

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. 45

Decided: October 16, 1997

By appeal (designated "EJE-9/WC-8" and referred to herein as EJE-9) filed October 14, 1997, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, and Wisconsin Central Ltd. (referred to collectively as appellants) ask that we reverse a discovery order issued on October 9, 1997, by Administrative Law Judge Jacob Leventhal. Appellants indicate that Judge Leventhal, in the order being challenged, refused to address the merits of appellants' request that applicants<sup>1</sup> be ordered to respond to all discovery requests, propounded by any party, seeking information within the possession or custody of Indiana Harbor Belt Railroad Company (IHB). Appellants claim that applicants, and more particularly Conrail, have refused to provide any such information, alleging 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.

Appellants indicate that, on Tuesday, October 7, 1997, they notified Judge Leventhal's office that they intended to appear at the discovery conference to be held on Thursday, October 9, 1997. Appellants, however, appear to have overlooked that revised section 18 of the Discovery Guidelines provides that counsel for a party seeking a ruling on a discovery issue shall contact Judge Leventhal's office by 4:00 p.m. on Monday to request a discovery conference to be held at 9:30 a.m. on Thursday. See Decision No. 20 (served August 15, 1997), slip op. at 2. Appellants are correct that original section 18 of the Discovery Guidelines provided for notification by 4:00 p.m. on Monday for a discovery conference to be held at 9:30 a.m. on Wednesday. See Decision No. 10 (served June 27, 1997), Appendix at 8-9. But the 2-day (Monday-Wednesday) pattern of Decision No. 10 was changed by the revision of section 18 in Decision No. 20. The current pattern is a 3-day (Monday-Thursday) pattern. Appellants insist that they provided the 2-day notice required by Decision No. 10. The fact remains, however, that they did not provide the 3-day notice required by Decision No. 20.

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 insistence upon compliance with the procedural requirements of Decision No. 20 constitutes neither a clear error of judgment nor a manifest injustice. The EJE-9 appeal will therefore be denied.

Nothing said herein touches upon the merits of the discovery dispute concerning IHB.

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

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<sup>1</sup> 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.

It is ordered:

1. The EJE-9 appeal is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary