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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36785

CITY OF CHARLOTTE, NORTH CAROLINA
—ACQUISITION EXEMPTION—
NORFOLK SOUTHERN RAILWAY COMPANY

**MOTION FOR PROTECTIVE ORDER OF
CITY OF CHARLOTTE, NORTH CAROLINA
PURSUANT TO 49 C.F.R. § 1104.14**

Robert A. Wimbish
Thomas J. Healey
Stephen J. Foland
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
rwimbish@fletcher-sippel.com
Telephone: (312) 252-1500

**ATTORNEYS FOR THE CITY OF
CHARLOTTE, NORTH CAROLINA**

Dated: June 10, 2024

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Pursuant to 49 C.F.R. § 1104.14, the City of Charlotte, North Carolina (“Charlotte”) hereby moves the Board to issue a Protective Order to govern Charlotte’s tender, under seal, of unredacted copies of two documents, entitled as, respectively, a “Contract of Purchase and Sale” (the “PSA”) and a “Comprehensive Rail Agreement” (the “CRA”), between Charlotte and Norfolk Southern Railway Company (“NSR”), setting forth, as is pertinent here, the rights and obligations of the parties as bear on the analysis of the Surface Transportation Board (the “Board”) in the above-captioned proceeding.

Pursuant to 49 C.F.R. part 1150, subpart D, Charlotte is filing herewith a Notice of Exemption (the “Notice”) to acquire approximately 29.04 miles of right-of-way, track, and related assets from NSR, part of NSR’s “O-Line,” extending from milepost O-0.04 in downtown Charlotte to milepost 29.08 in Mooresville, North Carolina, in the City of Charlotte, Mecklenburg County, and in Iredell County, North Carolina. Charlotte is filing herewith a Motion to Dismiss (“Motion”) the Notice, seeking the Board’s determination that the transaction, as it has been structured, does not require the Board’s authorization, pursuant to the decision of the Interstate Commerce Commission in *State of Maine, Department of Transportation*—

Acquisition Exemption—Maine Central Railroad Company, 8 I.C.C.2d 835 (1991) (“*State of Maine*”) and its progeny.

Pursuant to 49 C.F.R. §§ 1104.14 and 1180.6, Charlotte has offered with the Motion a redacted (public) version of the PSA as Exhibit C, and a redacted (public) version of the draft CRA as Exhibit D. Charlotte has also filed unredacted versions of these two documents under seal, subject to Board issuance of the requested Protective Order. The PSA and CRA each contain commercially-sensitive information which could cause competitive and other harm to Charlotte and NSR if it were to be disclosed publicly. Public disclosure of this information is not necessary for the Board to consider and rule upon the merits of Charlotte’s Motion. Charlotte therefore moves the Board to issue a Protective Order, to accept the unredacted versions of the documents for filing under seal, and to adopt the attached proposed Protective Order and Undertakings to control access to the unredacted documents, in keeping with the approach the Board has taken in other, similar transactions.¹

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Thomas J. Healey

Stephen J. Foland

Fletcher & Sippel LLC

29 North Wacker Drive, Suite 800

Chicago, Illinois 60606-3208

rwimbish@fletcher-sippel.com

Telephone: (312) 252-1500

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Dated: June 10, 2024.

¹ See, e.g., *Va. Passenger Rail Auth.—Acquisition and Operation of Certain Assets of Norfolk S. Ry. Co. in Montgomery and Roanoke Counties, and the Cities of Salem and Roanoke, Va.*, FD 36588 (STB served Mar. 7, 2022).

