

SERVICE DATE – LATE RELEASE OCTOBER 6, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34667

BNSF RAILWAY COMPANY
– ACQUISITION AND OPERATION –
STATE OF SOUTH DAKOTA

Decided: October 6, 2005

By application filed February 18, 2005, BNSF Railway Company (BNSF) seeks authority, under 49 U.S.C. 10901 and 49 CFR Part 1150, Subpart A § 1150.1 et seq., to acquire and operate approximately 368 miles of railroad lines (referred to as the “Core Lines”) that are now owned by the State of South Dakota (the State). The Core Lines extend principally: between milepost (MP) 777.0 near Aberdeen, SD, and MP 650.6 near Mitchell, SD; between MP 518.9 near Sioux City, IA, and MP 649.7 near Mitchell, SD; between MP 293.1 near Canton, SD, and MP 650.6 near Mitchell, SD; between MPs 74.1 and 68.8 in Sioux Falls, SD; between MP 68.8 near Sioux Falls, SD, and MP 49.4 near Canton, SD; and between MPs 511.9 and 518.9 in Sioux City, IA.

By joint motion filed May 19, 2005, BNSF and the State asked that this proceeding be stayed pending the implementation of the terms and conditions of an agreement reached between BNSF and the State, dated as of April 25, 2005, to resolve the State’s concerns in this proceeding and to settle and resolve related litigation pending between BNSF and the State. The agreement provides, among other things, for the grant to the State or third parties of certain trackage, haulage, or access rights over rail lines owned or to be acquired by BNSF in South Dakota. The agreement contemplates the execution of a number of implementing agreements with third parties, after which BNSF and the State would seek unconditional and expedited approval of BNSF’s proposed acquisition of the Core Lines. The agreement also contemplates that all conditions of settlement (including execution of required third party implementing agreements, Board approval of BNSF’s acquisition of the Core Lines, and closing on the Core Lines acquisition) must occur prior to October 25, 2005, or the terms of the settlement will be null and void.

By decision served May 25, 2005, this proceeding was ordered held in abeyance until October 25, 2005.

By joint petition filed October 4, 2005, BNSF and the State now ask that the Board issue a protective order in this proceeding. A protective order, BNSF and the State argue, is necessary

to enable redacted copies of the parties' settlement agreement to be disclosed to other parties to this proceeding.

Good cause exists to grant the joint petition. Issuance of a Protective Order will ensure that confidential information will be used solely for this proceeding and not for other purposes.

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

It is ordered:

1. The joint petition filed October 4, 2005, by BNSF and the State is granted, and the Protective Order and Undertakings contained in the Appendix to this decision are adopted.

2. This decision is effective on its 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 work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers or carriers, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (“STB” or “Board”) concerning STB Finance Docket No. 34667, and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. 34667 or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, 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.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or 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 Protective Order.

5. 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 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 Protective Order.

6. 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 challenges.

7. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

8. Designated material may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34667 and any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 34667 and/or with any related proceedings.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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 10 of this Protective Order.

14. 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, or 3 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. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

15. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to

later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

16. 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.

17. Any party must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board. Any party who designates information or documents as “Highly Confidential” also must make available (simultaneously with the party’s submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party’s in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party’s submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all “highly confidential” information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

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 October 6, 2005, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34667, 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. 34667, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 34667 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 Protective 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 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.

Signed: _____

Affiliation: _____

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 October 6, 2005, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34667, 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. 34667, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 34667 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 Protective 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 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.

Signed: _____
OUTSIDE [COUNSEL] [CONSULTANT]
Affiliation: _____

Dated: _____