

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. 15

Decided: July 31, 1997

The protective order that was entered in this proceeding in Decision No. 1¹ provides, in pertinent part, that discovery material designated "HIGHLY CONFIDENTIAL" may be disclosed only to an outside counsel or an outside consultant, or to an employee of such outside counsel or outside consultant, who has executed the appropriate confidentiality undertaking. *See* Decision No. 1 at 4 (Protective Order, ¶8) and 7 (the Exhibit B undertaking applicable to highly confidential material).²

By motion (not designated) filed July 21, 1997, the United Transportation Union (UTU) seeks to waive, with respect to itself only, the provision in the protective order restricting the production of highly confidential material to outside counsel and outside consultants. UTU claims that it has signed the Exhibit B undertaking and provided that undertaking to applicants,³ but that applicants, citing the protective order, have refused to place UTU on the highly confidential list. UTU, noting that its interests in this case are represented by inside counsel only, and claiming that the highly confidential information produced in this case "is essentially of no value from a commercial standpoint to a union," asks that we allow UTU's inside counsel to be placed on the highly confidential list in this proceeding.⁴

By reply (designated CSX/NS-32) filed July 28, 1997, applicants urge the denial of UTU's motion.

We will modify the protective order entered in Decision No. 1 to allow in-house counsel for UTU to review material designated "highly confidential," provided that such in-house counsel executes the Exhibit B undertaking and otherwise abides by the terms of the protective order. *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 (ICC served Mar. 13, 1995) (*BN/SF Dec. No. 12*) (modifying the protective order in that proceeding to allow in-house counsel for any labor organization or other non-commercial party that was not represented by outside counsel to review material designated "highly confidential"). *Compare BN/SF Dec. No. 21* (served May 3, 1995) (denying a similar

¹ That protective order was thereafter revised, in ways not presently relevant, in Decision No. 4. *See* Decision No. 4, slip op. at 8.

² The "highly confidential" designation is reserved for "material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information." *See* Decision No. 1 at 4 (Protective Order, ¶6).

³ CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc., and Consolidated Rail Corporation are referred to collectively as applicants.

⁴ Although UTU states that "UTU has signed" the Exhibit B undertaking, it is clear that the actual signatory was UTU's in-house counsel (Daniel R. Elliott, III).

modification sought by entities with which applicants had "arms-length business relationships" because the sought modification "could adversely affect the primary applicants' future business dealings with those entities"). *Compare also BN/SF Dec. No. 33* (served June 20, 1995).

We are not persuaded by the arguments advanced by applicants in support of a "zero exceptions" policy respecting the outside counsel requirement. Applicants argue that the protective order safeguards highly confidential material produced by parties other than applicants, and that such parties "may be reluctant to fully participate and take certain positions if the protective order does not fully protect their highly confidential materials from disclosure to in-house counsel." CSX/NS-32 at 2 n.3. We have found that experience suggests otherwise; there is no reason to believe that self-censorship of the kind feared by applicants occurred in the *BN/SF* proceeding. Applicants also argue, in essence, that modification of the protective order in the manner in which it was modified in *BN/SF Dec. No. 12* will effectively "reduce the Highly Protective designation to a mere formality with no substantive effect." CSX/NS-32 at 3. We disagree. The contested modification applies only to labor organizations and other non-commercial parties; as indicated in *BN/SF Dec. No. 21*, it does not apply to commercial entities with which applicants have had in the past and are likely to have in the future "arms-length business relationships." Applicants, noting that the modification entered in *BN/SF Dec. No. 12* was agreed to by the *BN/SF* applicants, argue that, as a factual matter, labor organizations do have arms-length business relationships with railroads. This, of course, is true, but, as applicants themselves concede, "the subjects of the negotiations are different." CSX/NS-32 at 3. And, because the subjects are different, the effects of allowing in-house counsel access to highly confidential material are similarly different.

Applicants have not explained, nor do we see, why a protective order modification that caused no difficulties for the applicant railroads in the *BN/SF* proceeding should be expected to cause unacceptable difficulties for the applicant railroads in the present proceeding. Because we see no good reason to depart from the applicable precedent in *BN/SF Dec. No. 12*, we will adhere to that precedent here.

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

It is ordered:

1. The protective order entered in Decision No. 1 is modified to allow UTU's in-house counsel to review "highly confidential" material, provided that such in-house counsel executes the appropriate undertaking and otherwise abides by the terms of the protective order.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary