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SEC

SERVICE DATE - MARCH 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33853

CEMEX USA—PETITION FOR DECLARATORY ORDER—
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: March 9, 2000

On February 29, 2000, Cemex USA (Cemex) filed and served on The Burlington Northern and Santa Fe Railway Company (BNSF) a petition for a declaratory order and a verified statement by Mr. Gary P. Burns, Cemex's Director of Supply Chain. Cemex simultaneously filed a motion for a protective order to protect the information submitted in the petition for a declaratory order and verified statement and to protect information to be submitted, or evidence to be filed, in the future. Cemex designated the declaratory order petition and verified statement as confidential under 49 CFR 1104.14 stating that they contain financial information that affects its status. Cemex states that it will file an original and 10 copies of a redacted version of the declaratory order petition and verified statement for the public record.

Good cause exists to grant the motion for a protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material can cause serious competitive injury. Issuance of a protective order will ensure that material submitted or otherwise produced in response to a discovery request will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules governing requests for protective orders, 49 CFR 1104.14, and will be granted.

It is ordered:

1. Cemex's motion for a protective order is granted. The Protective Order and Undertaking in the Appendix to this decision are adopted.
2. The confidential version of Cemex's petition for a declaratory and the verified statement by Mr. Burns will be kept under seal and will not be placed in the public docket or otherwise disclosed to the public. Parties to this proceeding must comply with the Protective Order and Undertaking.
3. This decision is effective on its service date.

STB Finance Docket No. 33853

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order, “person” or “people” includes any person or entity, including such people and entities that are not formal parties to this proceeding.

2. For purposes of this Protective Order, information designated as “Confidential,” as used herein, includes all such designated material and all information contained in such material.

3. This Order shall apply to all information designated as “Confidential” (i) filed with the Surface Transportation Board (Board) or any other administrative, legislative, or judicial body in connection with this proceeding; or (ii) obtained by any person pursuant to discovery requests made in connection with this proceeding.

4. Any person filing documents with the Board or any other administrative, legislative, or judicial body in connection with this proceeding or filing material responding to a discovery request in connection with this proceeding may designate as “Confidential” any information or portion thereof that it in good faith contends contains confidential, proprietary, or highly sensitive information by clearly writing “Confidential” on each page of material so designated.

5. If a person inadvertently fails to designate documents or other material as “Confidential,” it may make such a designation subsequently by notifying the appropriate people in writing and sending revised pages properly marked in accordance with paragraph 4 of this Protective Order. After such notification is received, such materials and information shall be substituted as if they initially had been designated as Confidential.

6. A person at any time may request by letter that a producing person cancel the “Confidential” designation of any document (or portion thereof) or discovery response (or portion thereof). Such a request should identify with particularity the designated documents (or portions thereof) or discovery responses (or portions thereof) it contends should not be treated as Confidential, provide the reasons therefore, and explicitly state that it is made pursuant to this paragraph. If such request is denied in whole or in part, the requesting person may file a motion with the Board to have the “Confidential” designation removed as to the information listed in the request. The documents (or portions thereof) or discovery responses (or portions thereof) shall be treated as designated, pending a ruling on such motion. The burden of establishing that such information should not be afforded the protections of this Order shall be on the person filing the motion.

7. Information designated as “Confidential” may be disclosed only to “Authorized Persons.” An “Authorized Person” is a person who has signed an undertaking, in the form set forth as Attachment 1 hereto, stating his or her identity, title, and employer, and that he or she has read this Order and agrees to abide by it, and who is:

- (a) an attorney actively involved in this proceeding on behalf of a person, or a legal assistant or a clerical employee under such attorney's supervision; or
- (b) a non-permanent employee who has been employed by any person to provide advice, expertise or assistance in connection with this proceeding, or an assistant or clerical employee under such a non-permanent employee's supervision.

8. Storage, transmission, or communication of information designated "Confidential" must reasonably ensure that Confidential information will not be disclosed accidentally or otherwise to non-Authorized Persons.

9. Information designated "Confidential" may not be used for any purpose whatsoever other than the disposition of this proceeding.

10. All Confidential information filed with the Board, and any material filed with the Board that discloses Confidential information, shall be filed, and kept, under seal until further order of the Board.

11. At the termination of this proceeding, including all appeals, all Confidential information and materials containing Confidential information, other than copies of pleadings or other documents filed with the Board, shall be returned to the persons who filed or produced them, at their request; otherwise, after a reasonable amount of time has passed, all such documents shall be destroyed,¹ except that a copy of Confidential information and materials may be retained by an Authorized Person for his or her files.

12. The provisions of this Order that restrict the handling, communication, and use of Confidential information shall remain binding after the termination of this proceeding, unless the Board or the person filing or producing such designated materials gives written authorization for alternative handling, communication, or use of the information.

13. This Order shall not bar or otherwise restrict:

- (a) a person from opposing production of the information under the Board's Rules of Practice;
- (b) an Authorized Person from making copies, abstracts, digests, and analyses of Confidential information for use in connection with this proceeding, subject to the requirement that all such copies, abstracts, digests, and analyses be treated as Confidential information and clearly marked as such;
- (c) an Authorized Person from rendering advice or opinions in connection with this proceeding to his or her client or employer based upon his or her examination of Confidential information, provided such person does not disclose the

¹ "Destroy" shall mean shredding of paper documents and destruction of computer-memory devices (e.g., floppy diskettes).

Confidential information to any non-Authorized Person;

(d) a person from using any Confidential information during hearings in this proceeding, subject to further order of the Board; and

(e) a person from applying to the Board at any time for additional protection.

14. If Confidential information in the possession of any person is subpoenaed by any administrative, legislative or judicial body, or any other person purporting to have authority to subpoena such information, the person to whom the subpoena is directed may not produce such information without first giving written notice (including the delivery of a copy of the subpoena) to the person that designated such information "Confidential" or the attorneys for such person. If a subpoena purports to require the production of such Confidential information on less than four (4) business days' notice, the person to whom the subpoena is directed shall give immediate notice by telephone of the receipt of such subpoena to the person who has filed or produced such information, or the attorneys for such person.

UNDERTAKING

I hereby attest to my understanding that information or documents designated “Confidential,” including the information contained in documents so designated, are provided to me pursuant to the terms, conditions, and restrictions of the attached Protective Order entered in Cemex USA v. Burlington Northern Santa Fe Railway Company—Petition for Declaratory Order, STB Finance Docket No. 33853, that I have been given a copy of and have read the aforementioned Protective Order and, that if I am not an attorney, have had its meaning and effect explained to me by an attorney in this case; that I hereby agree to be bound by it and its terms, and that I will provide a copy of this executed undertaking to counsel for each party who has designated information I receive as Confidential. I recognize that I may be held personally liable for any damages that the person furnishing information may suffer as a result of my disclosure or use of any Confidential information protected by this Order.

Dated: _____

Signed: _____

Name: _____

Title: _____

Employer: _____