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July 12, 2022

304969

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

ENTERED
Office of Proceedings
July 12, 2022
Part of
Public Record

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

Dear Ms. Brown:

Kansas City Southern (“KCS”) and BNSF Railway Company (“BNSF”) hereby file, via e-filing, their “Joint Motion to Allow Certain KCS Personnel to Access Certain “Highly Confidential” 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 email at wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for Kansas City Southern

Enclosures

cc: Parties of Record

 GRANTED	DECISION ID NO.: <u>51347</u>
	DECIDED DATE: <u>7/13/2022</u>
	SERVED DATE: <u>7/13/2022</u>
	APPROVED: <u><i>maslain</i></u> Director
Office of Proceedings	☐ Decision No. 21

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36500

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

**JOINT MOTION TO ALLOW CERTAIN KCS PERSONNEL TO ACCESS CERTAIN
“HIGHLY CONFIDENTIAL” DOCUMENTS PRODUCED BY BNSF IN DISCOVERY**

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Counsel for BNSF Railway Company

Attorneys for Kansas City Southern, Et Al.

Dated: July 12, 2022

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On June 15, 2022, Kansas City Southern, The Kansas City Southern Railway Company (“KCSR”), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCS”), filed a Motion to Redesignate the Confidentiality of Certain Documents Produced by BNSF in Discovery (“Motion to Redesignate”) asking the Surface Transportation Board (“Board”) to order BNSF Railway Company (“BNSF”) to redesignate as “Confidential” certain discovery response materials designated and produced as “Highly Confidential” to allow certain KCS operating personnel to participate in the preparation of the applicants’ evidence due July 12, 2022. In a decision served on June 29, 2022, the Board denied the Motion to Redesignate and directed the parties to meet and confer on these discovery issues and bring any unresolved discovery issues before the administrative law judge appointed in this proceeding, Hon. Thomas McCarthy. KCS and BNSF (the “Parties”) have met and conferred regarding the documents set forth in KCS’s Motion to Redesignate and reached an agreement satisfactory to both Parties.

After much consideration, the Parties agreed to jointly move the Board to amend the Protective Order to allow four KCS personnel access to certain agreed-upon “Highly Confidential”

documents upon the KCS employees' signing the highly confidential undertaking and agreeing to be bound by the Protective Order currently in place in this proceeding.¹

Specifically, KCS and BNSF agreed to modify the protective order to allow specified KCS personnel access to a sample of the “Highly Confidential” documents for which KCS originally sought redesignation. Accordingly, the Parties are filing this Joint Motion and seek that the Board modify the protective order to allow the four agreed-upon in-house KCS personnel² to view the documents set forth in KCS/BNSF Exhibit 1 – Bates Numbers of Highly Confidential Documents That BNSF Agreed to Redesignate as Confidential for Certain Named KCS Personnel (“KCS BNSF Exhibit 1”).

A protective order may be modified to allow certain internal personnel to access “Highly Confidential” information. Recently, the Board modified a “protective order to allow certain Amtrak personnel to access select materials designated as ‘highly confidential,’ provided those Amtrak personnel sign the undertaking for ‘highly confidential’ material.” See App. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496 (STB served June 10, 2022); *see also* CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements, FD 33388, slip op. at 1 (STB served Oct. 17, 1997) (The Board modified a protective order in accordance with the modifications agreed to by CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”), specifically “that the Designated Personnel shall be given access only to those Highly Confidential materials that will be produced in response to petitioners' First and Second Sets of Interrogatories

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

² These four in-house personnel are David Reeves, Associate General Counsel; Jeff Songer, Executive Vice President Strategic Merger and Planning; Mike Naatz, Chief Marketing Officer, and Mike Bilovesky, Vice President, Marketing and Sales Ag & Minerals (“four in-house personnel”).

and Document Requests to applicants.”). Similarly, in this matter, KCS has identified four in-house personnel who are the only ones at KCS with the expertise and familiarity necessary to analyze the “Highly Confidential” documents produced by BNSF. Allowing these four in-house personnel to view a sample of documents marked Highly 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.”³

As the Board has recently granted similar modifications to a protective order in the Amtrak proceeding, FD 36496, and previously modified protective orders where the parties have agreed to modification,⁴ KCS and BNSF respectfully request that the Board modify the protective order to allow the four in-house personnel to access the documents in KCS BNSF Exhibit 1 that are designated as “Highly Confidential” provided that such personnel executes the “Highly Confidential” undertaking of the Protective Order.

Respectfully submitted,

/s/ William A. Mullins

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Attorneys for Kansas City Southern, et al.

³ See Motion to Redesignate at 8.

⁴ CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements, FD 33388, slip op. at 1 (STB served Oct. 17, 1997)

/s/ Anthony J. LaRocca

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(202) 429-3000

Counsel for BNSF Railway Company

Dated: July 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused Kansas City Southern and BNSF Railway Company's Joint Motion to Allow Certain KCS Personnel to Access Certain "Highly Confidential" Documents Produced by BNSF in Discovery to be served on this date upon all Parties of Record 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: July 12, 2022

/s/ William A. Mullins

William A. Mullins

Attorney for Kansas City Southern, Et. Al.

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EXHIBIT 1

**BATES NUMBERS OF HIGHLY CONFIDENTIAL DOCUMENTS THAT BNSF AGREED
TO REDESIGNATE AS CONFIDENTIAL FOR CERTAIN NAMED KCS PERSONNEL**

BNSF0002467
BNSF0002660
BNSF0002996
BNSF0003021
BNSF0003331
BNSF0003480
BNSF0003490
BNSF0003518
BNSF0003606
BNSF0003672