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SEC

SERVICE DATE - MARCH 6, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33337

MINNESOTA NORTHERN RAILROAD, INC.--TRackage RIGHTS
EXEMPTION--THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: March 4, 1997

On January 9, 1997, Minnesota Northern Railroad, Inc. (MNR) filed motion for a protective order under 49 CFR 1104.14. This motion was filed in conjunction with a notice of exemption filed January 8, 1997, under 49 CFR 1180.2(d)(7) and 1180.4(g), from the prior approval requirements of 49 U.S.C. 11323. In the notice, the Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant overhead trackage rights to MNR over a line of railroad between mileposts 31.0 and 33.0 near Erskine, MN.

Under 49 CFR 1180.4(g)(1), parties seeking an exemption from section 11323 must file a copy of the contract pertaining to the proposed transaction. MNR states that the Asset Purchase Agreement, as amended, that governs trackage rights between BNSF and MNR, contains sensitive commercial, financial, and proprietary information. MNR states that if the agreement were released to the public, MNR and BNSF would suffer competitive and commercial harm.

Good cause exists to grant the motion for a 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 requested protective order will also help to minimize potential discovery disputes and facilitate the more speedy and efficient resolution of this proceeding.

It is ordered:

1. The motion for a protective order is granted; the parties are directed to comply with the protective order in the appendix.

2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. This Order shall apply to all documents, information and other products of discovery (including testimony and transcripts of testimony taken at depositions) obtained by any party to this proceeding pursuant to discovery requests (including workpaper requests), whether directed to another party or to a person not a party to this proceeding.

2. Any party or person responding to a discovery request (including a workpaper request) may designate as "Confidential Information" any response (including production of documents) or portion thereof that it in good faith contends contains confidential, proprietary or commercially sensitive information. Any party or person responding to such a request may also designate as "Highly Confidential Information" any "Confidential Information" that it in good faith contends contains such highly sensitive information that disclosure to employees or agents of another party, even subject to the restrictions of this Order governing the use and dissemination of "Confidential Information," could reasonably threaten significant economic or competitive harm to the producing party or person. Except as provided by Paragraph 5, "Confidential Information" and "Highly Confidential Information" as used herein include all such designated responses, any copies, extracts, abstracts or summaries of all or part of such responses, and all or any portion of information contained in such responses.

3. Responses to discovery requests (including workpaper requests) may be designated as "Confidential Information" or "Highly Confidential Information" as follows:

(a) Responses or portions of responses to interrogatories, written deposition interrogatories, requests for admission or workpaper requests may be designated by stamping or printing "Confidential" or "Confidential Information," or "Highly Confidential" or "Highly Confidential Information," in the front thereof and, if only portions of the response are to be so designated, clearly marking the confidential or highly confidential portions.

(b) Prior to the production of copies to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they are "Confidential Information" or "Highly Confidential Information." Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing "Confidential Information" or "Highly Confidential Information" or stamping "Confidential" or "Confidential Information" on each page containing "Confidential Information," or stamping "Highly Confidential" or "Highly Confidential Information" on each page containing "Highly Confidential Information," and, if only portions of a document page are to be so designated, clearly marking the confidential portions.

(c) A deponent or the attorney for a deponent may designate the deponent's entire testimony and the transcript thereof to be treated as "Confidential Information" or "Highly Confidential Information" by so requesting on the record prior to the conclusion of the deposition. Such designation shall be effective only until 15 days after the availability of the transcript of the deposition, after which portions of the deposition testimony may be designated "Confidential Information" or "Highly Confidential Information" only by informing each party in writing of the pages, and the portions thereof, that contain "Confidential Information" or "Highly Confidential Information."

4. If a party or person inadvertently fails to designate discovery or other material as "Confidential Information" or "Highly Confidential Information" in a timely fashion as provided herein, it may make such a designation subsequently by notifying the parties in writing. After receipt of such notification, such materials and information shall be treated as if they had been designated in a timely fashion.

5. Any party at any time may by written notice request that the producing party or person cancel the "Confidential Information" or "Highly Confidential" designation of any transcript, document or discovery response or portion thereof. Such request should identify particularly the designated responses it contends should not be treated as "Confidential Information" or "Highly Confidential Information," provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted ten (10) days after receipt of the request, unless the producing party or person, prior to the end of the ten (10) day period, sends by certified mail or commercial messenger service a written denial of the request. If such request is denied in whole or in part, the requesting party may file a motion with the Board to have the "Confidential Information" or "Highly Confidential Information" designation removed as to the discovery responses listed in the request. The burden of establishing that the responses should not be afforded the protections of this Order shall be on the moving party.

6. Other than as provided in Paragraph 7 below, "Confidential Information" and "Highly Confidential Information" may only be disclosed to "Authorized Persons." An "Authorized Person" is a person who, prior to the receipt of any "Confidential Information" or "Highly Confidential Information," has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and is:

(a) an attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(b) a person who is an employee or agent of a party and is actively involved in this proceeding;

(c) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by

any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(d) a reporter employed to record depositions; or who, in the case of "Highly Confidential Information," is:

(1) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(2) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(3) a reporter employed to record depositions.

Each such undertaking by an "Authorized Person" shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such undertaking shall be served upon counsel of record for each party no later than ten (10) days after such undertaking is executed.

7. "Confidential Information" and "Highly Confidential Information" may also be disclosed to:

(a) an employee of the producing party during a deposition of such employee;

(b) a deponent employed by an organization that also employs the person who produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to the deponent; or

(c) any person so authorized either (i) in writing by the party or person that produced the "Confidential Information" or "Highly Confidential Information" to be disclosed to such person or (ii) by the Board upon motion by any party for good cause.

8. Storage, transmission or communication of "Confidential Information" and "Highly Confidential Information" must be such as to reasonably ensure that the "Confidential Information" and "Highly Confidential Information" will not be disclosed, accidentally or otherwise, to non-authorized persons.

9. No person may be present at a deposition during the discussion of "Confidential Information" or "Highly Confidential Information" who has not been authorized by this Order to review the "Confidential Information" or "Highly Confidential Information" to be discussed.

10. "Confidential Information" and "Highly Confidential Information" may be used by the receiving party, and by any "Authorized Person," solely for purposes of this proceeding and

any related court litigation or judicial appeals, and not for any other purpose whatsoever (including any business or commercial purpose).

11. All "Confidential Information" and "Highly Confidential Information" filed with the Board, and any pleading, motion, or other paper filed with the Board that contains or discloses "Confidential Information" or "Highly Confidential Information" shall be filed under seal and kept under seal until further order of the Board.

12. All documents containing "Confidential Information" or "Highly Confidential Information" shall, at the option of the producing party/person, be destroyed or returned to the producing party/person at the termination of this proceeding, including all appeals.

13. The provisions of this Order that restrict the handling, communication and use of "Confidential Information" and "Highly Confidential Information" shall continue to be binding after the termination of this proceeding, including any related court litigation or judicial appeals, unless the Board or the producing party/person authorizes in writing alternative handling, communication or use of the information.

14. This Order shall not bar or otherwise restrict:

(a) a party or producing person from opposing production of any information under the Board's Rules of Practice;

(b) an "Authorized Person" from making copies, abstracts, digests and analyses of "Confidential Information" and "Highly 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" or "Highly Confidential Information," as the case may be, and clearly marked as such;

(c) an "Authorized Person" from rendering advice or opinions with respect to this proceeding to his or her client or employer based upon his or her examination of "Confidential Information" or "Highly Confidential Information" as long as such person does not disclose the "Confidential Information" or "Highly Confidential Information" itself to a person not authorized by this Order to have access to the "Confidential Information" or "Highly Confidential Information," as the case may be;

(d) a party from using any "Confidential Information" or "Highly Confidential Information" during hearings in this proceeding, subject to any further order of the Board;

(e) a party or producing person from using its own "Confidential Information" or "Highly Confidential Information" in any manner it sees fit, or from revealing such "Confidential Information" or "Highly Confidential Information" to whomever it chooses, without

the prior consent of any other party or of the Board;
and

(f) a party or producing person from applying to the Board at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires.

15. If "Confidential Information" or "Highly Confidential Information" in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such "Confidential Information" or "Highly Confidential Information" on less than four (4) business days' notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

16. Information that is obtained outside of this proceeding shall not be subject to this Order even if the same information is produced and designated as "Confidential Information" or "Highly Confidential Information" in this proceeding.

17. To the extent that "Confidential Information" or "Highly Confidential Information" is produced by a party or other person in this proceeding and held and used by the receiving party in compliance with the terms of this Order, such production, disclosure and use of such "Confidential Information" or "Highly Confidential Information" are deemed essential for the disposition of this proceeding and shall not be deemed a violation of 49 U.S.C. § 11904.

CONFIDENTIALITY UNDERTAKING

I, [Name] , am [Position or Job Title]
 , of [Company, Firm or Employer] , [Address of
Company, Firm or Employer] . I am:

- () an outside attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;
- () an attorney who is a regular employee of a party and is actively involved in this proceeding;
- () a person who is an employee or agent of a party and is actively involved in this proceeding;
- () a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision;
- () a court reporter employed to record depositions in the captioned proceeding,

and affirm that I have read and understand the Protective Order served March 6, 1997 in the captioned proceeding, and that I agree to abide by the terms of such Protective Order.

Dated: _____