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SERVICE DATE - LATE RELEASE NOVEMBER 10, 1997

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. 53

Decided: November 7, 1997

On October 21, 1997, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, and Wisconsin Central Ltd. (referred to collectively as appellants) filed an appeal (designated "EJE-11/WC-11" and referred to herein as EJE-11) requesting that we reverse a discovery order issued by Administrative Law Judge Jacob Leventhal on October 16, 1997. After a hearing on the matter, Judge Leventhal concluded that the 51% stock ownership interest in the Indiana Harbor Belt Railroad Company (IHB) held by Consolidated Rail Corporation (Conrail) did not give Conrail control of the IHB, as that term is used in 49 CFR 1114.30.¹ Appellants ask us to overturn the judge's finding, and compel Conrail to produce information currently within the possession or custody of IHB.

IHB, one of three terminal carriers in Chicago, is owned 51% by Conrail and 49% by Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CP/Soo). Appellants indicate that, subsequent to approval of the primary application, applicants² propose that CSX will assume management and dispatching control over the IHB. To determine the impact of the CSX/NS/Conrail transaction on IHB, appellants seek from Conrail information relative to IHB's operations, including IHB's contracts with shippers, 100% IHB traffic tapes, density charts, IHB's current timetable, current slow order and track speed documents, yard diagrams, and signal system

¹ Our discovery rule at 49 CFR 1114.30(a)(1) provides that, in responding to a request to produce documents, a party must produce "any tangible things which are in the possession, custody, or control of the party on whom the request is served * * * ."

² CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

information. Applicants objected to eight of the ten discovery requests, alleging that Conrail does not exercise control over IHB.

Appellants argue that information regarding IHB's operation is critical to determining the impact of the CSX/NS/Conrail transaction on shippers who depend on IHB for neutral switching services. Appellants contend that, even though Conrail permits IHB to operate independently, Conrail has the ability to control IHB and to acquire documents from IHB. According to appellants, the issue here is not whether Conrail actually wields its controlling powers, but whether Conrail has such powers. Appellants indicate that IHB's president, secretary, and treasurer are all Conrail employees, who work out of Conrail's headquarters in Philadelphia, PA. Appellants cite Winston Network, Inc. v. IHB, 944 F.2d 1351, 1354 (7th Cir. 1991), to support their position.

Appellants refer to other indicia of the relationship between IHB and Conrail: three IHB directors with offices in Philadelphia; IHB executive meetings conducted by telephone from Philadelphia; IHB payments to Conrail for IHB officers' salaries and for administration of IHB pension programs, procurement, insurance, property taxes, and corporate tax and property accounting; IHB bank accounts and certificates of deposit in Philadelphia; and IHB corporate seal, articles of incorporation, bylaws, and board of directors' minutes in Philadelphia. Appellants contend that the following Board decisions recognize Conrail's controlling interest in IHB: Decision No. 12, served July 23, 1997, slip op. at 8 (NS and CSX will be "parties controlling the controlling shareholder in the Indiana Harbor Belt Railway . . ."); Rio Grande Ind., Inc.--Pur. & Track.--Soo Line R. Co., 6 I.C.C.2d 854, 863 n.9 (1990) ("Conrail now owns, and will continue to own a 51 percent controlling interest in IHB"); and Indiana Harbor Belt Railroad Company--Acquisition of Line of Chicago And Western Indiana Railroad Company--Exemption from 49 U.S.C. 11343, Finance Docket No. 31148 (ICC served Sept. 22, 1988) slip op. at 2 ("Conrail, which controls IHB . . .").

