

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. 42

Decided: October 3, 1997

This decision addresses: (1) the CSX/NS-81 appeal filed September 22, 1997, by applicants,¹ and the ACE-15 reply² filed September 23, 1997, by movants;³ and (2) the ACE-14 appeal⁴ filed September 23, 1997, by movants, and the CSX/NS-85 reply filed September 26, 1997, by applicants.

BACKGROUND

Movants' First Discovery Requests. On July 3, 1997, movants submitted certain broad discovery requests to applicants, essentially asking for all documents concerning virtually all shipments of coal, and concerning all negotiations involving rates for shipments of coal, for the years 1978 through the present.⁵ On July 11, 1997, applicants submitted their objections to these discovery requests. On July 16, 1997, Administrative Law Judge (ALJ) Jacob Leventhal granted in part and denied in part movants' motion to compel compliance with their discovery requests. Judge Leventhal limited the material that applicants were required to provide to shipments of the movants (as opposed to shipments of all shippers) to destinations solely served by Conrail,⁶ and to certain years only (for CSX, 1978-1982 and 1995-1997; for NS, 1980-1984 and 1995-1997; for Conrail,

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 This pleading is designated "ACE, et al.-15", but is referred to herein as ACE-15.

³ Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, Indianapolis Power and Light Company, and The Ohio Valley Coal Company are referred to collectively as movants.

⁴ This pleading is designated "ACE, et al.-14", but is referred to herein as ACE-14.

⁵ As of July 3, 1997, there were only four movants: Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, and The Ohio Valley Coal Company. The fifth movant, Indianapolis Power & Light Company, although it was not a party to the discovery requests submitted on July 3, 1997, has been regarded, for all purposes presently relevant, as if it had been a party to those requests. See CSX/NS-81 at 6 n.7.

⁶ This limitation has since been expanded to embrace shipments of two other shippers (New York State Electric & Gas Company and Niagara Mohawk Power Corporation) to destinations solely served by Conrail. See ACE-14 at 8.

1988-1992 and 1995-1997).⁷ See Decision No. 11 (ALJ written decision served July 18, 1997, confirming the ALJ oral decision announced on July 16, 1997), slip op. at 2 ("I find that the discovery as limited below may lead to admissible evidence that may enable the movants to prove that the 'one lump' economic theory does not apply in this proceeding. Balancing the burden asserted by the respondent[s] against the need of the movants to know, I find that the need to know outweighs the burden, subject to the limitations described below. The discovery ordered below is necessary for the movants to establish their premise.").⁸ See also Decision No. 17 (served August 1, 1997) (we affirmed Judge Leventhal's partial denial of movants' motion to compel).

Applicants, not having filed a timely challenge to Judge Leventhal's partial grant of movants' motion to compel, were therefore required to provide the limited discovery that Judge Leventhal had ordered. Applicants thereafter produced much of the material they had been ordered to produce, but, over movants' objections, applicants redacted certain "commercially sensitive proprietary information," CSX/NS-70 at 1, from the material they produced. The redactions were brought to Judge Leventhal's attention at a hearing held on August 20, 1997, and were thereafter the subject of briefs filed August 25, 1997, by applicants, and August 29, 1997, by movants. In Decision No. 26 (ALJ written decision served September 5, 1997), Judge Leventhal directed applicants to produce the redacted information without further delay. In an ALJ oral decision announced at a hearing held on September 5, 1997, Judge Leventhal confirmed that Decision No. 26 applied to certain additional redactions as well ("the redactions we have been arguing about this morning," see CSX/NS-70, Transcript at 73). See also Decision No. 32 (served September 12, 1997) (we affirmed Judge Leventhal's decisions requiring the production, without further delay, of the redacted information).

Movants' Second Discovery Requests. In their second set of interrogatories and request for production of documents to applicants (designated "ACE, et al.-11", but referred to herein as ACE-11), served September 4, 1997, movants asked applicants to produce, for CSX, NS, and Conrail (including all predecessor railroads), the revenue masking factors applicable to the so-called "1% Waybill Samples" filed with the Board⁹ for the years 1978 through the present.¹⁰

⁷ The 1978-1982 years for CSX, the 1980-1984 years for NS, and the 1988-1992 years for Conrail were chosen in order to provide data for periods beginning two years before and ending two years after certain mergers that involved CSX, NS, and Conrail, respectively.

⁸ Applicants state: that ALJ Decision No. 11 resolved three document requests that movants had made; that one of these requests sought the production of each applicant's 100% traffic tapes since 1978; that, with respect to this request, the governing objection was lack of relevance; that Judge Leventhal's ruling on this request "essentially confirmed that traffic data as to shippers other than the [movants] themselves were not sufficiently relevant"; and that movants have acknowledged that the discovery request at issue in the CSX/NS-81 and ACE-14 appeals seeks "the same confidential rate data that [movants] would have obtained if [Judge Leventhal] had found the prior request for traffic tapes relevant." CSX/NS-85 at 5 & n.5.

⁹ References in this decision to "the Board" embrace both the Surface Transportation Board (for the period beginning January 1, 1996) and the Interstate Commerce Commission (for the period ending December 31, 1995).

¹⁰ The ACE-11 pleading contained one interrogatory and one document request, which were identical except in one respect: whereas the interrogatory asked applicants to "state," the document request asked applicants to "provide," the revenue masking factors for the years 1978 through the most recently-filed time period. See ACE-11 at 7.

In their initial objections to this request, designated CSX/NS-74 and served September 11, 1997,¹¹ applicants objected to the masking factors production request on the grounds that the request (a) sought material which was neither relevant nor likely to lead to relevant and admissible evidence, and (b) was unduly broad. See CSX/NS-74 at 1-2.

By letter dated September 12, 1997 (not designated), movants asked Judge Leventhal to convene a discovery conference to discuss their masking factors production request. In a response (designated CSX/NS-78) served September 16, 1997, applicants elaborated upon the objections contained in their CSX/NS-74 pleading.

In an oral decision issued after discovery conferences on September 17 and 19, 1997, Judge Leventhal granted in part and denied in part movants' motion to compel applicants to produce their 1978-1997 revenue masking factors. Judge Leventhal required applicants to produce their revenue masking factors for the years with respect to which he had previously required applicants to comply with movants' first discovery requests: for CSX, 1978-1982 and 1995-1997; for NS, 1980-1984 and 1995-1997; for Conrail, 1988-1992 and 1995-1997. See ACE-14 at 3. In addition, because the only masking factors Conrail could document were those being applied currently or recently, Judge Leventhal ordered Conrail to make, for the prior years back to 1988, a comparative special study, using (i) the traffic data previously produced to movants and (ii) the Waybill Sample. See CSX/NS-81 at 8. To allow applicants an opportunity to seek appellate relief, Judge Leventhal stayed his decision to 5:00 p.m., September 22, 1997.

On September 22, 1997, at about 2:00 p.m., applicants filed their CSX/NS-81 appeal. Applicants ask: that we continue the stay of Judge Leventhal's decision pending our resolution of the CSX/NS-81 appeal, see CSX/NS-81 at 1 n.1; that we reverse Judge Leventhal's decision insofar as it required the production of their revenue masking factors, see CSX/NS-81 at 14-15; that we further reverse Judge Leventhal's decision insofar as it required Conrail to make a comparative special study, see CSX/NS-81 at 9 n.10; and that, if we do not entirely reverse the assailed portions of Judge Leventhal's decision, we should, at the very least, provide that any revenue masking factors applicants might disclose can not be used to unmask revenues or rate information on movements to shippers other than the movants' destinations with respect to which applicants have previously produced traffic data pursuant to Judge Leventhal's prior rulings, see CSX/NS-81 at 15 n.16.

Recognizing that the objections raised by applicants were substantial, and recognizing also that 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 not have been entered, we stayed Judge Leventhal's decision, insofar as it required production of the masking factors, pending our resolution of applicants' CSX/NS-81 appeal. See Decision No. 39 (served September 22, 1997).¹²

¹¹ While the CSX/NS-74 pleading is actually dated August 6, 1997, see CSX/NS-74 at 6, the fax markings on the CSX/NS-74 pleading suggest that it was served on September 11, 1997.

¹² The stay we entered in Decision No. 39 applied, by its terms, to Judge Leventhal's decision, but only "insofar as it requires production of the masking factors." See Decision No. 39, slip op. at 2, ordering paragraph 1. Although applicants indicated that their request for a stay applied also to that portion of Judge Leventhal's decision that required Conrail to make a comparative special study, see CSX/NS-81 at 9 n.10, the stay we entered in Decision No. 39 does not explicitly apply to that portion of Judge Leventhal's decision. The CSX/NS-81 appeal, which embraced applicants' stay request, was filed at about 2:00 p.m. on September 22; the stay request had to be acted upon almost instantly, because the stay that had been granted by Judge Leventhal was set to expire at 5:00 p.m.; and, in the short time available to consider and act on the stay request, we failed to observe that the request applied not only to that portion of Judge Leventhal's decision that required production of the masking factors but also to that portion of his decision that required Conrail to make a comparative special study.

On September 23, 1997, movants filed their ACE-14 appeal, which asks that we reverse Judge Leventhal's decision insofar as it denied movants' motion to compel applicants to produce their 1978-1997 revenue masking factors.

Movants' Arguments. Movants claim, in essence, that the crucial issue in this proceeding, from their perspective, is whether the acquisition and control of Conrail by CSX and NS will affect the rates charged either to movants themselves or to those who ship movants' coal. This issue, movants contend, goes beyond the "one lump" theory mentioned in ALJ Decision No. 11, and focuses instead on whether the "acquisition premium" paid by CSX and NS for Conrail would or could result in rate increases to shippers such as movants.

Their need for the revenue masking factors, movants contend, reflects the limitations inherent in the data produced by applicants pursuant to ALJ Decision No. 11. Movants maintain that these limitations, which include both (i) the gaps in the years with respect to which data have been produced, and (ii) the fact that the years are not consistent as between the three applicants, frustrate an intelligent comparison of the data produced by each applicant. Movants therefore contend that, if they are to provide a statistically reliable and useful study of applicants' ratemaking practices, they must have data applicable to the missing years, which necessarily means that they must "fill in" the missing years with data other than the data they were denied in ALJ Decision No. 11.

The other data that movants have in mind are data derived from the Waybill Sample. Movants acknowledge, of course, that they have had access to the Waybill Sample; such access, although tied to this proceeding, has been had outside the regular discovery process presided over by Judge Leventhal. See 49 CFR 1244.8 (describing procedures governing access to the Waybill Sample). Movants insist, however, that such access, in and of itself, is not sufficient for present purposes, because certain of the Waybill Sample revenue entries to which they have had access have been "masked" and are, for this reason, not technically accurate. Movants contend that, if they are to work with accurate revenue data, they must be given access to the revenue masking factors; these factors, movants note, will allow them to "unmask" the revenue entries contained in the Waybill Sample.

Movants argue that, to "fill in" the missing years, they need the revenue masking factors for the years with respect to which Judge Leventhal did not order production of the underlying data in ALJ Decision No. 11. They need these revenue masking factors, movants insist, in order to construct, for the years 1978-1997, "time lines" of applicants' ratemaking practices for a sufficient number of "origin-destination" pairs to result in a statistically reliable study.

Movants add that, in order to clarify certain matters, they also need the revenue masking factors for the years with respect to which Judge Leventhal did order production of the underlying data in ALJ Decision No. 11. They need the revenue masking factors with respect to these years, movants claim, because there are discrepancies in the data produced by applicants that the revenue masking factors may help explain,¹³ and because the revenues in the Waybill Sample are or may be adjusted for credits or rebates, thus distorting the rates themselves.

Movants insist that the underlying data they would recreate via application of the masking factors to the Waybill Sample is relevant, notwithstanding that direct access to such data was denied in ALJ Decision No. 11. That aspect of that decision, movants claim, was premised not upon relevance but upon burden. Judge Leventhal, movants insist, did not find that the material he allowed applicants not to produce was not relevant; rather, he found that production of such material would be burdensome, and that the burden of production would outweigh relevance. Production of

¹³ Movants claim that "there is at least one discrepancy on the Waybill Sample which the masking factors will help eliminate, and there could well be others (the analysis is now ongoing)." ACE-15 at 3 (emphasis in original).

the revenue masking factors, movants claim, should not be burdensome at all. And, movants add, the commercial sensitivity of the masking factors should not pose a problem; movants concede that the masking factors, if produced by applicants, would be entitled to Highly Confidential status under the protective order previously adopted in this proceeding.¹⁴

DISCUSSION AND CONCLUSIONS

The Waybill Sample,¹⁵ a weighted random sample of carload waybills for terminating shipments by rail carriers,¹⁶ is a comprehensive database on rail carload freight traffic flows and characteristics. Proc. On Release of Data From ICC Waybill Sample, 4 I.C.C.2d 194, 195-96 (1987).¹⁷ This database contains, for each movement included in the Waybill Sample, the originating and terminating freight stations, the railroads participating in the movement, all railroad interchange points, the number of cars, the car types, the movement weight in tons, the commodity, and the freight revenue.

The waybills that make up the Waybill Sample are filed with the Board by the Nation's railroads. A railroad is required to file waybill sample information for all line-haul revenue waybills terminated on its lines if, in any of the three preceding years, it terminated: (1) at least 4,500 revenue carloads; or (2) at least 5% of revenue carloads terminating in any state. See 49 CFR 1244.2. A railroad that is required to file waybill sample information may file either authenticated copies of a sample of audited revenue waybills or a computer tape containing specified information from a sample of waybills. See 49 CFR 1244.3.

The primary purpose served by the Waybill Sample is regulatory oversight. The Waybill Sample is used in calculating: the productivity adjustment to the Rail Cost Adjustment Factor;¹⁸ and the revenue-to-variable cost benchmark figures used as starting points under the recently adopted simplified evidentiary guidelines for determining maximum reasonable rail rates.¹⁹ Prior to January 1, 1996, the Waybill Sample was also used in calculating the Cost Recovery Percentage.²⁰ But, because the Waybill Sample contains such comprehensive information, it has also been used for

¹⁴ See Decision No. 32, slip op. at 3-4.

¹⁵ Although the Waybill Sample is often referred to as the "one percent" Waybill Sample, this reference is not accurate. Many types of commodity movements included in the Waybill Sample are sampled at a rate well in excess of 1%. For example, waybills representing movements of 100 or more cars are sampled, by most railroads, at a rate of 50%.

¹⁶ With respect to any shipment of freight by rail, a waybill is the document or instrument prepared from the bill of lading contract or shipper's instructions as to the disposition of the freight, which is used by the railroad(s) handling the freight as the authority to move the shipment and as the basis for determining freight charges and interline settlements. See 49 CFR 1244.1(c).

¹⁷ See also Expansion of the ICC Waybill Sample Public Use File (49 CFR Part 1244), Ex Parte No. 385 (Sub-No. 3) (ICC served Jan. 31, 1990, and Jan. 23, 1992).

¹⁸ See new 49 U.S.C. 10708 (requirement that the Board publish a rail cost adjustment factor, which must take into account changes in railroad productivity).

¹⁹ See new 49 U.S.C. 10701(d)(3). See also Rate Guidelines -- Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996, and May 1, 1997).

²⁰ See old 49 U.S.C. 10709(d)(1)(B)(i).

many additional purposes, including (1) studies of the impact of mergers and deregulation,²¹ (2) analyses of rail traffic flows and patterns, (3) studies of movements of hazardous materials, coal, and other commodities, (4) development of marketing studies, (5) development of freight car manufacturing plans, (6) development of information for verified statements submitted in regulatory proceedings, and (7) development of information for use in academic research projects.

The Waybill Sample contains a great deal of confidential information, and, for this reason, it is made available only in limited circumstances and to certain persons. See 49 CFR 1244.8(b) (the Waybill Sample is available, in certain circumstances not presently relevant, to railroads, Federal agencies, and States; and, in connection with formal regulatory proceedings, it is also available to transportation practitioners, consulting firms, and law firms, but an appropriate confidentiality agreement must be signed). See also 49 CFR 1244.8(b)(5) (certain nonconfidential information contained in a so-called "Public Use Waybill File" is available to anyone).

The protection of confidential data contained in, or otherwise ascertainable from, the Waybill Sample has been a recurring problem. Although the names of the shipper and consignee are not included in the data submitted in connection with the Waybill Sample, data that are included, such as the origin and destination Freight Station Accounting Code (FSAC) and the 7-digit Standard Transportation Commodity Code (STCC), might, in their raw form, permit identification of a shipper and consignee, and might thereby disclose a railroad's significant customers and also the rate (including confidential contract rates) at which it transports the traffic. This is particularly troublesome because a railroad is required to include in its waybill samples data for traffic moving under contract, even though all aspects of the contract, including the rate charged and the revenue collected, are outside of the Board's jurisdiction. See new 49 U.S.C. 10709. It has been fairly easy to protect such data in the Public Use Waybill File; details are merely aggregated to a level that obscures the confidential aspects. It has not, however, been so easy to protect such data in the Waybill Sample itself.

The so-called "masking factors" were the solution ultimately devised to protect extremely confidential revenue data contained in the Waybill Sample itself. Beginning with the 1987 Waybill Sample, railroads have been allowed to "mask" the revenues attributable to contract traffic. Railroads applying masking factors to their waybill samples provide these masking factors to the Board; and the masking factors thus provided have been applied to the Waybill Sample by our staff in calculating the productivity adjustment to the Rail Cost Adjustment Factor, the revenue-to-variable cost benchmarks used as starting points under the Ex Parte No. 347 (Sub-No. 2) rate guidelines, and the now discontinued Cost Recovery Percentage. These masking factors have never been made publicly available, not even under a protective order; they have been held in the strictest confidence, and, at any time, have been known only by a few members of the Board's staff.²²

We have made the Waybill Sample available to movants' outside consultants, but we have not given them (nor have they sought from us) access to the masking factors. If movants had requested that we allow them access to the masking factors in our possession, we would have rejected their request, not for lack of a protective order²³ but because such masking factors have

²¹ See 49 CFR 1180.4(h)(6), as recently amended in Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556, 62 FR 9714, 9717 (Mar. 4, 1997), 62 FR 28375 (May 23, 1997) (in rail merger proceedings, the Board may take official notice of the Waybill Sample).

²² Waybill Sample data is actually gathered and processed for the Board by a contractor; but even the contractor has not been allowed access to the masking factors.

²³ The confidentiality agreement called for by 49 CFR 1244.8(b)(4)(v) is akin to the Exhibit B "Highly Confidential" undertaking applicable under the protective order previously adopted in this proceeding. See Proc. On Release of Data From ICC Waybill Sample, 4 I.C.C.2d at 205

(continued...)

never been made available, and have never been intended to be made available, to any persons not on our staff.²⁴

The issue now to be decided is whether movants can obtain from applicants, through the regular discovery process, the masking factors they would not be allowed to obtain under 49 CFR 1244.8(b)(4). We hold that they cannot,²⁵ and we will therefore grant the CSX/NS-81 appeal and deny the ACE-14 appeal.²⁶

The total confidentiality of each railroad's masking factors has been essential to the Board's effort to gather the data it needs to fulfill its statutory duties. Masking factors have been used for a decade to protect the competitively sensitive, extraordinarily confidential, deregulated rates in contracts between shippers and railroads. Further, they are not relevant to any legitimate issue raised by movants here, and their forced disclosure would seriously harm an important element of the Board's efforts to gather useful transportation data while protecting the security of extraordinarily confidential, statutorily protected, shipper-railroad contract rate and revenue data.²⁷

Release of the masking factors would undermine the confidentiality policies underlying the maintenance of the Waybill Sample and would raise serious concern in the transportation community as to the ability of railroads to protect confidential rail contract rates while at the same time participating in the Waybill Sample program. This consideration tips the scales against a finding of relevance, because the 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.

²³(...continued)

("transportation practitioners, consultants, and outside counsel . . . serve as a protective buffer between the confidential data and the rail or shipper clients they represent").

²⁴ Movants' claim, see ACE-15 at 4, that the 49 CFR Part 1244 regulations do not preclude release of the masking factors overlooks that those regulations do not even reference the masking factors.

²⁵ Our holding is not premised on the argument advanced by applicants, see CSX/NS-78 at 10, that a procedural default now bars movants from seeking the masking factors. Because movants' July 3 discovery requests did not seek the masking factors, ALJ Decision No. 11 cannot be read as having ruled that the masking factors were not to be made available to movants.

Nor is our holding premised upon a belief that production of the masking factors would be burdensome. Production by CSX and NS of their revenue masking factors should not be particularly difficult. Production by Conrail of its masking factors (i.e., the preparation by Conrail of a comparative special study, see CSX/NS-81 at 8) might be difficult, but it would seem that any such difficulty should properly be charged to Conrail's recordkeeping practices.

²⁶ We are reversing that portion of Judge Leventhal's decision that granted in part movants' motion to compel, and we are affirming that portion of Judge Leventhal's decision that denied in part movants' motion to compel. Our reversal of that portion of Judge Leventhal's decision that granted in part movants' motion to compel nullifies both the requirement that applicants produce their masking factors and also the related requirement that Conrail conduct a comparative special study in view of its apparent inability to produce certain of its masking factors.

²⁷ The revenues that movants seek to unmask are, for the most part, revenues charged to shippers other than movants themselves. With regard to movants' own shipments, the masking factors would be of use to movants in a few atypical instances only.

Moreover, the proposition that movants seek to prove with the unmasked revenues is highly questionable. Movants are asserting, in essence, that Conrail has some as yet unexercised market power that either CSX or NS will exercise if we allow them to acquire Conrail's lines. They are, in essence, challenging a basic principle of economics, that firms will generally attempt to maximize their profits. "This is the basic premise the ICC and the Board have long applied, with court approval, when viewing competitive issues in assessing mergers: if carriers have additional market power, they will use it." Decision No. 17, slip op. at 3. We cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a "fishing expedition."²⁸

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

It is ordered:

1. The CSX/NS-81 appeal is granted. That portion of Judge Leventhal's decision that granted in part movants' motion to compel is reversed.
2. The ACE-14 appeal is denied. That portion of Judge Leventhal's decision that denied in part movants' motion to compel is affirmed.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

²⁸ Because the risk to our Waybill Sample program is so great, because movants have no real need for the data anyway, and because the proposition that movants seek to prove is so entirely unlikely, even the existence of the protective order applicable to this proceeding cannot justify the forced production of applicants' masking factors.