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Part of
Public Record

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June 15, 2022

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: **CANADIAN PACIFIC RAILWAY LIMITED, ET AL. – CONTROL –
KANSAS CITY SOUTHERN, ET AL., FD 36500**

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Kansas City Southern (“KCS”) hereby files, via e-filing, its “Motion to Redesignate the Confidentiality Designation of Certain Documents Produced by BNSF in Discovery”. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for Kansas City Southern

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
– CONTROL – KANSAS CITY SOUTHERN, ET AL**

**MOTION TO REDESIGNATE THE CONFIDENTIALITY DESIGNATION OF
CERTAIN DOCUMENTS PRODUCED BY BNSF IN DISCOVERY**

EXPEDITED CONSIDERATION REQUESTED

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Attorneys for Kansas City Southern, et al.

Dated: June 15, 2022

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FD 36500

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INTRODUCTION & SUMMARY

Pursuant to Paragraph 10 of the April 2, 2021, Protective Order governing this proceeding ("Protective Order"),¹ Kansas City Southern, The Kansas City Southern Railway Company ("KCSR"), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS"), for the reasons explained herein, respectfully files this Motion to Redesignate the Confidentiality Designation of Certain Documents Produced by BNSF in Discovery ("Motion") asking the Board to order BNSF Railway Company ("BNSF") to redesignate as "Confidential" certain discovery response materials designated and produced as "Highly Confidential."

As the Board is aware, the Board, in Decision No. 3, assigned Administrative Law Judge ("ALJ") Thomas McCarthy to handle all discovery matters and initial resolution of all discovery disputes. Since that time, several railroads, including BNSF, have vigorously participated in the

¹ The Board entered a protective order in the proceeding on April 2, 2021. See Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, Et Al, FD 36500, Decision No. 1 (STB served April 2, 2021).

discovery process. BNSF served its first set of discovery on KCS and CP on October 12, 2021. KCS responded on November 1, 2021. Discovery has continued for months and remains ongoing. In fact, BNSF's most recent discovery response (BNSF Production No. 6) was served on June 1, 2022, at 9:19 pm; in effect, giving Applicants one business day to review those documents for use in the June 3 deposition of BNSF's witness, Paul Hirsch, Assistant Vice President of the Mexico Business Unit for BNSF ("Hirsch Deposition").

BNSF designated all of the Production No. 6 documents as Highly Confidential (referred to herein and Highly Confidential or "HC"). BNSF's delay in serving BNSF Production No. 6² and designating all of those materials as HC prevented KCS from sharing those documents with the very in-house personnel who would have familiarity with the information contained in those documents and prejudiced KCS's full participation in the Hirsch Deposition. The continued designation of the documents that are subject to this Motion as HC documents will only further adversely impact KCS's ability to respond fully to BNSF's comments (and other parties' comments) in the time afforded – July 12 under the current schedule.

Most of the documents produced in BNSF Production No. 6, all of which were designated HC, do not fall under the definition of HC material under the protective order adopted for this proceeding. Paragraph 6 of the Protective Order states -

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.

² BNSF's email producing the documents stated that BNSF's "production contain[ed] files designated highly confidential pursuant to the April 2, 2021, protective order issued in this proceeding."

See Protective Order (*Emphasis supplied*).

The documents that are subject to this Motion do not meet this standard. Accordingly, consistent with Paragraph 10³ of the Protective Order, KCS is filing this Motion and challenges BNSF's designation of the documents set forth in KCS Exhibit 1 - List of Documents Improperly Designated as Highly Confidential ("Exhibit 1")⁴ and requests the documents be redesignated as "Confidential."

Given the current procedural schedule and the need to show these documents to KCS in-house personnel who are assisting in the July 12 reply, KCS is asking for expedited consideration of this Motion. Specifically, KCS requests that the Board direct BNSF to respond to this Motion no later than June 21, 2022 (one week) and that the Board rule on the Motion no later than June 28, 2022 (two weeks). This would afford KCS two weeks to collaborate with its own in-house personnel (who are the only potential parties that would have any first-hand knowledge of the assertions and claims made in the BNSF documents) and CP concerning the preparation of the Applicants' July 12, 2022, response. Given KCS's concerns that its ability to respond fully is being prejudiced by BNSF's actions, KCS is filing with the Board to resolve the issue as expeditiously as possible and requests BNSF to respond expeditiously.

³ As stated in FN 3, BNSF's production was subject to the terms of the Protective Order. Paragraph 10 of the Protective Order states "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)."

⁴ Exhibit 1 includes the bates numbers of the actual HC documents that are subject to this Motion. A link to the actual HC documents subject to this Motion is also being filed under seal.

ARGUMENT

I. BNSF'S DISCOVERY THAT IS THE SUBJECT OF THIS MOTION HAS BEEN IMPROPERLY DESIGNATED AS HIGHLY CONFIDENTIAL.

Per the Protective Order, any party may designate in good faith 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.” See Protective Order, Paragraph 10. The documents that are the subject of this Motion do not contain “shipper-specific rate or cost data” or “competitively sensitive” information or “proprietary information.”

To justify a Confidential or Highly Confidential status, a party needs to do more than simply assert their desire to keep a document confidential.⁵ In merger proceedings where the Board has a tremendous responsibility to ensure that the transaction is in the public interest and that all parties have an opportunity to be fairly heard, the Board should ensure that parties have a full opportunity to examine the evidence on impacted railroads, gateways, and shippers and to rebut and comment on such evidence. In such proceedings, it is particularly important that only shipper-specific and truly commercially sensitive and proprietary information be designated Highly Confidential. Otherwise, participating parties may not have a full and fair opportunity to comment. See Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., NOR 42121 (STB served July 13, 2011) (“TPI”): (1) agreeing with CSX Transportation, Inc. that certain improperly designated information did not constitute Highly Confidential material under the definition of HC material under the protective order adopted for the proceeding (i.e., “specific rate, traffic, or cost data or other competitively sensitive information”) and (2) that the Highly

⁵ See Stagecoach Group, PLC & Coach USA, Inc., et al.--Acquis. of Control--Twin Am., LLC, MC-F 21035, slip op. at 6 (STB served Feb. 8, 2011).

Confidential designation shielded CSX’s in-house marketing and operating personnel from refuting certain lane-specific allegations regarding the need for TPI’s customers to receive products via rail.” In TPI, the Board ordered redesignation of the challenged materials to Confidential because the materials did not meet the definition of HC material. It should likewise do so here.

The BNSF discovery documents that comprise Exhibit 1 can largely be grouped into four buckets: (1) general historical commodity and volume information that is not shipper specific (2001-2014); (2) historical Routing and Gateway Analysis; (3) analysis of infrastructure upgrades and investments; and (4) historical revenue and commodity business plans (2003-2014). To be clear, none of these materials contain shipper-specific rate or cost data, future forecast, contribution information, or any other competitively sensitive or current proprietary information. Thus, the documents set forth in Exhibit 1 are not by the terms of the governing Protective Order properly designated as Highly Confidential.

Likewise, the discovery documents set forth in Exhibit 1 do not involve the type of disclosures that Congress in passing 49 U.S.C. § 11904(a)-(b) intended to protect. 49 U.S.C. § 11904(a)-(b) was not intended to prevent disclosure of old, historical business routings, lanes, commodities, and gateway data. Such data is not the type of information that the statute seeks to protect. 49 U.S.C. § 11904(a)-(b) details the type of commercially sensitive material that is protected against disclosure by federal law. Specifically, rail carriers are prohibited from disclosing – “without the consent of the shipper or consignee” – information concerning “the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation.”⁶ The documents in Exhibit 1 do not meet this standard and do not

⁶ See 49 U.S.C. § 11904(a)-(b)

involve the kind of customer-specific information described in the statute. Furthermore, even if they did, one of the major purposes of the Protective Order is to allow parties to a merger proceeding to exchange precisely this type of information without it being a violation of the statute. The documents in Exhibit 1 do not involve future forecasts or projections and as such disclosure will not impact future business and competitive opportunities for BNSF. They are historical in nature and no longer are competitively sensitive.

II. KCS HAS AND WILL SUFFER FURTHER PREJUDICE ABSENT THE BOARD GRANTING THIS MOTION.

As explained above, BNSF only recently produced many of the documents contained in Exhibit 1. BNSF's most recent large production of documents came just 36 hours before the Hirsch Deposition. This afforded Applicants just one business day to review and prepare to use the materials in connection with the Hirsch Deposition. As such, BNSF's failure to properly designate the documents contained in Exhibit 1 has already prejudiced KCS by suppressing its participation in the Hirsch Deposition.

Continued designation of the Exhibit 1 documents as HC will prevent KCS from being able to share the evidence with in-house personnel most able to refute allegations raised by BNSF to date. Redesignating such materials as "Confidential" is fully consistent with precedent. In a 2014 case, the Board ordered the redesignation of certain materials in an adverse abandonment so that the railroad personnel most capable of addressing various legal arguments could respond to the criticisms offered concerning the railroad's operations. See Paulsboro Refining Company LLC – Adverse Abandonment – In Gloucester Co., NJ, AB 1095 (Sub-No. 1) (STB Served April 29, 2014); see also, TPI, supra.

Redesignation is also consistent with the views expressed by Chairman Oberman in the Amtrak proceeding, FD 36496. On April 5, 2022, in that case, Chairman Oberman questioned

why certain materials were designated highly confidential or confidential given that the materials did not involve any proprietary or confidential data.⁷ On April 6, 2022, in that same case, Chairman Oberman again expressed concerns about the parties over designation of materials as Confidential and/or Highly Confidential. Chairman Oberman stated, “I have a great concern about [ensuring proper] confidentiality.”⁸ While those comments were made in the context of a trial “on the record,” the same principles underlying those comments are applicable here: it is in the public interest to ensure all parties properly designate, exchange, and have access to the most important and probative evidence necessary to provide evidence to Board. An over-designation of materials that do not contain HC material but nonetheless are marked HC prevents parties from adequately preparing and presenting their best case.

Designating the documents included in Exhibit 1 as “Confidential” will allow counsel and outside consultants to speak freely with the relevant in-house personnel who have expertise and familiarity with the information contained therein and to prepare analysis and commentary with respect to those documents. Only by redesignating such materials can Applicants have an equal understanding of BNSF’s claims concerning routings, traffic lanes, commodities, volumes, and key drivers, by gateway, and by railroad. It is fundamentally unfair for BNSF in-house personnel to be able to discuss those documents with their counsel and consultants and to present evidence and commentary based upon those documents but prohibits Applicants’ in-house personnel, and especially KCS personnel, from also being able to review and analyze the

⁷ Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496, April 5, 2022, hearing, (Page 13 of PDF/page 371 of transcript)

⁸ Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496, April 5, 2022, hearing, (Page 327 of PDF/page 1091 of transcript)

information. The KCS personnel are the only individuals that regularly deal with the involved regions, traffic lanes, origins, and destinations and the only personnel capable of providing guidance and advice. As such, KCS personnel, in consultation with their counterparts at CP, are the only ones with all the tools necessary to refute BNSF's claims.

None of the information KCS seeks to redesignate is forward-looking, relates to future forecasts, or could by disclosure diminish railroad competition. The information in the documents is historical in nature and does not contain shipper-specific rate or cost data or other currently competitively sensitive or proprietary information.

Regardless, should the Board have concerns about across-the-board redesignation, an alternative path exists. KCS would be willing to restrict access to the redesignated materials to a core group of Applicant personnel most capable of refuting BNSF's claims. The Board adopted a similar approach recently in the Amtrak case, by modifying the existing protective order to allow certain in-house personnel access to certain materials designated as Highly Confidential. See Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496 (STB served June 10, 2022).

BNSF's designation of the materials in Exhibit 1 as Highly Confidential hampers KCS from responding to the principal attacks concerning the impacts of the KCS/CP merger and prejudices the Applicants' ability to prepare reply evidence. The Board has made clear that confidentiality designation must balance legitimate access versus protection. See Central Oregon & Pac. R.R., Inc. – Abandonment, and Discontinuance of Service - In Coos, Douglas, and Lane Counties. OR, AB-515 (Sub-No. 2), at 4 (Aug. 15, 2008). In striking that balance here, the Board must carefully consider the public interest implications of the merger. Given that the documents

in question do not contain any competitively sensitive information, and where the persons most able to evaluate and rebut merger allegations are KCS personnel working with a limited group of CP personnel, the balance weighs strongly in favor of redesignating these materials as Confidential.

CONCLUSION

KCS respectfully requests that the Board order BNSF to redesignate the discovery documents identified in Exhibit 1 from Highly Confidential to Confidential for the reasons explained herein.

Respectfully submitted,

/s/ William A. Mullins

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Attorneys for Kansas City Southern, et al.

Dated: June 15, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused Kansas City Southern's Motion to Redesignate the Confidentiality Designation of Certain Documents Produced by BNSF in Discovery to be served on this date upon counsel for BNSF by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: June 15, 2022

/s/ William A. Mullins
William A. Mullins

Attorney for Kansas City Southern

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FD 36500

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EXHIBIT 1

BATES NUMBERS OF IMPROPERLY DESIGNATED DOCUMENTS

LINK TO HC DOCUMENTS IS BEING FILED UNDER SEAL

CANADIAN PACIFIC RAILWAY LIMITED,
ET AL. – CONTROL –
KANSAS CITY SOUTHERN, ET AL., FD 36500

**Exhibit 1 - List of Documents Improperly
Designated as Highly Confidential**

Bates ID	Year
BNSF0002814-0002828	2008
BNSF0002839-0002857	2010
BNSF0002798-0002813	2012
BNSF0002910-0002929	2014
BNSF0002720-0002727	2007
BNSF0000932-0000942	2003, 2004
BNSF0000947-0000964	2016
BNSF0002651	2003, 2004
BNSF0002660	2008
BNSF0002661	Pre-2011
BNSF0002673	2011
BNSF0002682	2013
BNSF0002683	2014
BNSF0002732-0002737	2006-2010
BNSF0002741-0002742	2007-2011
BNSF0002872-0002887	2011
BNSF0002888-0002909	2011-2013
BNSF0000943-0000945	N/A
BNSF0000946	2003
BNSF0002467-0002480	2004
BNSF0002633-0002640	2008
BNSF0002943-0002963	2003-2006
BNSF0002964-0002981	2003-2006
BNSF0002982-0002995	2001-2005
BNSF0002996-0003008	2003-2006
BNSF0003009-0003020	2003-2006
BNSF0003021-0003030	2004
BNSF0003279-0003295	2004-2005
BNSF0003296-0003303	2005
BNSF0003304-0003330	2010
BNSF0003331-0003343	2006
BNSF0003355-0003364	2002
BNSF0003381-0003407	2010-2011
BNSF0003408-0003423	2001-2010
BNSF0003424-0003437	2003-2006

BNSF0003438-0003455	2003-2006
BNSF0003456-0003479	2006
BNSF0003480-0003489	2003-2006
BNSF0003490-0003517	2007
BNSF0003518-0003530	2009
BNSF0003532-0003549	2010
BNSF0003550-0003569	2006
BNSF0003570-0003590	2003-2006
BNSF0003591-0003605	2003-2006
BNSF0003606-0003637	2002
BNSF0003672-0003683	2001

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Below is a link to the documents BNSF designated as “Highly Confidential” has been redacted. These documents are being filed under seal subject to the protective order served by the Board in the proceeding on April 2, 2021. See Canadian Pacific Railway Limited, Et. AL. – Control – Kansas City Southern, Et. AL, FD 36500, Decision No. 1 (STB served April 2, 2021).

