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SERVICE DATE - LATE RELEASE JANUARY 29, 1998

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. 64

Decided: January 28, 1998

On January 13, 1998, CSX¹ filed an appeal (designated as CSX-137) requesting that we reverse a discovery ruling issued by Administrative Law Judge Jacob Leventhal on January 8, 1998. On January 13 and 14, 1998, Eighty-Four Mining Company (EFM) and Erie-Niagara Rail Steering Committee (ENRS) filed separate appeals, designated as EFM-13 and ENRS-13,² with respect to a second discovery ruling by Judge Leventhal in the same decision. In his discovery decision, Judge Leventhal denied the motions by EFM and ENRS to compel CSX and NS to respond to discovery related to applicants' rebuttal presentation. However, Judge Leventhal also ordered CSX and NS, over applicants' objection, to make their rebuttal witnesses available for cross-examination by EFM and ENRS, who can then submit transcripts of the deposition testimony with their briefs. EFM and

¹ CSX refers to CSX Corporation and CSX Transportation, Inc. In this proceeding, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) and CSX seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS. NS and Conrail did not join in the appeal by CSX that is under consideration here. CSX, NS and Conrail are collectively referred to as applicants in this decision.

² An appeal from a discovery decision issued by Judge Leventhal in this proceeding must be filed within 3 working days of the date of his decision. See Decision No. 6, slip op. at 7, served May 30, 1997, and published that date at 62 FR 29387, 29390. The appeal of ENRS was late-filed under this requirement, but CSX does not object to it on this basis. We will accept and consider it here.

ENRS appeal from the former ruling,³ while CSX seeks to reverse the latter ruling.⁴ EFM, ENRS, and CSX filed separate replies on January 16, 1998.

BACKGROUND

Judge Leventhal's January 8, 1998 discovery decision relates to motions by EFM and ENRS to compel applicants to respond to interrogatories and document requests, including the provision of unredacted versions of CSX's settlement agreements with Canadian Pacific Railway Company (CP) and Canadian National Railway Company (CN) (see EFM-10 at 13 and ENRS-12 at 6-7). The discovery requests were filed subsequent to applicants' December 15, 1997 rebuttal filing for the purpose of contesting applicants' assertions on rebuttal that the conditions sought by EFM and ENRS are unnecessary and that the positions of EFM and ENRS will actually be improved by the CP and CN agreements in particular and the acquisition of Conrail in general. At the January 8, 1998 discovery conference, applicants objected to the requests on the grounds that they are entitled to close the evidentiary record pertinent to their application and past Board and Interstate Commerce Commission (ICC) practice does not permit EFM and ENRS, as parties filing only comments and requests for conditions to the primary application, to engage in discovery at that stage in the proceeding.

In his decision, Judge Leventhal ruled that, under the procedural schedule and prior Board and ICC decisions, EFM and ENRS are not entitled to pursue written discovery through interrogatories and document requests at the rebuttal stage of the evidentiary procedure. The Judge ruled further, however, that there was a distinction between written discovery for rebuttal purposes and the right to cross-examine applicants' rebuttal witnesses through deposition. Accordingly, he found that parties such as EFM and ENRS have the right to depose rebuttal witnesses and refer to the deposition testimony in their briefs. See Discovery Conference Tr. at 130-31.

EFM and ENRS contend that there is no case precedent directly on point with the issue of whether the testing of rebuttal verified statements is limited to depositions. EFM and ENRS maintain, nevertheless, that the judge erred in restricting their discovery to oral depositions because they are entitled to use all available discovery methods, not merely cross-examination by depositions, to test the veracity and accuracy of applicants' rebuttal witnesses. In addition, EFM and ENRS indicate that the Board's rules and the discovery guidelines adopted in this proceeding make no specific provision or limitation with regard to the type of discovery participants in the case can

³ Another commenter in this proceeding, APL Limited (APL), filed a statement in support of the appeals of EFM and ENRS and in opposition to the appeal of CSX. See APL-13, filed January 16, 1998.

⁴ NS has agreed to make its witnesses available for deposition. Accordingly, NS has not joined in CSX's appeal.

use. EFM and ENRS assert that, in the interest of securing a complete and accurate record, the judge's decision should be overruled and commenters such as themselves should be permitted to employ the more efficient discovery techniques of interrogatories and document production requests.

CSX argues that all commenters, including EFM and ENRS, are prohibited from filing rebuttal evidence and that, contrary to Judge Leventhal's ruling, our evidentiary rules do not provide a distinction between testimonial and other types of evidence. CSX maintains that the Board and its predecessor, the ICC, have consistently held that applicants--whether primary, responsive, or inconsistent--are entitled to submit the final evidence and close the record on the merits of their application and that, throughout the two most recent major control cases, the Board and the ICC have drawn a strong line between parties who choose to participate as commenters and those who choose to participate as responsive applicants. According to CSX, procedural decisions in both cases concluded that commenters did not have the right to submit surrebuttal evidence.

According to CSX, the acknowledged purpose of the discovery sought by EFM and ENRS is to permit them to adduce new evidence in support of their requests for conditions. While agreeing that commenters have the right to submit a brief, CSX argues that the brief may not contain new evidence. CSX indicates that EFM and ENRS are free to argue that applicants' rebuttal witnesses offered insufficient or incomplete foundations for their conclusions, but they may not offer new evidence into the proceeding and deprive applicants of their right to close the record on the merits of the primary application. According to CSX, neither EFM nor ENRS has shown any reason why the scope of their discovery, as commenters, should be broader than that of a responsive applicant and, therefore, both are prohibited from obtaining any discovery, whether by deposition or other means, at this stage in the proceeding, because neither has the right to make any rebuttal filing whatsoever.

DISCUSSION AND CONCLUSIONS

In this proceeding, we have delegated broad authority over discovery matters to Judge Leventhal. See Decision No. 6, slip op. at 7, 62 FR 29387, 29390. Appeals from his discovery decisions will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). Appeals from discovery orders "are not favored," id., and the standards for prevailing on such appeals are "stringent." See Decision No. 17, slip op. at 2 (served July 31, 1997). Because appellants have not demonstrated that Judge Leventhal's discovery decision constitutes a clear error of judgment or manifest injustice, the appeals will be denied.

It is well established that parties filing comments, protests, and requests for conditions, as in the case of EFM and ENRS here, are not permitted to file rebuttal in support of those pleadings. Parties filing inconsistent and/or responsive applications have the right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not. See Decision No. 6, slip op. at 6, and 62 FR 29387, 29390 and prior rail consolidation decisions cited therein. EFM and ENRS may not make rebuttal presentations, but they are entitled as parties to file briefs on or before

the February 23, 1998 due date. Although parties are not permitted to submit new evidence in their briefs, there is case precedent that supports Judge Leventhal's decision permitting circumscribed discovery of applicants' rebuttal witnesses and inclusion of the resulting cross-examination testimony in the deponent's briefs. See Union Pacific Corp.--Control and Merger --Southern Pacific Rail Corp., Decision No. 35, slip op. at 3 (served May 9, 1996), where we denied the request of Kansas City Southern Railroad Company, a party that filed comments and a request for conditions, to conduct written discovery and file a further evidentiary pleading after applicants filed their rebuttal, but where we also permitted the carrier to participate in cross-examination depositions and address the deposition testimony in its brief. Although the opposing sides in this dispute attempt to distinguish this decision, we find that it supports Judge Leventhal's decision.

CSX has taken inconsistent positions in regard to Decision No. 35. In its joint reply with NS (CSX/NS-193) to the instant appeals of EFM and ENRS, CSX cites Decision No. 35 with approval as supporting Judge Leventhal's discovery decision. See also applicants' opposition to motions to compel (CSX/NS-188 at 19-20). In its CSX-137 appeal to the discovery decision, however, CSX attempts to distinguish Decision No. 35 as inapplicable to the instant discovery dispute because the applicants in Decision No. 35 voluntarily made their rebuttal witnesses available, whereas it opposes further discovery here. Whether the deposition is voluntary, as NS has agreed to here, is de minimis. There is precedent for Judge Leventhal's discovery 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 appeals in EFM-13, ENRS-13, and CSX-137 from Judge Leventhal's discovery decision are 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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