

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. 18

Decided: August 4, 1997

By application filed June 23, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), and Consolidated Rail Corporation (CRC)¹ seek approval and authorization under 49 U.S.C. 11321-25 for: (1) the acquisition by CSX and NS of control of Conrail, and (2) the division of Conrail's assets by and between CSX and NS.² In Decision No. 12, served July 23, 1997, and published that day in the *Federal Register* at 62 FR 39577, we accepted for consideration the primary application and various related filings upon finding that the application and related filings are in substantial compliance with our applicable requirements.

On July 24, 1997, pursuant to 49 CFR 1117.1, Potomac Electric Power Company (PEPCO), a party in the control proceeding,³ filed a petition (PEPC-3) directly with the Board⁴ asking us to modify the protective order entered in the control proceeding in Decision No. 1 (served April 16, 1997), and modified in Decision Nos. 4 (served May 2, 1997) and 15 (served August 1, 1997), to permit PEPCO to use certain confidential and highly confidential information subject to that order in a pending rate complaint case. Specifically, PEPCO seeks an exception from Paragraph 10 of the protective order, which provides that confidential and highly confidential material "may not be used for any purposes other than these proceedings."

PEPCO's petition relates to a rate complaint that it filed on January 3, 1997, in STB Docket No. 41989, *Potomac Electric Power Company v. CSX Transportation, Inc.*,⁵ challenging CSXT's common carrier rates for coal movements to PEPCO's Dickerson, MD, generating station. Arguing that CSXT's common carrier rates exceed a reasonable maximum under the Board's stand-alone cost

¹ CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRR and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

² We shall refer to the transaction proposed in the primary application as the CSX/NS/CR transaction and to our proceeding where the merits of that transaction are currently under review as the control proceeding.

³ PEPCO filed on June 17, 1997, its notice of intent to participate in the control proceeding (PEPC-01).

⁴ PEPCO has directed its petition to the Board rather than to the Administrative Law Judge assigned to resolve discovery matters in the control proceeding because PEPCO does not consider the relief sought in the nature of a discovery dispute, and because of PEPCO's asserted need for expedited handling of issues beyond the scope of the control proceeding. CSX concurs with PEPCO's suggestion that its petition should be decided in the first instance by the Board.

⁵ PEPCO's rate reasonableness complaint is not related to the CSX/NS/CR transaction.

(SAC) constraint, PEPCO designed a hypothetical stand-alone railroad (the Dickerson Railroad) replicating a portion of CSXT's lines in northern West Virginia and western Maryland.

In its instant petition, PEPCO argues that information directly relevant to CSXT's criticism of PEPCO's stand-alone traffic group and revenues has been produced by the applicants in the control proceeding. Consequently, to rebut CSXT's criticisms in the rate proceeding, PEPCO requests our permission to use the confidential and highly confidential information produced by the applicants in the control proceeding in its rebuttal due August 11, 1997, in the rate case. PEPCO maintains that this information would be treated as confidential and highly confidential material under the protective order served in the rate case on February 5, 1997.

PEPCO indicates that traffic included in its SAC model includes both: (i) coal and other freight that currently moves over certain lines of CSXT; and (ii) coal that currently moves in single-line Conrail service from mine origins along the former Monongahela Railroad (MGA) in southwestern Pennsylvania to the Port of Baltimore. In particular, PEPCO's model assumes that a substantial volume of the MGA traffic will be diverted from Conrail single-line service to interline service, involving the hypothetical Dickerson Railroad as a bridge carrier and CSXT as the terminating carrier. In its opening statement in the rate case, PEPCO bases the volume and revenue associated with this MGA traffic on information derived from the 1995 Waybill Sample.

In its reply filed July 11, 1997, in the rate case, CSXT challenges PEPCO's inclusion of the MGA traffic, arguing, *inter alia*, that diversion of any of this single-line Conrail traffic to a stand-alone bridge carrier would be commercially infeasible, and that, in any event, the projected revenue divisions are both theoretically invalid and inconsistent with actual experience.

PEPCO indicates that, in addition to material that is publicly available in the control proceeding, PEPCO's outside counsel and consultants have obtained confidential and highly confidential documents related to the MGA coal traffic. PEPCO contends that applicants' traffic projections in the control proceeding contradict the projections CSXT has presented in the rate case. To demonstrate the alleged inconsistencies in CSXT's traffic projections, PEPCO seeks permission to use two categories of confidential and highly confidential information contained in the control proceeding's document depository: (1) *forecasted* (Year 2000) export coal and MGA-origin Baltimore coal traffic data for CSXT and NS resulting from the proposed Conrail acquisition; and (2) *actual* base year (1995) export coal and MGA-origin Baltimore coal traffic data for CSXT, NS, and Conrail.

PEPCO maintains that granting its request would not harm the applicants in the control proceeding because the applicants will not be required to produce new evidence or studies, and no new parties or individuals would gain access to the information. PEPCO also contends that the modification will not prejudice CSXT in the rate case. PEPCO asserts that the forecast data it seeks to use only became available with the filing of the control application on June 23, 1997, and that the information was not available for discovery during the evidentiary period in the rate case, nor was it available prior to the submission of PEPCO's opening evidence on May 5, 1997.

CSX, NS, and Conrail filed separate replies on July 29, 1997, opposing PEPCO's request.⁶ Although NS and Conrail are not parties in the rate case, both carriers contend that granting PEPCO's request will adversely affect our ability to control the discovery process in our proceedings generally, and undermine the integrity of the protective order in the control proceeding specifically. NS and Conrail maintain that, because protective orders serve an important beneficial purpose in our proceedings, there should be a strong presumption against modifications to existing protective orders. According to NS and Conrail, PEPCO has not made a compelling showing of extraordinary circumstances to justify its request.

⁶ CSX's reply is designated as CSX-13; NS's reply is designated as NS-10; and Conrail's reply is designated as CR-6.

CSX contends that the confidential information PEPCO seeks to use to impeach CSX's rate case testimony is neither relevant to, nor inconsistent with, that testimony. According to CSX, its traffic studies of forecasted increases in traffic levels and revenues that PEPCO wants to use in the rate case are intended to measure only the impact of the proposed acquisition of Conrail. CSX indicates that, in contrast, its traffic and revenue projections in the rate case are designed to show the effects of general economic and business conditions unrelated to the acquisition. For that reason, CSX asserts that PEPCO's attempt to compare the projections in the two proceedings is meaningless and that there is no evidentiary inconsistency in the two proceedings.

CSX also maintains that PEPCO does not need access to its actual base year (1995) traffic volumes and revenues for MGA-origin Baltimore and eastern export coal traffic because PEPCO already possesses, as a result of discovery in the rate case, CSXT's 100% traffic and revenue tapes for 1996. CSX states that PEPCO does not need NS's data either because neither NS nor its traffic is at issue in the rate case. CSX submits that PEPCO's request, insofar as it seeks historic traffic information, is designed to obtain Conrail's coal traffic data to include in the SAC traffic grouping challenged by CSXT in the rate case. If that is PEPCO's purpose, CSX contends that the requested modification is an improper attempt belatedly to obtain discovery from a third party. CSX also complains that allowing access to the data at this late stage would deprive it of its right to respond to PEPCO's revised SAC evidence. Finally, CSX requests that, should we grant PEPCO's petition to any extent, we should describe precisely what confidential material from the control proceeding petitioner is permitted to use in the rate case.

DISCUSSION AND CONCLUSIONS

The petition will be denied. PEPCO has failed to show the kind of extraordinary circumstances or compelling need that we believe should be necessary for us to modify a protective order such as this one. PEPCO's proposed relief undermines the very purpose of our protective orders. The protection afforded by protective orders encourages parties to make more specific and forthcoming voluntary submissions, and also gives parties the incentive to respond favorably to evidentiary requests that, absent the protective order, might be resisted. By entering into protective orders and agreeing to their conditions, parties gain access to information that might not otherwise be available. The importance of such access is magnified in a proceeding such as this one, where the applicants have submitted volumes of highly sensitive commercial information in the document depository. We believe that these railroads and their shippers should be able to rely on the assurance that any confidential information subject to the protective order "may not be used for any purposes other than these proceedings."⁷ We have serious concerns that granting PEPCO's request and permitting it to use the control proceeding's information for other purposes would have a chilling effect on the discovery process not only in this case, but in our proceedings generally.

Even apart from these general concerns about the sanctity of the protective order, PEPCO has not shown that it should be permitted to use the materials it seeks to use. PEPCO has failed to demonstrate that it needs to be permitted to use CSXT's actual coal traffic and revenue data derived from the control proceeding. As indicated by CSXT, PEPCO already has CSXT's 100% traffic and revenue tapes for 1996 in the rate case. Furthermore, because NS is not involved in the rate case and none of its traffic figures in PEPCO's stand-alone rate case, PEPCO's request for NS data is clearly unwarranted.

To obtain Conrail's actual traffic and revenue data for use in the rate case, PEPCO could have used available discovery procedures, including third-party discovery, but chose not to do so. The discovery stage in the rate case has long passed. Permitting PEPCO to introduce new data now

⁷ As argued by CSX, NS, and Conrail, we note that PEPCO may have already violated the spirit of, if not the explicit terms of, the protective order by filing in the rate complaint proceeding information that is currently subject to the control proceeding protective order, and by including descriptions and comparisons based on that information.

that could have been discovered much earlier would be an unwarranted reopening of the evidentiary phase of the rate proceeding. We will not allow parties to forgo discovery in formal proceedings (either because of oversight or because of a concern that the discovery may produce evidence that may not support their theory), present their case using information that they deem adequate to support their theory, and then, after reviewing their case and the case made by their opponents, seek to gain access to the confidential information that they elected not to pursue in the first instance. Such gamesmanship is unfair to other parties and would delay the resolution of our cases, contrary to specific Congressional directives.

We note that CSX has demonstrated that its forecasts of increased traffic and revenue as a result of its proposed acquisition of Conrail's assets are totally unrelated to the projections it made in the rate case. Traffic projections in the rate case reflect traffic growth based upon economic considerations such as likely growth in the utilities' use of coal; traffic projections in the control case specifically exclude those economic considerations, and for the most part reflect the fact that certain existing Conrail traffic not currently handled by CSX will be handled by CSX if its acquisition of Conrail lines is approved. Moreover, as CSX has noted, PEPCO has other non-confidential sources of CSXT coal traffic information to enable PEPCO to make the same arguments in the rate case that it advances here, to the extent it believes they are relevant.

Finally, we note that we might be willing to permit a party to use newly available information covered by a protective order in extraordinary circumstances, such as where a party seeks use of confidential information that it can demonstrate impeaches, as untruthful, evidence submitted in another proceeding. Petitioner has not made that showing here. Moreover, we cannot help but note that this issue would not even have arisen but for PEPCO's use of the same lawyers in both cases, a situation that calls for extreme care in the use of this confidential information.

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

It is ordered:

1. PEPCO's petition to modify the protective order to permit use of confidential and highly confidential information from the control proceeding in support of its August 11, 1997 rebuttal evidence in STB Docket No. 41989 is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary