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SERVICE DATE – NOVEMBER 10, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: November 10, 2004

By complaint filed and served on defendant The Burlington Northern and Santa Fe Railway Company (BNSF) on October 19, 2004, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) allege that the carrier's rates for the movement of coal from origins in the Powder River Basin of Wyoming to WFA's Laramie River electric generating station (Laramie River), located near Moba Junction, WY, are unreasonably high. WFA alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.

By motion filed on October 29, 2004, WFA seeks a protective order with respect to evidentiary submissions and discovery. The proposed order, as set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.¹ It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904. It also includes provisions incorporating modifications to those orders as required by recent Board decisions which addressed protective orders in rate cases.² Finally, as an adaptation designed to avoid the need for routine, unopposed motions to compel the disclosure of confidential contracts related to the dispute, the protective order (at paragraph 7) specifically provides for the production of

¹ See, e.g., AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 41191 (Sub-No. 1) (STB served Sept. 11, 2003).

² See Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003, and June 6, 2003), reconsideration denied (STB served July 31, 2003).

such contracts as a measure toward a more efficient discovery process. Although not mentioned in the protective order, parties are required by Board rule to file a public version of all submissions simultaneously with the submission of any highly confidential or confidential version in these cases.

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 a discovery request or otherwise, 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 at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

On October 29, 2004, WFA filed a motion to establish a procedural schedule for this proceeding to which BNSF reportedly concurs. On November 8, 2004, BNSF filed an answer to the complaint.

The proposed procedural schedule will be adopted. The parties are directed to meet to discuss discovery matters as soon as possible, but no later than November 17, 2004.

It is ordered:

1. WFA's motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The following procedural schedule is set for this proceeding:

December 7, 2004	Staff-supervised discovery conference.
January 21, 2005	End of discovery.
April 5, 2005	Opening statements due.
May 3, 2005	Staff-supervised technical conference.
July 6, 2005	Reply statements due.
September 2, 2005	Rebuttal statements due.

4. The parties shall meet as soon as possible, but no later than November 17, 2004, to discuss discovery matters.

5. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.
 - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding over this proceeding. Material that is so designated may be disclosed only to outside counsel

or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Administrative Law Judge, the Board, or the court, as appropriate, with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending 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 “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
7. Each party is ordered to produce to the other party rail transportation contracts and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts are relevant in preparing their evidence in this proceeding. Any such contracts shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party to the opportunity contest the release.
9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.
10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is

produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

11. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing the filing party’s “HIGHLY CONFIDENTIAL” material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party’s “HIGHLY CONFIDENTIAL” material has been redacted. The “CONFIDENTIAL” version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). Alternatively, in lieu of preparing and serving a “CONFIDENTIAL” version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party’s own “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by the reviewing party’s In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the “HIGHLY CONFIDENTIAL” version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party’s In-house Personnel.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on November 10, 2004, governing the production of confidential documents in STB Docket No. 42088, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42088 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents 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.

Dated: _____

UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on November 10, 2004, governing the production of confidential documents in STB Docket No. 42088, 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 designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents 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: _____