

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. 39

Decided: September 22, 1997

In a decision issued orally after discovery conferences on September 17 and 19, 1997, Administrative Law Judge (ALJ) Jacob Leventhal required applicants¹ to produce to the Ace Utilities² certain "masking factors" used by applicants in reporting revenue as part of the Board's Waybill Sample program. To allow applicants an opportunity to appeal his decision to the Board, Judge Leventhal stayed his decision (as respects the masking factors) to 5:00 p.m., Monday, September 22, 1997.

In their appeal (designated CSX/NS-81) filed Monday, September 22, 1997, applicants claim that Judge Leventhal's decision reflects a clear error of judgment, and results in manifest injustice, "because it requires disclosure of extraordinarily confidential information integral to the efficacy of an important Board program, without any showing of relevance." CSX/NS-81 at 3. Applicants further claim that neither the Board nor its predecessor (the Interstate Commerce Commission) has ever disclosed a railroad's masking factors to a third party. CSX/NS-81 at 5. Applicants therefore ask that we reverse Judge Leventhal's decision "and preserve the long-standing total confidentiality of the Waybill Sample masking factors." CSX/NS-81 at 15. Applicants add that, if we allow this discovery to proceed, we should, at a minimum, provide that the data disclosed may not be used to unmask revenues or rate information on movements to shippers other than the ACE Utilities' destinations for which applicants previously produced traffic data pursuant to Judge Leventhal's prior rulings.

Because the issues raised by applicants are substantial, and because, as applicants note, CSX/NS-81 at 2, there would be no effective way to "unring the bell" if we were to determine, after production had been made, that the production order should never have been entered, we will stay Judge Leventhal's decision, insofar as it requires production of the masking factors, pending our resolution of applicants' CSX/NS-81 appeal.

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

¹ 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.

² Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, Indianapolis Power and Light Company, and Ohio Valley Coal Company are referred to collectively as the Ace Utilities.

It is ordered:

1. Judge Leventhal's decision, insofar as it requires production of the masking factors, is stayed pending our resolution of the CSX/NS-81 appeal.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary