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SERVICE DATE - MAY 8, 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. 78

Decided: May 7, 1998

On April 23, 1998, APL Limited (APL) filed an appeal (designated as APL-21) requesting that we reverse a ruling issued by Administrative Law Judge Jacob Leventhal on April 17, 1998. In his ruling, Judge Leventhal granted, in part, the petition by CSX¹ to declassify certain portions of the record with respect to a lease agreement between Conrail and APL. CSX's petition (designated as CSX-141) sought to change the designation of the material from "Highly Confidential" to "Public." In granting the relief sought by CSX, Judge Leventhal found that, contrary to APL's assertions, the declassified portions of the lease agreement do not contain commercially sensitive material (Tr. at 18-19) and that CSX's need to use the information in its oral argument outweighs any detriment to APL (Tr. at 20). CSX replied in opposition to APL's appeal.

BACKGROUND

In 1988, APL and Conrail entered into a 16-year rail transportation contract providing for the movement of intermodal traffic between various points in the Eastern United States, including rail movements between Chicago, IL, and Conrail's South Kearny Yard in Northern New Jersey. In connection with the transportation contract, Conrail also agreed to lease a 20-acre intermodal facility in South Kearny to APL for a term of 24 years at an annual rental of "One Dollar (\$1.00), payment waived." Lease agreement, Section 4.1. Under the terms of applicants' agreement to acquire Conrail (referred to herein as the Transaction Agreement), Conrail's South Kearny Yard is allocated to CSX. Pursuant to section 2.2(c) of the Transaction Agreement, APL's Chicago-South Kearny movements are allocated to both CSX and NS, with revenues from the movements pooled between them.

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. CSX, NS and Conrail are collectively referred to as applicants in this decision.

In this proceeding, APL takes the position that section 2.2(c) of the Transaction Agreement, insofar as it provides for the succession of CSX and/or NS to the rail transportation contracts of Conrail, where both the shipper and the succeeding carrier will remain bound by the terms of the contract, should not be approved by us, either generally or as applied to APL. According to APL, section 2.2(c) is anticompetitive on its face and, therefore, APL should not be bound by the terms of its existing transportation contract with Conrail, but instead should have the opportunity to negotiate new rail service terms with both CSX and NS.

To further support its position that section 2.2(c) of the Transaction Agreement should not be approved, APL, in its brief filed February 23, 1998, unilaterally declassified as “Public” and referred to two provisions in its Conrail transportation contract that, in its entirety, had previously been classified by APL as “Highly Confidential”: section 17 with respect to contract renegotiation in light of inequities or substantially changed circumstances; and section 19 restricting contract assignment generally. In response to APL’s reference to this newly declassified material, CSX asked APL to declassify two interrogatory answers by APL, as well as two portions of APL’s lease agreement with Conrail: section 4 dealing with the annual rent for South Kearny intermodal facility; and section 27 concerning the relationship between the lease agreement and the transportation contract. After APL refused CSX’s request, CSX filed its petition in CSX-141 asking us to declassify the two portions of the lease agreement. APL opposed CSX’s petition. In Decision No. 74, served March 26, 1998, we referred the matter to Judge Leventhal for resolution.² In his April 17, 1998 ruling, Judge Leventhal granted CSX’s declassification petition with respect to sections 4 and 27 of the lease agreement and, as modified by counsel for CSX at the April 17 conference before Judge Leventhal, APL’s single-word “no” response to the two interrogatories.

In its appeal, APL argues that, when Judge Leventhal declassified three sentences of a 30-page lease, the Judge erred by permitting material to be taken out of context of a unitary document. APL also maintains that, because the Judge refused to address the issue of relevancy of the material, he had no basis to conclude that CSX had met its burden of showing that declassification of the material was necessary to present its case to us. According to APL, the Judge’s ruling will permit CSX to use irrelevant argument in its oral presentation, thereby requiring APL to use its limited time to reply to CSX’s so-called “equitable” issues that are not directly at issue in this proceeding. Such a result, APL contends, would be manifestly unjust by forcing it to devote time and effort in addressing allegedly irrelevant issues and argument.

CSX responds that, because declassification of the material is necessary for it to argue its case, it has met its burden of proof. CSX maintains that it should not have to confine its argument to those portions of APL’s contracts that APL has seen fit to declassify. According to CSX, APL’s insistence that the involved material is irrelevant does not make it so. CSX indicates that the

² We note that APL, in its reply in opposition (APL-19), specifically sought to have this declassification matter referred to Judge Leventhal.

material declassified by Judge Leventhal is not commercially sensitive and should not have been classified as “Highly Confidential” in the first place.

DISCUSSION AND CONCLUSIONS

In this proceeding, we have delegated broad authority over disputes arising out of the discovery process to Judge Leventhal. See Decision No. 6, slip op. at 6-7 (May 30, 1997). Appeals from his 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 his procedural orders “are not favored,” id., and the standards for prevailing on such appeals are “stringent.” See Decision No. 17, slip op. at 2 (July 31, 1997). For the reasons discussed below, APL’s appeal will be denied.

We agree with Judge Leventhal that the declassified portions of the lease agreement and APL’s interrogatory responses do not contain commercially sensitive material and that CSX’s need to use the information in its oral argument outweighs any detriment to APL. While maintaining that the declassified material is irrelevant to the issues in this case,³ APL does not argue that the material is commercially sensitive nor that its release would cause it competitive harm. In fact, APL has already disclosed that, at the time it entered into its transportation contract with Conrail, it also signed a lease agreement for Conrail’s South Kearny facility “at nominal rental until the year 2012.” APL-4, Rhein V.S. at 15. The declassified material merely informs as to the amount of that nominal rent, the relationship between the transportation contract and lease, and APL’s single-word negative answers to two interrogatories. Because there is nothing commercially sensitive about this information, APL’s claims that the lease agreement is a unified whole and that it would be misleading to declassify portions of it are of no avail to APL.

In addition, CSX has shown, and Judge Leventhal has agreed, that CSX needs to refer to the declassified material to argue its case. Prior to filing its February 23, 1998 brief, APL had not referred to, nor relied on, the antiassignment clause (section 19) or the inequities clause (section 17) in its transportation contract with Conrail to advance its case against section 2.2(c) of the applicants’ Transaction Agreement. By unilaterally declassifying and referring to these two provisions in its previously classified transportation contract, APL opened the door to further disclosure and discussion relative to the issue of the assignability of Conrail’s contracts. In arguing that section 2.2(c) is the only appropriate and fair method to succeed to the contracts, CSX is entitled to refer to the contested material. APL’s selective declassification of contract provisions at this late date should not foreclose CSX’s reference to the lease provisions and interrogatory responses that CSX believes are probative to its case and that, admittedly, are not commercially sensitive.

³ Although it is within APL’s prerogative to argue that certain information or issues are irrelevant to the case at hand, we are the final arbiter of what is or is not relevant in this proceeding.

Judge Leventhal exercised his discretion by considering all factors, balancing the prejudice to CSX as against the prejudice to APL, and ultimately granting CSX's declassification request. The exercise of such discretion by Judge Leventhal is entirely within the scope of his authority in this proceeding.⁴ Because APL has not demonstrated that Judge Leventhal's ruling constitutes a clear error of judgment or manifest injustice, the appeal will be denied.

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

It is ordered:

1. The appeal in APL-21 from Judge Leventhal's April 17, 1998 decision is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁴ See Decision No. 17 (July 31, 1997), Decision No. 58 (December 5, 1997), and Decision No. 68 (February 23, 1998) where, in each instance, we affirmed Judge Leventhal after finding that he exercised his discretion in granting or denying additional discovery requests.