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ALJ

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. 26

Decided: September 3, 1997

Pursuant to the ruling in a discovery dispute decided on July 18, 1997 and affirmed on appeal to the Board in Decision No. 17, the Applicants produced documents and interrogatory responses. In the course of production of the responsive documents, Applicant CSX redacted certain information from six of its responsive documents which it claims to be highly confidential internal management cost information. Applicant claims that disclosure of this redacted material to ACE's counsel and consultants would result in a risk of substantial commercial harm to CSX. Although this dispute concerns CSX documents, CSX says the issue is common to all of the Applicants. NS has similarly redacted cost information from documents provided to the movants.

Because of the redactions, the movants seek an order compelling the Applicants to supply the redacted material. In accordance with the established procedure in this proceeding, a discovery conference was held on August 20, 1997.¹ Because of the extreme importance the Applicants placed on the issue, their request was granted over the objections of the movants, who wanted both sides to rest on their oral arguments.

Accordingly, Applicants filed their brief on August 25, 1997 and movants filed a reply brief on August 29, 1997. On September

¹The movants are American Electric Power, Atlantic City Electric Company, Delmarva Power & Light, and the Ohio Valley Coal Company (collectively referred to as "ACE").

3, 1997, Applicants filed a response to the movants' reply brief. In their response, the Applicants claim that they should be permitted to file a response because they filed their brief before first seeing that of the movants. Therefore Applicants say they could not anticipate movants' arguments. The Applicants seem to overlook the fact that they requested the briefing. We now have had oral argument, initial and reply briefs on this dispute. Both sides have had an ample opportunity to present their respective arguments. Argument must be concluded at some time. Applicants' response is rejected.

Applicants advance a number of arguments to support their claim that they should not be required to reveal the redacted material.

They argue that the highly confidential, proprietary cost information is in no way necessary for AEP or any other party to develop testimony that the "one lump theory" does not apply in this case and that there is no basis for ordering the production of the documents at issue. In other words, the Applicants are arguing the relevancy of the redacted material. In Decision No. 11, the Discovery Judge ruled:

I find that the discovery as limited below may lead to admissible evidence that may enable the movants to prove that the "one lump" economic theory does not apply in this proceeding. Balancing the burden asserted by respondent against the need of the movants to know, I find that the need to know outweighs the burden, subject to the limitations described below. The discovery ordered below is necessary for the movants to establish their premise. Slip Opinion at 2.

On the petition of ACE for reconsideration, the Board in denying the ACE's petition for reconsideration found:

The discovery request made here was extremely broad, embracing literally thousands of commercially sensitive files of each of the applicant carriers . . . As explained below, given the marginal relevance to this case of the material 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 Board went on to say:

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. Decision No. 17 at 2.

Thus, both the Discovery Judge and the Board have ruled upon the relevance of the disputed documents. In apparent submission to the rulings, the Applicants have produced documents with redactions. However the redacted cost and price information negate the usefulness of the produced documents. The effect of the redactions is an ephemeral compliance with the decisions but without substance. I find once again that the material sought by ACE should be produced without the redactions subject to the Highly Confidential provisions of the Protective Order in effect in this proceeding.

The Applicants do raise a serious claim as to the highly confidential commercial sensitivity of the information they are required to produce. The Protective Order in effect in this proceeding should suffice to allay Applicants' concerns. Violation of the Protective Order would be a serious offense and could lead to significant consequences.

All the cases cited by both sides have been considered. Discovery disputes have to be resolved on a case by case basis. In the instant proceeding, the Discovery Judge finds that the discovery of the redacted material is warranted subject to the Highly Confidential designation of the Protective Order.

In a letter dated August 28, 1997 to the Board, ACE and CSX stated that ACE is withdrawing an appeal from the order of the Presiding Judge that CSX need not produce certain information that was redacted from two documents. Subsequent to the filing of the appeal CSX discovered that, through an inadvertence, the material redacted from those documents was produced to appellants in another document. ACE and CSX request that the Presiding Judge or the Board vacate that portion of the order that was the subject of the appeal. For good cause shown, that portion of the order is vacated.

It is ordered:

- 4 -

1. CSX is ordered to produce the documents without the redactions and without further delay subject to the Highly Confidential designation of the Protective Order.²

2. This decision is effective immediately.

By the Board, Jacob Leventhal, Administrative Law Judge.

**VERNON A. WILLIAMS
Secretary**

²Although this dispute involves CSX, the ruling applies to any other Applicant under the same circumstances.