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SERVICE DATE - DECEMBER 1, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41687

GRAIN LAND COOP v. CANADIAN PACIFIC LIMITED AND  
SOO LINE RAILROAD COMPANY D/B/A CP RAIL SYSTEM

Decided: November 26, 1997

By complaint filed April 5, 1996, Grain Land Coop (Grain Land) alleges that Canadian Pacific Limited and Soo Line Railroad Company, doing business as Canadian Pacific Railway (collectively CP or Respondent): (1) breached its common carrier obligation under 49 U.S.C. 11101 to provide transportation or service on reasonable request and, under 49 U.S.C. 11121, failed to provide adequate car service [Count 1 of the complaint]; and (2) engaged in unreasonable practices, in violation of 49 U.S.C. 10702, by misrepresenting or recklessly disregarding material facts [Count 2 of the complaint]. Subsequently, CP agreed to permit Grain Land to amend its complaint, without further pleading, to include claims of discrimination and rate reasonableness under 49 U.S.C. 10702 and 10741.<sup>1</sup>

Grain Land served its first discovery request on CP on June 6, 1996.<sup>2</sup> During discovery, CP objected to Grain Land's requests for shipper-specific waybill tapes and private car data on the grounds that disclosure of such information without the consent of the shippers involved is prohibited by 49 U.S.C. 11904.<sup>3</sup> When CP refused to enter into a confidentiality agreement with Grain Land for the release of this information,<sup>4</sup> Grain Land renewed its motion to compel CP's

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<sup>1</sup> By decision served September 3, 1996, we granted the parties' stipulated motion to amend Grain Land's complaint to include additional claims of discrimination and rate reasonableness.

<sup>2</sup> In our decision served December 23, 1996, we assigned discovery matters to Administrative Law Judge (ALJ) Jacob Leventhal.

<sup>3</sup> Except in certain circumstances not pertinent here, section 11904 prohibits a rail carrier from disclosing shipper or consignee-specific traffic information, or information about the contents of a transportation contract, that may be used to the detriment of the shipper or consignee, without their consent.

<sup>4</sup> Subsequently, Grain Land indicates that on May 29, 1997, it entered into a stipulated protective order with CP that defines section 11904 data as highly confidential and limits access to highly confidential data to outside counsel and consultants only. According to Grain Land, the

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production of the shipper-specific data. Oral argument on the matter was heard before ALJ Leventhal on April 17, 1997. In his decision served June 9, 1997, ALJ Leventhal found that:

\* \* \* Grain Land seeks information that may lead to admissible evidence indispensable to its case but that information is protected material subject to Section 11904. \* \* \* I agree with CP that I do not have jurisdiction to require that information protected by Section 11904 be released.

I find that the information is needed by Grain Land. However, I also find that if shipper and consignee names are redacted from the material sought, there would be no violation of the section. CP is ordered to make the information available to Grain Land with the names of shipper and consignee redacted at a time mutually agreed upon by the parties.

On June 13, 1997, Grain Land filed an appeal from ALJ Leventhal's discovery decision.<sup>5</sup> CP replied to the appeal on June 18, 1997. On July 30, 1997, CP filed a motion to dismiss the complaint with respect to Grain Land's claims of unreasonable practices (i.e., Count 2 of the complaint), rate reasonableness, and discrimination. In the alternative, CP requests that Grain Land be compelled to respond to interrogatories concerning the basis for Grain Land's rate reasonableness and discrimination claims. Grain Land replied in opposition to the motion on August 19, 1997. By motion filed September 25, 1997, CP asks that Grain Land be compelled to answer CP's second supplemental interrogatory No. 21 relative to Grain Land's identification and calculation of damages. Finally, on November 10, 1997, Grain Land replied to the motion and filed a cross motion to compel CP to answer specified interrogatories propounded previously by complainant.

#### DISCUSSION AND CONCLUSIONS

**Grain Land's Appeal from Discovery Decision.** Among other claims, Grain Land in its complaint alleges that CP engaged in unreasonable car supply practices and discrimination, in contravention of sections 11121 and 10741, respectively. Grain Land indicates that, without unredacted waybill data, it will be unable to present competent evidence at the heart of its case:

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1996, Grain Land has attempted, without success, to determine who got the cars and why. Without knowing who got the cars, it is impossible to know whether illegal discrimination was involved. [Complainant's appeal, at 15].

ALJ Leventhal specifically found that “[t]he material sought to be discovered appears reasonably necessary to enable the complainant to prepare its case. \* \* \* I find that the information is needed by Grain Land.” ALJ’s decision, at 2. In our view, Grain Land has shown a sufficient basis for us to grant its appeal.

CP contends that, even though the parties have entered into a confidentiality agreement, Grain Land’s outside counsel and consultant may not review documents and extract information that are protected from disclosure under section 11904. CP adds that we lack authority to order its disclosure to Grain Land of data protected by section 11904. However, under the parties’ comprehensive protective order, Grain Land’s outside counsel and consultant, not Grain Land itself, will receive and review the shipper-specific data designated as highly confidential, and extract pertinent information. Such outside counsel and consultants, in order to gain access to protected information, must agree to protect the confidentiality of information and, under no circumstances, permit employees of Grain Land or its affiliates to view the unredacted information.<sup>6</sup> In previous proceedings, where comparable protective orders and limitations were employed, the Board granted shipper-complainants’ requests to compel rail carriers to produce similarly sensitive shipper data. See Potomac Electric Power Company v. CSX Transportation, Inc., STB Docket No. 41989 (STB served Mar. 3, 1997); Pennsylvania Power & Light Company v. Consolidated Rail Corp. et al., STB Docket No. 41295 (STB served Mar. 10, 1997) (PPL v. Conrail).<sup>7</sup>

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<sup>6</sup> See Stipulated Protective Order, EXHIBIT B, UNDERTAKING--CONFIDENTIAL AND HIGHLY CONFIDENTIAL MATERIAL:

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.

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Even in situations where rail carriers object to a complainant's access to unredacted material due to its extraordinary commercial sensitivity, we have found that protective orders provide adequate safeguards from unauthorized or unintended disclosure. Accordingly, in CSX Corp. and CSX Trans., Inc., Norfolk Southern--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corp., STB Finance Docket No. 33388, Decision No. 32 (STB served Sept. 12, 1997), we affirmed ALJ Leventhal's decision giving coal shippers access to applicants' confidential coal rate negotiations and contracts over a 2-year period. Applicants argued that disclosure of the data to outside counsel and consultants, as provided under the terms of the applicable protective order, would not suffice to protect the highly confidential material they sought to redact. In rejecting applicants' argument, we found that, although outside counsel and consultants must exercise extreme care in preserving confidentiality, the highly sensitive nature of the information was not a sufficient reason to permit less than full disclosure to these individuals. Id. at 4.

Grain Land and CP have entered into a similar protective order that classifies section 11904 material as highly confidential. Because access to such information is restricted to Grain Land's outside counsel and consultants, and because we are ordering CP to allow such persons access to the information, CP's release of the shipper-specific data in its possession will not violate section 11904. Accordingly, Grain Land's appeal will be granted.

**Motion to Dismiss.** Granting a motion to dismiss requires that all factors be viewed in the light most favorable to the complainant. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 326 (1991). Moreover, to ensure that participants have a full and fair opportunity to meet their burdens of proof, motions to dismiss prior to the submission of evidence are, as a general rule, denied. Hill v. Federal Power Comm'n, 335 F.2d 355, 363 (5th Cir. 1964). In view of our decision granting Grain Land's appeal and requiring CP to produce additional evidence sought under the complaint, CP's motion will be denied.

If its motion is denied, CP alternatively requests that Grain Land be compelled to respond to interrogatories concerning the basis for complainant's rate reasonableness and discrimination claims. CP's motion in this regard will be granted. We stated in our notice of proposed rulemaking in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation

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Proceedings, STB Ex Parte No. 527 (STB served July 22, 1996), published at 61 FR 52710, that “[t]he sooner a railroad is fully apprised of the type of case the complainant intends to present, the sooner it can determine what information it will need to present its defense.” Id. at 3. Accordingly, to move this proceeding forward, we will require that CP provide complainant’s outside counsel/consultants access to the requested section 11904 data within 10 days of service of this decision. Within 30 days of service of this decision, Grain Land must: (1) respond to CP’s interrogatories regarding the basis for its rate reasonableness and discrimination claims; and (2) file an amended complaint with us. In its amended complaint, Grain Land must indicate what rates it is challenging (by tariff reference, tariff item number(s), and specific points from and to which the rates apply) and what relief it seeks (i.e., rate prescription and/or reparations). Complainant must also indicate whether it intends to challenge CP’s rates based on a constrained market pricing presentation, or contest the rate levels based on our simplified revenue-to-variable cost analysis. See Rate Guidelines--Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996) (Non-Coal Guidelines), pet. for judicial review pending sub nom., Association of Am. Railroads v. Surface Transp. Bd., No. 97-1020 (D.C. Cir. filed Jan. 10, 1997). To determine the availability of the simplified procedure, should such procedure be chosen, complainant must provide the required supporting documentation. See Non-Coal Guidelines, slip op, at 37-38.

The pending discovery disputes, including CP’s motion to compel answers regarding complainant’s claim for damages and Grain Land’s cross motion to compel, will be ruled upon by ALJ Leventhal, who is assigned to resolve discovery matters in this case. The parties must serve their pleadings directly with ALJ Leventhal at the address specified below.

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

It is ordered:

1. Grain Land’s appeal is granted. Within 10 days of service of this decision, CP must provide complainant’s outside counsel/consultants access to its section 11904 data.
2. Within 30 days of service of this decision, Grain Land must: (a) respond to CP’s Second Supplemental Interrogatory No. 11 and Interrogatory No. 8 (Set II), regarding the basis for complainant’s rate reasonableness and discrimination claims; and (b) file an amended complaint before us that provides the required rate reasonableness information.
3. All discovery pleadings in this proceeding must be sent to Administrative Law Judge Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289].
4. The request to intervene, by Fritz R. Kahn, is granted.

5. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>6</sup> See Stipulated Protective Order, EXHIBIT B, UNDERTAKING--CONFIDENTIAL AND HIGHLY CONFIDENTIAL MATERIAL:

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.

<sup>7</sup> CP argues that PPL v. Conrail is inapplicable because no shipper actually objected to the  
(continued...)

Even in situations where rail carriers object to a complainant's access to unredacted material due to its extraordinary commercial sensitivity, we have found that protective orders provide adequate safeguards from unauthorized or unintended disclosure. Accordingly, in CSX Corp. and CSX Trans., Inc., Norfolk Southern--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corp., STB Finance Docket No. 33388, Decision No. 32 (STB served Sept. 12, 1997), we affirmed ALJ Leventhal's decision giving coal shippers access to applicants' confidential coal rate negotiations and contracts over a 2-year period. Applicants argued that disclosure of the data to outside counsel and consultants, as provided under the terms of the applicable protective order, would not suffice to protect the highly confidential material they sought to redact. In rejecting applicants' argument, we found that, although outside counsel and consultants must exercise extreme care in preserving confidentiality, the highly sensitive nature of the information was not a sufficient reason to permit less than full disclosure to these individuals. Id. at 4.

Grain Land and CP have entered into a similar protective order that classifies section 11904 material as highly confidential. Because access to such information is restricted to Grain Land's outside counsel and consultants, and because we are ordering CP to allow such persons access to the information, CP's release of the shipper-specific data in its possession will not violate section 11904. Accordingly, Grain Land's appeal will be granted.

**Motion to Dismiss.** Granting a motion to dismiss requires that all factors be viewed in the light most favorable to the complainant. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 326 (1991). Moreover, to ensure that participants have a full and fair opportunity to meet their burdens of proof, motions to dismiss prior to the submission of evidence are, as a general rule, denied. Hill v. Federal Power Comm'n, 335 F.2d 355, 363 (5th Cir. 1964). In view of our decision granting Grain Land's appeal and requiring CP to produce additional evidence sought under the complaint, CP's motion will be denied.

If its motion is denied, CP alternatively requests that Grain Land be compelled to respond to interrogatories concerning the basis for complainant's rate reasonableness and discrimination claims. CP's motion in this regard will be granted. We stated in our notice of proposed rulemaking in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation

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<sup>7</sup>(...continued)

production of the coal contracts. However, during discovery in PPL v. Conrail, as here, defendants objected to the disclosure of contract information on the grounds that it would violate confidentiality clauses in their agreements with shippers. While the carriers' objections to disclosure were asserted on behalf of their contract shippers, the Board's decision in PPL v. Conrail concluded that any confidentiality concerns by shippers were adequately safeguarded under the protective order. Whether there were actual shipper objections is immaterial; any concerns by shippers over disclosure of sensitive material would be protected under the confidentiality agreement. The same rationale applies here.

Proceedings, STB Ex Parte No. 527 (STB served July 22, 1996), published at 61 FR 52710, that “[t]he sooner a railroad is fully apprised of the type of case the complainant intends to present, the sooner it can determine what information it will need to present its defense.” Id. at 3. Accordingly, to move this proceeding forward, we will require that CP provide complainant’s outside counsel/consultants access to the requested section 11904 data within 10 days of service of this decision. Within 30 days of service of this decision, Grain Land must: (1) respond to CP’s interrogatories regarding the basis for its rate reasonableness and discrimination claims; and (2) file an amended complaint with us. In its amended complaint, Grain Land must indicate what rates it is challenging (by tariff reference, tariff item number(s), and specific points from and to which the rates apply) and what relief it seeks (i.e., rate prescription and/or reparations). Complainant must also indicate whether it intends to challenge CP’s rates based on a constrained market pricing presentation, or contest the rate levels based on our simplified revenue-to-variable cost analysis. See Rate Guidelines--Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996) (Non-Coal Guidelines), pet. for judicial review pending sub nom., Association of Am. Railroads v. Surface Transp. Bd., No. 97-1020 (D.C. Cir. filed Jan. 10, 1997). To determine the availability of the simplified procedure, should such procedure be chosen, complainant must provide the required supporting documentation. See Non-Coal Guidelines, slip op, at 37-38.

The pending discovery disputes, including CP’s motion to compel answers regarding complainant’s claim for damages and Grain Land’s cross motion to compel, will be ruled upon by ALJ Leventhal, who is assigned to resolve discovery matters in this case. The parties must serve their pleadings directly with ALJ Leventhal at the address specified below.

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

It is ordered:

1. Grain Land’s appeal is granted. Within 10 days of service of this decision, CP must provide complainant’s outside counsel/consultants access to its section 11904 data.
2. Within 30 days of service of this decision, Grain Land must: (a) respond to CP’s Second Supplemental Interrogatory No. 11 and Interrogatory No. 8 (Set II), regarding the basis for complainant’s rate reasonableness and discrimination claims; and (b) file an amended complaint before us that provides the required rate reasonableness information.
3. All discovery pleadings in this proceeding must be sent to Administrative Law Judge Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [(202) 219-2538; FAX: (202) 219-3289].
4. The request to intervene, by Fritz R. Kahn, is granted.

5. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary