidential Information has been redacted. Any party submitting a document to the Board that is designated as "HIGHLY CONFIDENTIAL" shall make available to in-house counsel for all other parties who have signed an undertaking substantially in the form set forth in Exhibit A to this Order a version of that document containing all Confidential Information reviewable by such in-house counsel under the terms of this Order ("Confidential Version"). If the Confidential Version is provided to counsel for other parties in electronic form, the submitting party shall not also be required to provide a paper copy.

17. Nothing in this Protective Order restricts the right of any party to disclose intentionally and voluntarily any of that party's Confidential Information or Confidential Documents, if such Confidential Information or Confidential Documents do not contain or reflect any other party's Confidential Information. Any such disclosure shall constitute a waiver by the disclosing party of any claim of confidentiality under this Protective Order with respect to the Confidential Information or Confidential Documents so disclosed.

18. Information that is publicly available, or obtained outside of these Proceedings from a person with a right to disclose it publicly, shall not be subject to this Protective Order, even if the information constitutes Confidential Information and is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

19. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

**EXHIBIT A**

**UNDERTAKING**

**CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on December 7, 2016, in STB Docket No. FD 36077, governing the production and use of Confidential Information and Confidential Documents (as defined in that Protective Order) in Docket No. 36077, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 36077, Docket No. NOR 42148, any related proceedings before the Board, any judicial review proceeding arising out of that proceeding, and/or any proceedings on remand from such judicial review proceeding. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to and subject to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, appeal, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Surface Transportation Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that persons producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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: \_\_\_\_\_

**EXHIBIT B**  
**UNDERTAKING**

**HIGHLY CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, am outside [counsel] [consultant] for \_\_\_\_\_, for whom I am acting in this proceeding. I have read the Protective Order served on December 7, 2016, in STB Docket No. 36077 governing the production and use of Confidential Information and Confidential Documents (as defined in that Order) in Docket No. FD 36077, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 36077, Docket No. NOR 42148, any related proceedings before the Board, any judicial review proceeding arising out of that proceeding, and/or any proceeding on remand from such judicial review proceeding. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Surface Transportation Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/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: \_\_\_\_\_  
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_