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SERVICE DATE - LATE RELEASE JANUARY 12, 2000

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33842

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD INCORPORATED, ILLINOIS CENTRAL RAILROAD COMPANY, BURLINGTON NORTHERN SANTA FE CORPORATION, AND THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY —
COMMON CONTROL

Decision No. 2

Decided: January 12, 2000

On December 20, 1999, Burlington Northern Santa Fe Corporation (BNSFC) and The Burlington Northern and Santa Fe Railway Company (BNSFR),¹ and Canadian National Railway Company (CNR), Grand Trunk Western Railroad Incorporated (GTW), and Illinois Central Railroad Company (IC),² filed a notice of intent (BN/CN-1) to file an application³ seeking Board authorization under 49 U.S.C. 11323-25 and 49 CFR part 1180 for a major transaction under which BNSF and CN would be brought under common control.

In a petition filed January 5, 2000, applicants request that the Board enter a Protective Order (BN/CN-2). Applicants explain that a Protective Order is necessary for two reasons. First, they state that, in order to prepare the application, personnel of the applicants and their affiliates must exchange information, including shipper-specific material such as traffic data and tapes, and the Protective Order is necessary to protect confidential information and to facilitate compliance with 49 U.S.C. 11323 and 11904 and other relevant provisions of the ICC Termination Act of 1995. According to applicants, the proposed order will allow applicants and their affiliates to prepare and present all relevant materials that may be required for the Board's analysis of the application. Second, the applicants maintain that the proposed Protective Order will facilitate any necessary discovery at subsequent stages of the proceeding by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and/or proprietary information in the event that such materials are sought or produced.

¹ BNSFC and BNSFR are referred to collectively as BNSF.

² CNR, GTW, and IC are referred to collectively as CN.

³ BNSF and CN are referred to collectively as applicants.

The request is similar to those for protective orders in other control cases.⁴ Unrestricted disclosure of confidential proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested Protective Order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use.⁵ The requested Protective Order will facilitate the prompt and efficient resolution of this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a protective order is granted and the parties to this proceeding must comply with the Protective Order in the Appendix.⁶

⁴ See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556, Decision No. 1 (STB served Feb. 26, 1998); CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 1 (STB served Apr. 16, 1997).

⁵ On January 10, 2000, Kansas City Southern Railway Company (KCS) filed comments (KCS-1) suggesting Board clarification that no relevant document or information may be withheld merely on the basis of its commercial or proprietary sensitivity and that parties should use confidentiality designations in the appropriate and intended manner. The Board has addressed such matters in the past and will continue to do so if needed on a case-by-case basis.

⁶ This decision protects the information, materials, and data set forth in the attached Appendix whether contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

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2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 5 or 6 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (Board) concerning the control application in STB Finance Docket No. 33842, and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. 33842 or from any related proceedings before the Board.

2. Personnel of Canadian National Railway Company (CNR), Grand Trunk Western Railroad Incorporated (GTW), Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR) (collectively, CN), and of Burlington Northern Santa Fe Corporation (BNSFC) and The Burlington Northern and Santa Fe Railway Company (BNSFR) (collectively, BNSF), and their affiliates, including outside consultants and attorneys for CN or BNSF (representatives), may exchange Confidential Information for the purpose of participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, unless and until their control application in the Proceedings is approved.

3. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of CN and BNSF or their affiliates are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such proceedings and will

not be deemed a violation of 49 U.S.C. 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995 (ICCTA).

4. If the control application is disapproved by the Board, or if the application is approved but control is not effected, or if no application is filed, then all Confidential Documents, other than copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings, must be destroyed⁷ or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

5. If any party to these Proceedings determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective Order.

6. Any party producing material in discovery to another party to these Proceedings, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information, as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective Order.

7. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

8. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has

⁷ "Destroy" shall mean shredding of paper documents and destruction of computer-memory devices (e.g., floppy diskettes).

read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

9. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

10. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

11. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, 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.” See 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 in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

13. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

14. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board,

administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

15. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 12 of this Protective Order.

16. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, 5, or 6 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904 or of any other relevant provision of the ICCTA.

17. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

18. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING — CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on January 12, 2000, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33842, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33842, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 33842 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/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: _____

Exhibit B

UNDERTAKING — HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on January 12, 2000, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33842, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33842, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 33842 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents 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 materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/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: _____