Filed: August 18, 2025

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FreightCar America, Inc.,

Petitioner,

v.

National Steel Car Limited,

Patent Owner.

Case IPR2025-01047
U.S. Patent 8,132,515

PATENT OWNER MOTION TO SEAL AND FOR ENTRY OF A PROTECTIVE ORDER

Pursuant to 37 C.F.R. §§ 42.14 and 42.54, Patent Owner National Steel Car Limited ("Patent Owner") respectfully submits this unopposed Motion to Seal and for Entry of a Protective Order. Patent Owner specifically moves to seal confidential versions of its Patent Owner's Request for Discretionary Denial of Institution Brief ("Discretionary Denial Brief") and Exhibit 2007, and the entirety of Exhibits 2027, 2028, and 2033. Patent Owner is concurrently filing sealed and public versions, with confidential portions redacted, of its Discretionary Denial Brief and Exhibits 2007, 2027, 2028, and 2033. Patent Owner also proposes and moves for entry of, with Petitioner's consent, a modified version of the Board's Default Protective Order as Appendix A. Petitioner FreightCar America, Inc. ("Petitioner") does not oppose this motion and agreed to the modified version of the Board's Default Protective Order in Appendix A.

I. INTRODUCTION

Patent Owner's Discretionary Denial Brief, in part, relies on the direct competitive relationship between the parties leading up to the Petition. For support, Patent Owner's Discretionary Denial Brief includes its proprietary and highly sensitive documents including internal communications and business processes and confidential agreements between the parties. Patent Owner's Discretionary Denial Brief also includes information disclosed by Petitioner in the related action *National Steel Car Limited v. FreightCar America, Inc.*, et al., C.A. No. 1:24-cv-00594-JLH

(D. Del) (the "District Court Litigation"), which Petitioner claims to be confidential.

The parties rely on each of these documents in the District Court Litigation involving Petitioner and U.S. Patent 8,132,515 (the "'515 Patent"). In the District Court Litigation, the Honorable Christopher J. Burke entered a protective order providing strong protection of these documents and information. Ex. 2031. That protective order provides both a "CONFIDENTIAL" designation, which allows access to the document for employees and in-house counsel of the receiving party, and for a "CONFIDENTIAL – ATTORNEYS' EYES ONLY" designation, which allows outside counsel but not employees or in-house counsel of the receiving party to have access to these documents. *See id.*

Patent Owner seeks a protective order here with the same level of protection that the parties are operating under during the District Court Litigation. The "CONFIDENTIAL" designation in the District Court Litigation is analogous to the "PROTECTIVE ORDER MATERIAL" designation in the attached proposed protective order. Appendix A. The "CONFIDENTIAL – ATTORNEYS' EYES ONLY" designation is analogous to the "PROTECTIVE ORDER MATIERAL – ATTORNEYS' EYES ONLY" designation in the attached proposed protective order. *Id.*

Patent Owner designated Ex. 2028 under the "CONFIDENTIAL – ATTORNEYS' EYES ONLY" designation in the District Court Litigation.

Petitioner also served an interrogatory response (Ex. 2033), which Petitioner designated as "CONFIDENTIAL – ATTORNEYS' EYES ONLY". With those designations in the District Court Litigation, outside counsel, but not a receiving party's employees or in-house counsel, has access to these documents.

Petitioner filed portions of Ex. 2007 under seal in the District Court Litigation, and contends that certain portions of that document are entitled to protection under the "PROTECTIVE ORDER MATERIAL" designation under the modified protective order proposed herein. Ex. 2027 is a settlement agreement between the parties with confidential terms and conditions, which is protected as "CONFIDENTIAL" pursuant to the protective order in the District Court Litigation.

II. DOCUMENTS TO BE SEALED

Patent Owner requests the following documents be sealed:

Exhibit 2007, which is Petitioner's (and its co-defendants and real parties-in-interests') Answer and Counterclaims to Patent Owner's Second Amended Complaint in the District Court Litigation (D.I. 68) (the "Answer"). The Answer includes admissions made by Petitioner regarding confidential business practices that have never been made public.

Exhibit 2027, which is a confidential settlement agreement by and between Patent Owner and Petitioner regarding previous patent litigation between the parties (the "Settlement Agreement"). The terms and conditions of the Settlement

Agreement are confidential. The terms and conditions of the Settlement Agreement have never been made public.

Exhibit 2028, which is an internal communication between employees of Patent Owner. The communication includes information regarding Patent Owner's competitors and Patent Owner's employees' analysis of the same. This communication has never been made public.

Exhibit 2033, which is Petitioner's Response to Patent Owner's Interrogatory No. 7 from the District Court Litigation. Petitioner designated the same as "CONFIDENTIAL- ATTORNEYS' EYES ONLY" under the protective order in the District Court Litigation. The designated information in this response has never been made public.

The portions of the Discretionary Denial Brief that incorporate or reference the confidential portions of Exhibits 2007, 2027, 2028, and 2033.

III. The Proposed Protective Order

The parties agreed to the proposed protective order (Appendix A), which modifies the PTAB default protective order with certain provisions similar to the protective order from the District Court Litigation. For example, the proposed protective order in Appendix A includes a second confidential designation with essentially the same scope as the District Court Litigation's attorneys' eyes only designation, which reads:

> A Producing Party may designate Discovery Material as "CONFIDENTIAL — ATTORNEYS' EYES ONLY" if it contains or reflects information that is extremely confidential and/or sensitive in nature and the Producing Party reasonably believes that the disclosure of such Discovery Material is likely to cause harm or significant competitive disadvantage to the Producing Party. The Parties agree that the following information, if nonpublic, shall be presumed to merit the "CONFIDENTIAL — ATTORNEYS' EYES ONLY" designation: trade secrets, pricing information, financial data, sales information, sales or marketing forecasts or plans, business plans, sales or marketing strategy, product development information, engineering documents, testing documents, employee information, and other nonpublic information of similar competitive and business sensitivity.

Ex. 2031 at ¶ 9(a). The parties propose using similar language for a PROTECTIVE ORDER MATERIAL – ATTORNEYS' EYES ONLY designation in the proposed protective order (Appendix A, ¶ 2). The parties also propose accessibility restrictions to PROTECTIVE ORDER MATERIAL – ATTORNEYS' EYES ONLY information commensurate with that in the District Court Litigation.

The Board also recently accepted a protective order with a designation very similar to the PROTECTIVE ORDER MATERIAL – ATTORNEYS' EYES ONLY

designation proposed herein in IPR2022-01299 (Ex. 2094).

IV. MOTION TO SEAL LEGAL STANDARD

"There is a strong public policy for making all information filed in a quasi-judicial administrative proceeding open to the public." *Garmin Int'l v. Cuozzo Speed Techs*., LLC, IPR2012–00001, slip op. at 1–2 (PTAB Mar. 14, 2013) (Paper 34). The record for an *inter partes* review shall be made available to the public, except as otherwise ordered on a motion to seal. 35 U.S.C. § 326(a)(1); 37 C.F.R. § 42.14. The documents and information that are the subject of the motion to seal shall be treated as sealed until the motion is decided. *Id.*

In determining whether to grant a Motion to Seal, the Board must find "good cause" and "strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information." 37 C.F.R. § 42.54(a); Consolidated Trial Practice Guide (November 2019) at 19 *see also Argentum Pharms. LLC v. Alcon Res.*, Ltd., IPR2017-01053, Paper 27 at 3–4 (PTAB Jan. 19, 2018) (Informative) (describing the "good cause" standard). As described in the Consolidated Trial Practice Guide, the Board identifies confidential information in a manner "consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information."

The moving party bears the burden of showing that the relief requested should

be granted. 37 C.F.R. § 42.20(c). That includes showing that the information is truly confidential, and that such confidentiality outweighs the strong public interest in having an open record. *See Argentum*, Paper 27 at 3–4. A party moving to seal has the burden of showing that:

> (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely on the specific information sought to be sealed, and (4) on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Id. These factors support granting Patent Owner's motion to seal.

V. GOOD CAUSE EXISTS TO SEAL

First, the information sought to be sealed is "truly confidential." Patent Owner and Petitioner have not publicly disclosed the information that they request to be sealed. Moreover, the information in Ex. 2028 and Ex. 2033 in the District Court Litigation was designated as CONFDIENTAIL – ATTORNEYS' EYES ONLY under the District Court Litigation Protective Order. Ex. 2031. The information sought to be protected in Ex. 2007 was sealed when it was filed in the District Court Litigation, with a redacted version on the public docket. Finally, Ex. 2027 was disclosed as CONFIDENTIAL under the District Court Litigation Protective Order. Ex. 2031.

Second, regarding each of these exhibits, "concrete harm" to Patent Owner and/or Petitioner would result if the documents were accessible to any other party or the public. Broad unprotected disclosure of this information would provide the public at-large with direct insight into each party's business dealings and strategies. Such access would severely hinder Patent Owner and Petitioner's ability to compete in the market. Confidential information such as this is precisely the type of information to be protected pursuant to 37 C.F.R. § 42.54(a)(7).

Third, Patent Owner has a "genuine need" to rely on these documents in this proceeding. Patent Owner asserts that the competitive relationship of the parties, Petitioner's knowledge of the '515 Patent, and decision not to challenge them until now weighs in favor of the discretionary denial of the Petition. Patent Owner believes that the documents are essential for showing that the strong settled expectations of the parties favors discretionary denial of the Petition.

Fourth, the prejudicial effect that disclosure would have on Patent Owner and Petitioner far outweighs the public's interest in accessing this information for the purposes of the patentability of the challenged claims in this proceeding. Patent Owner and Petitioner have a strong interest in protecting their internal communications and business dealings from public disclosure. Moreover, Patent Owner will submit a redacted version of its Discretionary Denial Brief, which appropriately balances the public's interest in having an open record with Patent

Owner and Petitioner's interest in protecting their confidential information.

VI. CERTIFICATION OF CONFERENCE WITH OPPOSING PARTY PURSUANT TO 37 C.F.R. § 42.54

Patent Owner certifies pursuant to 37 C.F.R. § 42.54(a) that it contacted Petitioner's counsel regarding this Motion to Seal and for Entry of a Protective Order on August 8, 2025. Petitioner stated it does not oppose this motion.

VII. CONCLUSION

For the reasons stated above, Patent Owner respectfully requests that the Board grant this Motion to Seal and for Entry of a Protective Order.

Respectfully submitted,

Ice Miller LLP

Dated: August 18, 2025

/Safet Metjahic/

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APPENDIX A

Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked "PROTECTIVE ORDER MATERIAL" or "PROTECTIVE ORDER MATERIAL–ATTORNEYS' EYES ONLY."

2. PROTECTIVE ORDER MATERIAL–ATTORNEYS' EYES ONLY information is information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the undesignated disclosure of which would otherwise likely have the effect of either (i) impairing the PTAB's ability to obtain such information as is necessary to perform its statutory functions; or (ii) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the PTAB is required by law to disclose such information.

3. Access to PROTECTIVE ORDER MATERIAL information is limited to

the following individuals who have executed the acknowledgment appended to this order:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. Representatives of record for a party in the proceeding.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. In-house counsel of a party.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement.

Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

3. Access to PROTECTIVE ORDER MATERIAL–ATTORNEYS' EYES ONLY information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Outside Counsel. Outside counsel of record for a party in the proceeding.

(B) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(C) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(D) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an

Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

4. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons having access as identified above, shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

5. Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the

confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

6. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The documents or information shall remain under seal unless the Board determines that some or all of it does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the

confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" or "PROTECTIVE ORDER MATERIAL–ATTORNEYS' EYES ONLY and shall be produced in a manner that maintains its confidentiality.

7. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party.

8. Standard Acknowledgement of Protective Order. The following form may be used to acknowledge the protective order and gain access to information covered by the protective order:

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FREIGHTCAR AMERICA, INC.,
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v.

NATIONAL STEEL CAR LIMITED,
Patent Owner.

Case IPR2025-01047
U.S. Patent 8,132,515

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the District of Delaware for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

Date: _____ By: _____

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e) and with the agreement of counsel for Petitioner, a true and correct copy of **PATENT OWNER MOTION TO SEAL AND FOR ENTRY OF A PROTECTIVE ORDER** is being served electronically on August 18, 2025, to the e-mail addresses shown below:

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