

30901
SEC

SERVICE DATE - MARCH 15, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 290 (Sub-No. 2)

RAILROAD COST RECOVERY PROCEDURES FACTOR

STB Ex Parte No. 290 (Sub-No. 5)

QUARTERLY RAIL COST ADJUSTMENT FACTOR

Decided: March 14, 2000

In a decision in the above proceedings served January 5, 2000, the Board granted Western Coal Traffic League's (WCTL) request to inspect all workpapers used in developing the Rail Cost Adjustment Factor (RCAF). The Board ordered the Association of American Railroads (AAR) to make available for inspection the confidential RCAF workpapers under the condition that the proprietary workpapers would be subject to a standard protective order and treated as "Highly Confidential."

By joint motion filed March 9, 2000, WCTL and AAR (the parties) seek a protective order with respect to the RCAF workpapers. The parties presented a proposed order set out in the appendix. The proposed order provides for the RCAF workpapers to be treated as "Highly Confidential," with access limited to outside counsel and consultants, similar to the protective orders that have been entered in other recent proceedings before the Board.

Good cause exists to grant the motion for 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 WCTL's request to review the RCAF workpapers, will be used only in connection with these proceedings and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted.

It is ordered:

1. The joint motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.

STB Ex Parte No. 290 (Sub No. 2, et al.)

3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. This Protective Order applies to the workpapers that the Association of American Railroads (“AAR”) submits to the the Surface Transportation Board (“Board” or “STB”) in support of the AAR’s quarterly forecasts of the Rail Cost Adjustment Factor (the “RCAF Workpapers”) in STB Docket Ex Parte No. 290 (Sub-No. 5), or successor thereto.

2. At the same time that the AAR submits the RCAF Workpapers to the STB, the AAR shall also produce and disclose the RCAF Workpapers to persons that have executed the attached Undertaking (“Subscribing Persons”), upon their request.

3. To the extent that the RCAF Workpapers contain confidential or proprietary information not available to Subscribing Persons through other means, the AAR may designate such contents of the RCAF Workpapers as “Highly Confidential.”

4. Subscribing Persons shall consist of outside counsel and outside consultants of parties desiring to retain such outside counsel and outside consultants to review the AAR’s RCAF forecasts and the associated RCAF Workpapers. Information in the RCAF Workpapers designated as Highly Confidential as well as data derived therefrom (“Highly Confidential Information”) shall not be disclosed to employees or other agents or representatives of such parties without the consent of the AAR.

5. Parties may use Highly Confidential Information solely for purposes of reviewing, evaluating, and auditing the AAR’s RCAF forecasts, and any Board or judicial review proceeding involving those RCAF forecasts, and not for any other business, commercial, or competitive purpose.

6. Any party seeking to use Highly Confidential Information in hearings, pleadings, submissions, or other proceedings before the Board involving the RCAF forecasts, or in any judicial review proceeding arising therefrom, shall submit any documents setting forth or revealing such Highly Confidential Information 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 Highly Confidential Information, and (b) restrict access to the portion of the record or briefs reflecting discussion of such Highly Confidential Information in accordance with the terms of this Protective Order. In the case of pleadings submitted to the Board containing Highly Confidential Information, the pleadings shall be submitted in a package clearly marked on the outside “Confidential Materials subject to Protective Order” in accordance with 49 CFR 1104.14, or successor thereto.

7. Any party seeking to use Highly Confidential Information in the course of any deposition relating to a proceeding arising under the two preceding Paragraphs, 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 Highly Confidential Information 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 Highly Confidential Information shall be treated as Highly Confidential Information in accordance with the terms of this Protective Order.

8. Any party may challenge the designation of information as Highly Confidential by bringing such matter to the attention of the Board, or an Administrative Law Judge or judge(s) presiding in an appropriate proceeding.

9. Subscribing Persons shall be authorized to retain copies of the RCAF Workpapers and documents including data derived therefrom.

10. Nothing in this Protective Order shall serve to prevent Subscribing Persons from utilizing or distributing information derived from sources other than the RCAF Workpapers and such other information shall not be deemed Highly Confidential by virtue of this Protective Order.

11. All parties and Subscribing Persons must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, presiding Administrative Law Judge, or court, is shown by any party or Subscribing Person to warrant suspension or modification of any of the provisions herein.

**UNDERTAKING FOR
HIGHLY CONFIDENTIAL RCAF WORKPAPERS**

As outside [counsel] [consultant] for _____, for whom I am reviewing the AAR's RCAF forecasts and associated RCAF Workpapers, I have read the Protective Order dated _____, 2000, governing the production of the RCAF Workpapers in STB Ex Parte No. 290 (Sub-No. 5), understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents or information designated "Highly Confidential," that I shall limit my use of those documents and the information they contain to the purposes specified in Paragraph 5 and in the manner specified in Paragraphs 6 and 7 of the Protective Order, that I shall take all necessary steps to assure that Highly Confidential Information is provided only to outside counsel or outside consultants working with me that have executed this Undertaking, and that under no circumstances shall I otherwise permit access to said documents or information to others, including personnel of my client, its subsidiaries, affiliates, or owners. I further understand that I must similarly maintain the confidentiality of all other notes or other documents containing such Highly Confidential Information in compliance with the terms of 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 Highly Confidential Information 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: _____