Applicants reply that the appeal is moot because appellants concede that they cannot use the documents, and that it is premature because Judge Leventhal has not had an opportunity to rule on all objections raised to appellants' discovery requests. According to applicants, appellants have not remotely met our stringent standard for reversing discovery rulings because they have not shown that the requests meet the tests of relevance, need, burden, and confidentiality. Nor, applicants maintain, have appellants shown that the judge would have committed reversible error if he had concluded that those standards had not been met. Applicants maintain that discovery is sought from the wrong party and that the requests should have been addressed to IHB itself, which is a separately represented party of record in this proceeding. Applicants argue that, given the particular circumstances of the Conrail/IHB relationship, neither IHB nor IHB documents should be deemed within Conrail's control merely because of Conrail's 51% ownership of IHB stock.

DISCUSSION AND CONCLUSIONS

Appeals from discovery decisions issued by Judge Leventhal will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). See Decision No. 6, slip op. at 7, 62 FR 29387, 29390 (May 30, 1997). Judge Leventhal's finding that Conrail's 51% ownership of IHB's outstanding stock does not provide Conrail with "control" over IHB, as that term is used in 49 CFR 1114.30, constitutes neither a clear error of judgment nor manifest injustice. Because Judge Leventhal's conclusion is supported by the evidence of record, the appeal will be denied.

Appellants seek commercially sensitive, competitive and confidential material, including all IHB contracts with shippers and 100% IHB traffic tapes.³ We recently stated the governing standards for such discovery requests in Decision Nos. 34 and 42:

[T]he standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party. See Decision No. 34, slip op. at 2 n.9; Decision No. 42, slip op. at 8.

Appellants fail to demonstrate that they require the IHB information from applicants. The documents and information that appellants seek are the property, and within the control, of IHB. IHB has been a party of record in this proceeding since June 27, 1997, a status noted in our Decision No. 21, served August 19, 1997, at 12. Because the information sought by appellants relates exclusively to IHB, appellants could have made timely requests to IHB for discovery months ago. IHB could then have voiced its own concerns about relevance, burden, and confidentiality, and the parties could have explored alternative means of providing relevant information that was requested. However, appellants made no timely attempt to secure this discovery from IHB. Absent a showing that these documents would have been unavailable upon timely discovery to IHB, appellants have failed to show that they need to obtain them from or through applicants. Indeed, appellants have not demonstrated any substantial need for the particular documents, and certainly not the compelling need required to justify discovery of sensitive documents such as shipper contracts and traffic tapes.

³ With the exception of its shipper contracts and traffic tapes, IHB voluntarily tendered to appellants the other operating information they sought through discovery. See applicants' reply, Exh. C.

Appellants also fail to demonstrate that Judge Leventhal's substantive finding was erroneous. IHB operates a separate railroad with over 800 employees from its offices in Hammond, IN. Its labor agreements are separate from those governing Conrail employees, and are separately negotiated by IHB. Its day-to-day operations are under the direction and control of a general manager who is an IHB employee. IHB operates as a switching carrier for most major railroads operating from and to the Chicago area. The commercial relationships of Conrail and IHB as interconnecting railroads are governed by agreements negotiated at arm's length, as they are with other railroads with whom IHB connects. Conrail does not dictate to or unilaterally exercise dominion over IHB.

IHB is a railroad operated independently of the applicants. Conrail owns 51% of IHB's common stock. The remaining 49% is owned by CP/Soo. CP/Soo competes with Conrail, CSX, and NS, and is a party of record in this proceeding. As CP/Soo's counsel stated at the discovery conference, CP/Soo agrees that discovery of IHB documents and personnel cannot be made through Conrail. Transcript at 8-9, 53-55. Appellants omit any reference to CP/Soo's position, which was a factor in Judge Leventhal's decision. Thus, in denying appellants' discovery request, the judge expressly considered CP/Soo's interest in IHB as well as CP/Soo's opposition to appellants' current discovery request. Transcript at 57. In these circumstances, appellants have failed to make the requisite showing for overturning Judge Leventhal's decision.

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

It is ordered:

1. The EJE-11 appeal from Judge Leventhal's October 16, 1997 order is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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information. Applicants objected to eight of the ten discovery requests, alleging that Conrail does not exercise control over IHB.

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