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SERVICE DATE – JANUARY 20, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 772

OVERSIGHT PERTAINING TO UNION PACIFIC RAILROAD COMPANY'S
EMBARGOES

Decided: January 20, 2023

Pursuant to an order served on November 22, 2022, Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes, EP 772 (STB served Nov. 22, 2022), the Board held a public hearing in Washington, DC, on December 13 and 14, 2022. On December 22, 2022, Union Pacific Railroad Company (UP), filed a motion for a protective order in this proceeding. The motion states that during the public hearing, members of the Board asked UP to submit certain documents and that these documents contain information that qualifies as “confidential commercial information” under the Board’s regulations. (UP Mot. 1.) UP argues that these documents should be classified as exempt from release under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). (Id.) The motion requests that the Board issue an order (i) allowing UP to designate information submitted in response to the requests as “confidential commercial information” by indicating on documents it produces to the Board that they contain “Confidential Commercial Information, Subject to Exemption 4 of FOIA,” and (ii) providing that the Board will treat any information so designated as nonpublic, confidential commercial information and treat UP as the submitter of the information subject to all the protections provided in 49 C.F.R. § 1001.4. (Id. at 2.)

On January 4, 2023, the Freight Rail Customer Alliance (FRCA) and National Coal Transportation Association (NCTA) filed a reply in opposition to UP’s motion for a protective order. The reply argues that the primary issue in this proceeding is UP’s lack of accountability and transparency related to its use of embargoes and other service restrictions, and that UP should not be permitted to prevent customers and the public from scrutinizing its actions by keeping information submitted to the Board confidential. (FRCA and NCTA Reply 1.) The reply further argues that UP should not be permitted to protect information from FOIA disclosure under Exemption 4 in advance. (Id. at 2.) FRCA and NCTA state that they recognize that disclosure of some information UP might submit could cause “substantial competitive harm” but that any determination of such harm should be made only after the information is submitted, based on a weighing of competing considerations. (Id. at 2.)

On January 11, 2023, the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, International Brotherhood of Boilermakers, National Conference of Firemen and Oilers/32BJ SEIU and the Brotherhood of Locomotive

Engineers and Trainmen (collectively, the Unions) filed a reply in opposition to UP's motion. The Unions argue that the Board should deny the motion because UP has failed to identify what information it seeks to label as "confidential commercial information" and that UP might seek to apply that label to everything it produces. The Unions further argue that the Board should consider UP's motion in light of UP's recent behavior, specifically, the Unions argue, UP's failure to provide certain documents requested by the Board prior to the hearing and its failure to comply with the Board's initial reporting requirement in docket EP 770 (Sub-No. 1).

Various Board regulations recognize the possibility that parties submitting information to the Board may seek to protect confidential information from public disclosure. For example, the Board's regulations at 49 C.F.R. § 1001.4 state that if the Board has reason to believe that disclosure of information could reasonably be expected to cause substantial competitive harm or if information has been designated, in good faith by the submitter, as confidential commercial information, the Board will provide the submitter with notice of any FOIA request regarding its submissions and an opportunity to object to such a request. Likewise, the Board's regulations regarding protective orders do not prohibit an order seeking to protect confidential documents from public disclosure beyond the Board. *See, e.g.*, 49 C.F.R. § 1104.14. Accordingly, it is not inappropriate for UP to seek a protective order that allows UP to designate information it submits as "confidential commercial information" and protected from public disclosure. However, the Board will not issue a protective order at this time because UP has failed to submit an appropriate proposed protective order.

The Board agrees with FRCA and NCTA that transparency should be pursued in this proceeding to the greatest degree possible and any information submitted by UP should be made publicly available to the extent that it will not cause UP substantial competitive harm or constitute confidential commercial information. Consistent with the instruction in § 1001.4(c) for submitters to designate confidential commercial information "in good faith," UP may not use a blanket designation for everything it submits. Rather, UP must carefully consider what information could cause substantial competitive harm if disclosed and designate only that information as "confidential commercial information."¹ This will require UP to create and submit a confidential version and a public version of any submissions that contain confidential commercial information. In the public versions of submissions, UP should redact the portions of the documents it considers to be confidential commercial information. Moreover, UP must submit a draft protective order for review by the Board that includes a requirement to file confidential and public versions of any documents that contain confidential commercial information and to apply appropriate designations for confidential information.²

¹ Under 49 C.F.R. § 1001.4(c)(2), any claim that information constitutes confidential commercial information must, "whenever possible," be supported by "a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial information and has not been disclosed to the public."

² UP's draft protective order should be accompanied by an explanation of why this type of protective order is necessary here, as opposed to the type of protective order generally used in

It is ordered:

1. UP's December 22, 2022 motion for a protective order is denied without prejudice.
2. UP is directed to submit a draft protective order consistent with this decision by January 27, 2023.
3. This decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

similar proceedings that allows disclosure under certain conditions to parties to the proceeding (or to their outside counsel and consultants) while limiting disclosure to the broader public.