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SERVICE DATE - LATE RELEASE APRIL 16, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33561

PORT OF PEND OREILLE D/B/A PEND OREILLE VALLEY RAILROAD—ACQUISITION  
AND OPERATION EXEMPTION—THE BURLINGTON NORTHERN AND SANTA FE  
RAILWAY COMPANY

PROTECTIVE ORDER

Decided: April 15, 1998

On February 20, 1998, Port of Pend Oreille d/b/a Pend Oreille Valley Railroad (POVA),<sup>1</sup> a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to acquire the exclusive rail freight easement and all track structures on a 24.9-mile rail line that was owned by The Burlington Northern and Santa Fe Railway Company (BNSF).<sup>2</sup> Notice of the exemption was served and published in the Federal Register on March 10, 1998 (63 FR 11707).

On April 9, 1998, John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment GO 386 (petitioner), filed a petition to reject or revoke the exemption. Petitioner also indicated that discovery is sought under 49 CFR 1121.2 and 49 CFR 1114.21-31. Petitioner expresses an intention to supplement the petition to reject or revoke upon completion of discovery. This decision addresses discovery only.

Petitioner wishes to obtain access to an unredacted copy of the agreement or agreements between BNSF and POVA, dated February 3, 1998, as amended or supplemented (agreement). Petitioner states that counsel for POVA has furnished an unsigned and highly redacted copy of the agreement, on a confidential basis, but that counsel for POVA is unwilling to provide an unredacted copy in the absence of a Board-issued protective order.

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<sup>1</sup> Port of Pend Oreille is a municipal corporation of the State of Washington and operates, as the Pend Oreille Valley Railroad, a 61-mile rail line between Newport and Metaline Falls, WA.

<sup>2</sup> The rail line involved in the acquisition transaction is located between milepost 1433.0, at Newport, WA, and milepost 1408.1, at Dover, ID. In conjunction with the acquisition of the rail freight easement and track structures, POVA acquired incidental overhead trackage rights over BNSF's 6.9-mile rail line between milepost 1408.1, at Dover, ID, and milepost 1401.2, at North Sandpoint, ID. BNSF retained ownership of the real estate underlying the rail line which was acquired, and POVA became the exclusive operator of the rail line.

To facilitate discovery in this proceeding, petitioner's request will be deemed to be a request for a protective order, and a protective order will be issued. If the parties are unable to resolve discovery issues under the protective order, a motion to compel may be filed.

It is ordered:

1. The request for protective order is granted.
2. The parties to this proceeding must comply with the protective order in the Appendix to this decision.
3. The decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

APPENDIX

PROTECTIVE ORDER

1. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this or any related proceedings, or are submitted in pleadings or other documents filed with the Board, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

a. Shall be designated and stamped as "CONFIDENTIAL" and shall be used solely for the purpose of this or any related proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial or other competitive purpose.

b. Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Board or the Administrative Law Judge presiding in this or any related proceedings, except: (1) to employees, counsel or agents of the party requesting such materials, solely for use in connection with this or any related proceedings, or any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and (2) to any participant in this or any related proceedings who is not an employee, counsel or agent of the requesting party only in the course of public hearings, if any, in such proceedings.

c. If produced through discovery, must be destroyed, and notice of such destruction served on the Board and the presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials either withdraws from this or any related proceedings, or at the completion of this and any related proceedings, or any judicial review proceeding arising therefrom, whichever comes first.

d. If submitted in any pleadings or documents filed with the Board, may not be submitted unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order" in accordance with the procedure set forth at 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket except by order of the Board.

2. Any party producing material in response to requests for discovery by a party to this or any related proceedings, or submitting such material in a pleading or other document filed with the Board, may in good faith designate and stamp particular competitively sensitive material as "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or of the Administrative Law Judge presiding in this or any related proceeding. Material

that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this or any related proceedings, or any judicial review proceeding arising therefrom, 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 prior to receiving access to such materials, and are legally able to receive such materials. Material designated as "HIGHLY CONFIDENTIAL" under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings, if any, in this or in any related proceedings, or in any judicial review proceeding arising therefrom, 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 reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, the Board or the court to (i) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (ii) restrict access to the portion of the record or pleadings reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with this Protective Order.

4. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this or in any related proceedings, 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 "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts 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.

5. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraph 1 of this Protective Order, such production, disclosure, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this or any related proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904.

UNDERTAKING

I, \_\_\_\_\_, have read the Protective Order governing the production of confidential documents in STB Finance Docket No. 33561, 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 Finance Docket No. 33561 or any judicial review proceedings taken or filed in connection therewith ("the Proceedings"). 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 executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the party 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 [outside consultant] for \_\_\_\_\_

whom I represent in [by whom I have been retained for purposes of] this proceeding, I have read the Protective Order governing the production of confidential documents in STB Finance Docket No. 33561, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY," I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, 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, that at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all other 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 -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" by, or disclose any information contained therein to, any persons or entities that I do not represent in [by which I have not been retained for purposes of] this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the party 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.

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COUNSEL [OUTSIDE CONSULTANT]

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