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SEC

SERVICE DATE - MARCH 13, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34001

CANADIAN NATIONAL RAILWAY COMPANY–TRACKAGE RIGHTS
EXEMPTION–DETROIT RIVER TUNNEL COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: March 9, 2001

By motion filed February 27, 2001, Canadian National Railway Company (CN) seeks a protective order under 49 CFR 1104.14 for the unredacted draft CN Tunnel User Agreement (draft agreement) between Detroit River Tunnel Company (DRTC) (through DRTC's lessee the Detroit River Tunnel Partnership), CN, and Canadian Pacific Railway Company, which was submitted under seal. At the same time, CN filed a notice of exemption under 49 CFR 1180.2(d)(7) for CN's acquisition from Detroit River Tunnel Company of the trackage rights described in the draft agreement.

Good cause exists to grant the motion for protective order. According to CN, the financial terms of the draft agreement are incomplete and highly confidential, and contain propriety matters. CN notes that their public disclosure would cause substantial commercial and competitive harm to the parties to the agreement, particularly if those terms could be used by competitors to forecast CN's pricing of its rail services using trackage rights granted by the agreement.¹

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 the railroads' confidential information will be used solely for this proceeding and not for other purposes. Because CN did not submit a proposed protective order, the form set out in the Appendix to this decision will be imposed.

¹ In the verified notice of exemption, CN states that, when the parties finalize the terms of the trackage rights, CN will supplement the verified notice of exemption with both the final agreement (subject to the terms of the protective order) and a redacted copy of the agreement for the public record.

It is ordered:

1. CN's motion for a protective order is granted, and the Protective Order and Undertaking in the Appendix to this decision are adopted.
2. The draft agreement submitted in STB Finance Docket No. 34001 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.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

Protective Order

1. For the purposes of this Protective Order, “confidential information” means provisions of the CN Tunnel User Agreement between Detroit River Tunnel Company (DRTC) (through DRTC’s lessee, the Detroit River Tunnel Partnership), Canadian National Railway Company (CN), and Canadian Pacific Railway Company, filed February 27, 2001, in STB Finance Docket No. 34001.

2. The confidential information shall be used for the purpose of this and any related Board proceedings, or any judicial review proceeding arising therefrom, and not for any other business, commercial or competitive purpose.

3. The confidential information shall not be disclosed in any way or to any person without the written consent of CN or an order of the Board, except: to outside counsel or consultants of parties to these proceedings, solely for use in connection with this and any related Board proceedings, or any judicial review proceeding arising therefrom, provided that such outside counsel or consultant has been given and has read a copy of this Protective Order and agrees to be bound by its terms by signing the attached Undertaking prior to receiving access to this information.

4. Any documents containing the confidential information must be destroyed, and notices of such destruction must be served on the Board at the completion of this and any related Board proceedings, or any judicial review proceeding arising therefrom, whichever comes first.

5. If the Board retains the confidential information, it shall, in order to keep it confidential, treat the information in accordance with the procedure set forth at 49 CFR 1104.14.

6. If any party intends to use the confidential information at hearings in this proceeding or in any related Board proceedings, or in any judicial review proceeding arising therefrom, the party shall submit any documents setting forth or revealing such confidential information to the Board, or the reviewing court as appropriate, under seal, and shall accompany such submission with a written request to the Board or the court to (i) restrict attendance at the hearing during discussion of such confidential information, and (ii) restrict access to the portion of the record or briefs reflecting discussion of such confidential information in accordance with this Protective Order.

7. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, is shown by any party to warrant suspension of any of the provisions herein.

Undertaking

I, _____, have read the Protective Order governing the filing of confidential information by CN in STB Finance Docket No. 34001 and 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 purpose other than the preparation and preservation of evidence and argument in STB Finance Docket No. 34001 or any judicial review proceedings taken or filed in connection therewith. 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 this 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 CN 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:

Name

Position/Affiliation: