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SEC

SERVICE DATE - JULY 3, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34065

ELLIS & EASTERN COMPANY—TRACKAGE RIGHTS EXEMPTION—THE BURLINGTON  
NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: June 28, 2001

By motion filed June 25, 2001, Ellis & Eastern Company (EE), seeks a protective order under 49 CFR 1104.14 for the confidential trackage rights agreement between EE and The Burlington Northern and Santa Fe Railway Company (BNSF), which was submitted under seal (unredacted version).<sup>1</sup> EE concurrently filed a notice of exemption under 49 CFR 1180.2(d)(7) to acquire from BNSF the trackage rights described in the agreement, and a redacted copy of the agreement was attached to the notice.

Good cause exists to grant the motion. According to EE, the agreement contains commercially sensitive information in its compensation provisions. EE further states that unrestricted disclosure of this information could be competitively damaging.

The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted, subject to the protective order and undertaking contained in the Appendix to this decision. Issuance of the protective order ensures that EE's and BNSF's confidential information will be used solely for this proceeding and not for other purposes.

It is ordered:

1. EE's motion for a protective order is granted. The unredacted version of the trackage rights agreement submitted in STB Finance Docket No. 34065 will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

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<sup>1</sup> A proposed protective order and undertaking was included with the motion.

2. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

APPENDIX

1. For purposes of this Protective Order (Order), the term “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 Order, information designated as “Confidential,” as used herein, includes all such designated material, and all information contained in such designated material.

3. This Order shall apply to all information designated as “Confidential” (i) filed with the 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 the person 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,” that person 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 Order. After receipt of such notification, 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 request should identify with particularity the designated documents (or portions thereof) or discovery responses (or portions thereof) the person contends should not be treated as “Confidential,” provide the reasons therefor, and explicitly state that the request 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 in the attachment to this appendix, 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 as "Confidential" must be such as to reasonably ensure that confidential information will not be disclosed, accidentally or otherwise, to non-Authorized Persons.

9. Information designated as "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 under seal and kept under seal until further order of the Board.

11. All confidential information and materials containing such confidential information shall, at the request of the person filing or producing such documents, be returned to such person at the termination of this proceeding, including all appeals; otherwise, after a reasonable amount of time has passed, all such documents shall be destroyed, except that a copy of such 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 continue to be binding after the termination of this proceeding, unless the Board or the person filing or producing such designated materials authorizes in writing alternative handling, communication or use of the information.

13. This Order shall not bar or otherwise restrict:

(a) a person from opposing production of 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 confidential information itself to any non-Authorized Person;

(d) a person from using any confidential information during hearings in this proceeding, subject to any 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 will not produce such information until a reasonable amount of time has passed after giving written notice (including the delivery of a copy of the subpoena) to the person who has designated such information as “Confidential,” or the attorneys for such person. If a subpoena purports to require 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 designated such information as “Confidential,” or the attorneys for such person.

ATTACHMENT

UNDERTAKING

I hereby attest that (i) I understand that the 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 STB Finance Docket No. 34065, Ellis & Eastern Company–Trackage Rights Exemption–The Burlington Northern and Santa Fe Railway Company, (ii) I have been given a copy of and have read the aforementioned Protective Order, (iii) if I am not an attorney, I have had its meaning and effect explained to me by an attorney in this case, (iv) I hereby agree to be bound by it and its terms, and (v) 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 Protective Order.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Employer: \_\_\_\_\_