

SERVICE DATE - AUGUST 1, 1997

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

CSX TRANSPORTATION, INC.,  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
—CONTROL AND OPERATING LEASES/AGREEMENTS—  
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 17

Decided: July 31, 1997

By application filed June 23, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail, Inc. (CRR), and Consolidated Rail Corporation (CRC) seek approval and authorization under 49 U.S.C. 11321-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of the assets of Conrail by and between CSX and NS.<sup>1</sup>

American Electric Power, Atlantic City Electric Company, Delmarva Power & Light, and The Ohio Valley Coal Company (collectively referred to as “ACE”) filed a petition (ACE, *et al.*-6) on July 22, 1997, for reconsideration of the decision by the Administrative Law Judge (ALJ) partially denying their request to compel discovery. *See* Decision No. 11, served July 18, 1997. ACE sought broad discovery from NS, CSX, and Conrail, essentially asking for all documents concerning virtually all shipments of coal, and concerning all negotiations concerning rates for shipment of coal for the last 20 years. The ALJ limited the discovery authorized to shipments of the moving shippers, and to a period of 2 years before and after various mergers that involved the three railroads. The ALJ found that “discovery as limited [] may lead to admissible evidence that may enable the movants to prove that the ‘one lump’ economic theory does not apply in this proceeding.” Decision No. 11, slip op. at 2.

ACE contends that it needs the full data requested to determine whether the applicant railroads set their rates in order to maximize profits. If they do not now do so, then ACE argues that the transaction places the shippers at greater risk that, after the merger, CSX or NS will raise their rates in order to recoup the \$4 to \$5 billion “premium”<sup>2</sup> they paid for Conrail. Moreover, ACE claims that “applicants’ rate-setting practices to any sole-served shipper may demonstrate departures from the Board’s theory about those practices.” ACE also claims that, in the Burlington Northern/Santa Fe merger,<sup>3</sup> the Interstate Commerce Commission (ICC) denied allegations by various shippers because the data they submitted were not sufficiently comprehensive. Essentially, ACE claims that the data it seeks are necessary to make a comprehensive case that rail carriers in general do not price their services to maximize their profits, and that, for this reason, the one-lump theory as a general matter is not applicable to rail transportation.

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<sup>1</sup> CSXC and CSXT, and their wholly owned subsidiaries, are referred to collectively as CSX. NSC and NSR, and their wholly owned subsidiaries, are referred to collectively as NS. CRR and CRC, and their wholly owned subsidiaries, are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants. CSXT, NSR, and CRC are referred to collectively as applicant railroads.

<sup>2</sup> This “premium” refers to the amount above the single-share purchase price that CSX and NS had to pay to purchase all of the shares of Conrail. ACE seems to be arguing that Conrail could not have been that valuable to CSX and NS unless they are able to raise their rates enough to recoup the “premium” amount.

<sup>3</sup> *See Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995).

On July 25, 1997, applicants filed a joint reply (CSX/NS-30) . Applicants argue that the discovery requested would be extremely burdensome, and that the material ACE seeks is not relevant to a showing that the one-lump theory does not apply to these particular shippers. Applicants also contend that only one of the four ACE shippers would be a bottleneck shipper if the application is approved and consummated, and that the one-lump theory is not relevant to the others. To the extent the one-lump theory is at issue, applicants note, the ALJ's decision permits the shipper to obtain information necessary to show that it received competitive benefits that will not be available after the acquisition. Applicants maintain that petitioners have no viable alternative theory to replace the concept that railroads seek to maximize their profits, and that petitioners have not explained how the data sought would allow them to test the assumptions upon which the one-lump theory is based.

## DISCUSSION AND CONCLUSIONS

Appeals from discovery decisions of the ALJ are to be granted only "to correct a clear error of judgment" or to "prevent a manifest injustice." 49 CFR 1115.1(c). Petitioners have clearly not met that stringent standard. The discovery request made here was extremely broad, embracing literally thousands of commercially sensitive files of each of the applicant carriers. Identifying relevant documents in these files and taking appropriate measures to assure the confidentiality of this material would occupy many weeks of effort for numerous employees of each of these carriers. As explained below, given the marginal relevance to this case of the material that ACE seeks, the ALJ properly determined that this extraordinary discovery request was not justified. The ALJ properly exercised his discretion in imposing limits on the requested information.

The ALJ properly tailored discovery to the evidence that might be relevant for these shippers to show that the one-lump theory is for some reason inapplicable to their particular situation. As noted above, the ALJ limited discovery to information concerning movements involving these particular petitioners. To the extent that they are "bottleneck" shippers,<sup>4</sup> this will permit them to garner evidence relevant to the issue of whether they have received benefits from competition between competing origin or destination carriers in the past that would not be available after the merger.

Nevertheless, ACE claims that it needs data concerning all shippers to make a persuasive case. In this regard, its argument that one-lump rebuttal evidence was rejected by the ICC in the Burlington Northern/Santa Fe merger because it was anecdotal and not comprehensive is simply wrong. That evidence was rejected because it was unpersuasive in light of other evidence that better explained the carriers' actions in that case, which were fully consistent with the one-lump theory.

In reality, ACE is making arguments and requesting evidence here that go well beyond issues of rebutting the one-lump theory.<sup>5</sup> ACE is asserting that Conrail has some as yet unexercised market power that either CSX or NS will exercise if we permit the acquisition of Conrail's lines. NS and CSX will allegedly raise their rates to attempt to make up for the fact that they have made a bad business decision and paid \$4 billion to \$5 billion too much for Conrail's lines.

Thus, petitioners are attempting to undermine more than the one-lump theory here. They are challenging a basic principle of economics, that firms will generally attempt to maximize their profits. This is the basic premise the ICC and the Board have long applied, with court approval,

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<sup>4</sup> It appears that only one of the four ACE shippers would confront any semblance of an acquisition-related vertical competition issue. *See* CSX/NX-30 at 15-16.

<sup>5</sup> *See* Motion to compel filed by ACE on July 14, 1997 (ACE, *et al.*-5), v.s. Crowley at 4: "The objective of our analysis and the reason we requested the . . . data is to determine if the Railroads involved in the division of Conrail set rates to maximize net revenue subject to regulatory restraints or if the Railroads share the monopoly rents with their customers."

when viewing competitive issues in assessing mergers: if carriers have additional market power, they will use it. Petitioners have not suggested a plausible rival economic theory to replace this one. In addition, as Conrail points out, petitioners are in the best position to know what amount of their coal would have been shipped had Conrail attempted to set its rates any higher. Under these circumstances, we are extremely reluctant to authorize the broad discovery of commercially sensitive information that petitioners propose. *Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1546 (D.C. Cir. 1985) (“ . . . the Commission was simply not required to allow a dragnet, expensive exercise of discovery into [applicant’s] business when that discovery was seen by the agency as most unlikely to affect its decision.”).

We will address any issues of increased market power in our final decision in this proceeding. We will also address, in that decision, any impact on CSX and NS stemming from their obligations to finance these acquisitions. We are not convinced, however, that the material that ACE seeks would in any way aid our resolution of those issues.

*It is ordered:*

1. The petition for reconsideration of Decision No. 11 is denied.
2. This decision is effective immediately.

By the Board, Chairman Morgan, and Vice Chairman Owen.

Vernon A. Williams  
Secretary