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SERVICE DATE - LATE RELEASE JULY 1, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB EX PARTE NO. 573

RAIL SERVICE IN THE WESTERN UNITED STATES

STB SERVICE ORDER NO. 1518

JOINT PETITION FOR SERVICE ORDER

Decided: June 30, 1998

In these proceedings, the Board has addressed the transportation emergency in the western part of the United States in several ways. In STB Ex Parte No. 573, the Board initiated a general inquiry into the service problems in the West and held oral hearings on October 27 and December 3, 1997. In STB Service Order No. 1518, instituted following the October 27 hearing, the Board issued two emergency service orders that, among other things, made substantial changes to the way service is provided in and around Houston, TX. Additionally, in "UP/SP Oversight,"¹ the Board is reviewing a variety of competitive issues associated with the merger of the Union Pacific Railroad Company and the Southern Pacific Transportation Company (UPSP) that may be relevant to the way service is provided in the West, and, in "Houston/Gulf Coast Oversight,"² the Board is examining requests for Houston/Gulf Coast area remedial conditions to the UPSP merger, including requests seeking the divestiture of property.

¹ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 21) (UP/SP Oversight).

² Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 26) (Houston/Gulf Coast Oversight), Decision No. 1 (STB served May 19, 1998) [corrected decision redesignating the docket number from (Sub-No. 21) to (Sub-No. 26), designating the decision as Decision No. 1, designating the short name title "Houston/Gulf Coast Oversight," and retaining all other aspects of the March 31, 1998, including the procedural schedule.]

In connection with the decision served February 25, 1998, extending the previously issued emergency service orders to August 2, 1998, Entergy Service, Inc., and Entergy Arkansas, Inc. (Entergy), on May 18, 1998, filed a second supplemental statement and additional request for emergency relief, under seal, and a second motion for issuance of a protective order.³ Entergy requests that the emergency service orders be modified on a temporary basis to allow BNSF to deliver coal to Entergy's White Bluff coal-fired electric generating plant. Contending that the requested relief is fully consistent with the standards described in the notice of proposed rulemaking in Expedited Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served May 12, 1998), Entergy urges that the request be considered under the proposed standards and time-frames.

On June 9, 1998, UPSP filed a reply, under seal, to Entergy's second supplemental statement and additional request for emergency relief, which it characterized as a request for competitive access. Then, on June 16, 1998, Entergy responded with the filing of a petition for leave to file a reply, a reply under seal, and a third motion for a protective order.⁴

The protective order set out in the Appendix contains provisions substantially similar to those used in Houston/Gulf Coast Oversight, Decision No. 2 (STB served May 19, 1998) and a number of other recent rail cases. 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.

Entergy's motions for protective orders are not opposed, and UPSP also has submitted its reply under seal.⁵ Accordingly, good cause exists to enter a protective order. Unrestricted disclosure of confidential, proprietary, or commercially sensitive material can cause serious competitive injury. A protective order will ensure that all covered material will be used only in connection with this request for relief and not for any other business or commercial use.

³ On October 23, 1997, Entergy had filed both a comment in STB Ex Parte No. 573 and a petition in UP/SP Oversight to modify a merger condition to give The Burlington Northern and Santa Fe Railway Company (BNSF) trackage rights over the UPSP line between Memphis, TN, and Pine Bluff, AR, to allow BNSF to serve Entergy's White Bluff coal-fired electric generating plant via a build out to Pine Bluff. On December 1, 1997, Entergy filed a supplemental statement and additional request for emergency relief, under seal, and a motion for issuance of a protective order.

⁴ Entergy's petition for leave to reply will be considered in a subsequent Board decision.

⁵ UPSP's June 9 reply was submitted under seal with a redacted copy; it did not file a motion for a protective order. However, in contrast to Houston/Gulf Coast Oversight, where it argued that a new protective order was unnecessary because the one in the merger proceeding was already in place, UPSP did not object to Entergy's motion for a protective order.

STB Ex Parte No. 573
STB Service Order No. 1518

It is ordered:

1. Entergy's motions for protective orders are granted; the parties are directed to comply with the protective order in the Appendix.⁶
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

⁶ Regardless of whether they are in printed or computer related form, this protective order applies to all information, materials, and data as set forth in the Appendix.

APPENDIX

PROTECTIVE ORDER

1. To the extent materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other confidential or proprietary information are submitted, they 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, 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) Shall 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 submitting material, 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. Material that is so designated shall not be disclosed except to outside counsel or outside consultants, 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.

3. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material 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 Board or the reviewing court with a written request to the Board or the court to (a) restrict attendance at 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. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other proprietary information are submitted in compliance with paragraph 1 or 2 above, such 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.

5. All parties must comply with all of the provisions of 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 served on July 1, 1998, governing confidential submissions in STB Service Order No. 1518 and STB Ex Parte No. 573, 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 submitted under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of the submission of such data or information for any purposes other than the preparation and presentation of evidence and argument in STB Service Order No. 1518 and STB Ex Parte No. 573 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 making confidential submissions 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 served on July 1, 1998, governing confidential submissions in STB Service Order No. 1518 and STB Ex Parte No. 573, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my review or use of any submissions bearing the designation “HIGHLY CONFIDENTIAL—OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY,” I will limit my use of those submissions and the information they contain to this proceeding and any judicial review thereof, that I will take all necessary steps to assure that said submissions 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 submissions or information by personnel of my client, its subsidiaries, affiliates, or owners, that at the conclusion of this proceeding, I will promptly return to counsel for the originating party or destroy any copies of such submissions or any material made by me or by any outside counsel or outside consultants working with me, based on these submissions, 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 submissions 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 making confidential submissions 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: _____