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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

Decision No. 68

Decided: February 20, 1998

On February 10, 1998, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, I & M Rail Link, LLC, and Wisconsin Central Ltd. (collectively referred to as appellants) filed an appeal (designated as EJE-18/IMRL-7/WC-17) requesting that we reverse a discovery ruling issued by Administrative Law Judge Jacob Leventhal on February 5, 1998. In his discovery decision, Judge Leventhal denied appellants' motion to compel CSX<sup>1</sup> to reclassify as "Public" certain material designated by CSX as "Highly Confidential" and produced during discovery. CSX opposes appellants' appeal.

BACKGROUND

This discovery dispute relates to appellants' interrogatories and document requests directed to the primary applicants soon after applicants filed their reply statements on December 15, 1997. Appellants' discovery requests included Interrogatory No. 1 which seeks the production of any communication between CSX and other railroads concerning the Chicago terminal operations of the Indiana Harbor Belt Railroad Company subsequent to approval of the primary application. After filing initial objections, CSX provided certain documents responsive to the request, including a two-page document identified as "CSX 92 HC 000113" and "CSX 92 HC 000114" and classified by CSX as "Highly Confidential." That document is an internal CSX memorandum discussing the status of its negotiations with another Class I railroad concerning various Chicago-area construction and operating projects that have been jointly proposed by the two

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<sup>1</sup> CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) and CSX seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS. CSX, NS and Conrail are collectively referred to as applicants in this decision.

carriers. When CSX did not respond to appellants' request to reclassify the document from "Highly Confidential" to "Public," appellants sought an order from Judge Leventhal compelling CSX to reclassify it.<sup>2</sup> At the conclusion of the February 5, 1998 discovery conference, however, Judge Leventhal denied appellants' request to reclassify the confidentiality of the material. In his ruling, the Judge found that the document is "a unitary whole" (Tr. at 43) and that the potential harm to CSX from public release of the document outweighed the prejudice to appellants from maintaining the "Highly Confidential" designation for the material (Tr. at 44-47).

Appellants contend that Judge Leventhal's ruling should be reversed because the prejudice standard he employed can never be met by parties such as themselves that, in seeking reclassification, have already seen the document and had the opportunity to use it. Appellants argue that the Judge's standard focused too narrowly on the interests of those present, to the exclusion of those that were not present, such as shippers and state transportation agencies that have allegedly expressed concern about CSX's post-transaction control over the Chicago switching district. According to appellants, because potentially interested members of the public do not know about the existence of the document, they are unable to come forward and argue for its broader distribution, even though they may have a legitimate interest in CSX's internal assessment of its Chicago-area terminal operations. Appellants further argue that, because the contested material does not reveal internal ruminations or other details of negotiations, CSX has not shown a legitimate reason to maintain the "Highly Confidential" classification.

Appellants cite Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709, 804-07 (1986) (SF/SP) and Union Pacific Corporation--Control and Merger--Southern Pacific Rail Corporation, Finance Docket No. 32760, Decision No. 39 (STB served May 31, 1996) (UP/SP Decision No. 39), in support of their position that the Board will not allow parties to shield contradictory, damaging admissions from public scrutiny behind a "Highly Confidential"

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<sup>2</sup> Although appellants initially sought to reclassify the entire document, on appeal they have narrowed their request to include only the second page (i.e., CSX 92 HC 000114) of CSX's two-page document.

designation.<sup>3</sup> According to appellants, the material at issue in this case is very similar to the information that, despite the objections of the merger applicants in those proceedings, we permitted to be released to the public.

CSX contends that, because appellants have failed to show any prejudice to themselves from Judge Leventhal's discovery ruling, they have not met the strict standards to justify overturning his decision. CSX maintains that a "Highly Confidential" designation for the contested document is justified because both pages of the document relate to its ongoing confidential negotiations with a competing railroad that likely would be compromised by public disclosure. According to CSX, the two merger decisions cited by appellants are inapplicable here because they do not involve arm's-length business negotiations between two large, competing railroads. CSX argues that, in view of appellants' reference to the material in their rebuttal comments, the public is already aware of the document and does not need protection by appellants or us.