PROTECTIVE ORDER

1. For purposes of this Protective Order, “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
2. For purposes of this Protective Order, “Confidential Information” refers to any materials that any interested party may hereafter so designate in this Proceeding, including but not limited to traffic data, the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential financial and cost data, and other confidential or proprietary business or personal information.
3. For purposes of this Protective Order, “Highly Confidential Documents” means documents and other tangible materials containing or reflecting Highly Confidential Information including, but not limited to, the unredacted versions of the Purchase and Sale Agreement and the Comprehensive Rail Agreement (“Agreements”) between the City of Charlotte, North Carolina, and Norfolk Southern Railway Company.
4. For purposes of this Protective Order, “Highly Confidential Information” refers to any materials as the submitting party designates, in good faith, as Highly Confidential Information, such as shipper-specific cost or rate data, or other competitively or commercially-sensitive information, submitted under seal on June 7, 2024, in STB Docket No. FD 36785, and any other materials that any interested party may hereafter so designate in this Proceeding.
5. For purposes of this Protective Order, “Proceeding” means the proceeding filed under the Notice of Exemption and Motion to Dismiss, pursuant to *State of Maine, Department of Transportation—Acquisition Exemption—Maine Central Railroad Company*, 8 I.C.C.2d 835 (1991), pending before the Surface Transportation Board (“Board”) in STB Docket No. FD 36785, any judicial review arising from said Proceeding, and/or from any related proceedings before the Board.
6. All parties to this Proceeding agree the Agreements are Confidential Information, and the Agreements, any and all copies of thereof, and any and all documents incorporating information copied or otherwise derived therefrom, shall be designated and stamped as “CONFIDENTIAL,” and shall be handled as provided in this Protective Order.
7. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, 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, 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 the attached Confidential Undertaking attached to this Protective Order. Confidential Information shall only be provided pursuant to this Protective Order, and only upon the execution and delivery of the attached Confidential Undertaking to the City of Charlotte,

North Carolina (“Charlotte”) and Norfolk Southern Railway Company (“NSR”). Confidential Information shall be used solely for the purpose of preparation and presentation of evidence and argument in FD 36785 and related Board proceedings, or judicial review proceedings arising therefrom, and not for any other business, commercial, or other competitive purpose.

8. Highly Confidential Information shall not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to outside legal counsel, or retained outside consultant, who, before receiving any access to the Highly Confidential Information, has been given and has read a copy of this Protective Order, and has agreed to be bound by its terms by signing the Highly Confidential Undertaking attached to this Protective Order.

9. Any copies of or notes or Confidential Documents incorporating Confidential and/or Highly Confidential Information (other than file copies retained by outside counsel for a party to these Proceedings) must be destroyed, and notice of such destruction must be served on Charlotte and NSR, at the earlier occurrence of (a) such time as the party receiving Confidential and/or Highly Confidential Information withdraws from these Proceedings or (b) the completion of this and any related Board proceedings, or any proceeding or judicial review arising therefrom, including any petitions for reconsideration, appeals, or remands.

10. Any party to these Proceedings may challenge the designation by any other party 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 office whom authority has been lawfully delegated by the Board to adjudicate such challenges.

11. If any party intends to use Confidential and/or Highly Confidential Information at hearings or otherwise in this proceeding, or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any filings or documents setting forth or revealing such Confidential and/or Highly Confidential Information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (a) restrict attendance at any hearing during discussion of such Confidential and/or Highly Confidential Information, and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential Information in accordance with this Protective Order.

12. No party may include Confidential Information in any pleading, brief, discovery request or response, or other document submitted 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.” All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board.

13. No party may include Highly Confidential Information in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in these Proceedings unless (a) the pleading or other document is submitted under seal in accordance with this Protective Order, which requires the pleading or other document to be kept confidential by the other forum and not to be placed in the public docket in the Proceeding, or (b) the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Highly Confidential Materials Subject to Protective Order,” and accompanied by a motion to the other forum requesting a protective order requiring that the pleading or other document be kept confidential and not to be placed in the public docket in that forum's proceedings, and requesting that if the motion is not granted by that forum, that the pleading or other document be returned to the filing party.

14. No party may present or otherwise use Confidential and/or Highly Confidential Information at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed materials or exhibits containing or reflecting Confidential and/or Highly Confidential Information to the Board, and has accompanied such submission with a written request that the Board (a) restrict attendance at the hearing during any discussion of Confidential and/or Highly Confidential Information and (b) restrict access to any portion of the record, pleadings, or other briefs reflecting discussion of Confidential and/or Highly Confidential Information in accordance with this Protective Order.

15. No party may present or otherwise use Confidential and/or Highly Confidential Information at any deposition held in connection with these Proceedings without advising counsel for the party producing Confidential and/or Highly Confidential Information, counsel for the deponent, and all other counsel at the deposition. Attendance at any portion of the deposition at which Confidential and/or Highly Confidential Information is used or discussed shall be restricted to persons who may review it under the terms of this Protective Order. All portions of transcripts or exhibits which incorporate, refer to, or otherwise disclose Confidential and/or Highly Confidential Information shall be filed under seal and be otherwise handled as provided in this Protective Order.

16. To the extent that any materials reflecting Confidential and/or Highly Confidential Information are produced by a party to these Proceedings, and are held and/or used by the receiving person in compliance with this Protective Order, such production, disclosure, holding, and/or use of Confidential and/or Highly Confidential Information are deemed essential for the disposition of these and any related proceedings, and will not be deemed a violation of 49 U.S.C. § 11904, or any other relevant provision of the Interstate Commerce Commission Termination Act of 1995.

17. Nothing in this Protective Order shall restrict the right of any party to these Proceedings to disclose voluntarily any Highly Confidential Information originated by that party, if such Highly Confidential Information does not incorporate or otherwise reflect any Highly Confidential Information originated by any other party to these Proceedings.

18. If the Board retains Confidential and/or Highly Confidential Information, it shall treat the Confidential and/or Highly Confidential Information in accordance with the procedures set forth at 49 C.F.R. § 1104.14.

19. All parties must file simultaneously a public version of any Confidential and/or Highly Confidential submission filed with the Board. The highly confidential version may be served on other parties in electronic format only.

20. All parties must comply with 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.

CONFIDENTIAL UNDERTAKING

I, _____, have read the Protective Order governing the filing and treatment of the materials that may be tendered in this Proceeding (STB Docket No. FD 36785) and designated in whole or in part as Confidential due to the presence of Confidential Information, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information obtained pursuant to this Undertaking, or to use or permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such Confidential Information, for any purpose other than the preparation and presentation of evidence and argument in connection with STB Docket No. FD 36785, or any judicial review or proceeding taken or filed in connection therewith. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to this Protective Order to any person who is not also bound by the terms of this Protective Order and has not executed an Undertaking in the form hereof, and that at the conclusion of these proceedings (including any proceeding or administrative review, judicial review, 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 Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Confidential Undertaking and that Charlotte, North Carolina, Norfolk Southern Railway, 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 Confidential Undertaking but shall be in addition to all remedies available at law or equity.

Signature: _____

Position: _____

Dated: _____

HIGHLY CONFIDENTIAL UNDERTAKING

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this Proceeding. I certify that I have read the Protective Order governing the filing and treatment of Highly Confidential Documents (containing Confidential Information) prepared by the City of Charlotte, North Carolina (“Charlotte”) in STB Docket No. FD 36785, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of the redacted portions of the Purchase and Sale Agreement, the redacted portions of the draft Comprehensive Rail Agreement, and/or any other Highly Confidential Information or Highly Confidential Documents obtained under this Highly Confidential Undertaking, or to use or permit the use of any methodologies or techniques 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 STB Docket No. FD 36785, or any administrative or judicial review proceedings taken or filed in connection therewith. I further understand and agree not to disclose any information obtained under this Protective Order to any person who is not also bound by the terms of this Protective Order and has executed a Highly Confidential Undertaking in the form hereof. 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 Highly Confidential Information, other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I further understand and agree, as a condition precedent to receiving, viewing, or using copies of any information in this Proceeding, that I will take all necessary steps to ensure that Highly Confidential Information will be kept on a highly confidential basis by any outside counsel or consultants working with me; that under no circumstances will I permit access to the Highly Confidential Information by any employees, my client, or its subsidiaries, affiliates, or owners; and that at the conclusion of this Proceeding (including any administrative or judicial review or remand), I will destroy all documents containing or reflecting materials designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board).

I understand and agree that money damages would not be a sufficient remedy for breach of this Highly Confidential Undertaking, and that Charlotte, North Carolina, Norfolk Southern Railway, or other parties producing Highly Confidential Information or Highly Confidential Documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and 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 Highly Confidential Undertaking but shall be in addition to all remedies available at law or in equity.

Signature: _____
Outside [Counsel] [Consultant]

Dated: _____