#### DISCUSSION AND CONCLUSIONS

In this proceeding, we have delegated broad authority over discovery matters to Judge Leventhal. See Decision No. 6, slip op. at 7, 62 FR 29387, 29390. Appeals from his discovery decisions will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). Appeals from discovery orders "are not favored," id., and the standards for prevailing on such appeals are "stringent." See Decision No. 17, slip op. at 2, served July 31, 1997.

Here, Judge Leventhal exercised his discretion by considering all the factors, balancing the prejudice to CSX as against the prejudice to appellants, and ultimately denying appellants' declassification request. The exercise of such discretion by Judge Leventhal is entirely within the

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<sup>3</sup> In SF/SP, our predecessor, the Interstate Commerce Commission (ICC), referred to a strategic assessment study prepared under the direction of the SF/SP applicant's chairman and board of directors to determine the company's future course of business. The ICC concluded that, by not objecting to public cross examination on the material, the applicant effectively waived any claim of privilege to which it otherwise might have been entitled. Id. at 805, n.98. In UP/SP Decision No. 39, we affirmed a discovery ruling by Administrative Law Judge Jerome Nelson requiring public release of a passage from a board of directors' presentation that the UP/SP applicants maintained was proprietary and highly confidential. We found that the information that applicants sought to suppress was not commercially sensitive in the traditional sense, and that there was no clear error of judgment or manifest injustice in Judge Nelson's ruling. Slip op. at 2.

scope of his authority in this proceeding.<sup>4</sup> Because appellants have not demonstrated that Judge Leventhal's discovery ruling constitutes a clear error of judgment or manifest injustice, the appeal will be denied.

In previous decisions, when considering a request to make public certain confidential information filed under seal, we have focused on whether a lower level of classification would assist a party in making its case:

We resolve any doubts as to the need for confidentiality in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.<sup>5</sup>

Appellants contend that CSX's internal document should be an essential component of our consideration, on the record, of the impact of the primary application on the public interest. EJE-18/IMRL-7/ WC-17 at 2. By citing to, and including, the document in their rebuttal comments, appellants have accomplished that goal. The document already is in the record and we can consider it however we deem fit. See EJE-17/IMRL-6 and WC-16. Appellants do not show any injury to themselves by Judge Leventhal's denial of their request and maintaining CSX's designation of "Highly Confidential." Accordingly, public disclosure is not needed to assist appellants in making their case or us in our deliberations on the merits of the proposed consolidation.

We do not find the decisions in SF/SP and UP/SP Decision No. 39, as cited by appellants, controlling. In both proceedings, the ICC in SF/SP and the Board in UP/SP found that the challenged material consisted of broadly revealing statements by principals of the carrier-applicants and that, in the context of the pending rail mergers, the statements were not confidential or commercially sensitive in the traditional sense. Here, however, CSX has shown, and Judge Leventhal has agreed, that the challenged material consists of CSX's internal assessment of ongoing

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<sup>4</sup> Id. See also Decision No. 58, slip op. at 3, served December 5, 1997, where we affirmed Judge Leventhal after finding that he exercised his discretion in denying discovery as to applicants' additional interrogatory requests.

<sup>5</sup> See Arizona Public Service Company and Pacificorp. v. The Atchison, Topeka and Santa Fe Railway Company, No. 41185 (STB served July 29, 1997), slip op. at 4-5. (Motion objecting to confidential designation denied because movant's counsel does not need to share confidential information with carrier's management in order to make its case). See also Lower Colorado River Authority and City of Austin, TX v. Missouri--Kansas--Texas Railroad Company, No. 40155 (ICC served May 24, 1988), slip op. at 1. (Motion for leave to disclose protected material, including construction plans, denied where movant "failed to demonstrate why it is essential for its employees to review the confidential documents in the preparation of its reply").

business negotiations conducted at arm's length between CSX and a competing railroad. On its face, such confidential and commercially sensitive information is entitled to a "Highly Confidential" classification, and we are not inclined to overrule Judge Leventhal's discovery ruling that CSX's document may keep such a designation. The standard for overturning the judge's discovery decision is a strict one. Appellants have failed to meet it.

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

It is ordered:

1. The appeal in EJE-18/IMRL-7/WC-17 from Judge Leventhal's discovery decision is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary