

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. 1

Decided: April 16, 1997

On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC)<sup>1</sup> filed a notice of intent (CSX/NS-1) to file a joint application seeking Surface Transportation Board (Board) authority under 49 U.S.C. 11323-25 for: (1) the acquisition of control, by CSX and NS, of CRI, which is to be jointly owned by CSXC and NSC, by and through a special purpose limited liability company (LLC) and LLC's wholly owned subsidiary, Green Acquisition Corporation (Acquisition); and (2) as soon as practicable after the authorization and exercise of such control, the division of Conrail's assets into (a) assets which will be the subject of separate long-term operating agreements, operating leases or other operating arrangements with CSX and NS, respectively, (b) other assets which will be separately owned by CSX and NS, and (c) those assets which will continue to be held by CRI and CRC or their subsidiaries and operated for Conrail's account and that of its stockholders.<sup>2</sup> In addition, as part of the overall transaction, NSR will sell to CSXT a line of railroad owned by NSR, formerly owned by Conrail.

In a petition filed April 10, 1997, applicants request that the Board enter a protective order (CSX/NS-3). Applicants explain that a protective order is necessary for two reasons: (1) to permit employees of the merging carriers and their affiliates to exchange information, including shipper-specific material such as traffic data and tapes, to develop the Primary Application, and yet protect confidential information and facilitate compliance with 49 U.S.C. 11323 and 11904 and other relevant provisions of the ICC Termination Act of 1995; and (2) to facilitate any necessary discovery during later stages of the proceeding by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and/or proprietary information in the event that parties seek or produce such materials. Applicants propose to include in the protective order a provision governing the production of highly confidential competitive information in discovery, and restricting that information to use by outside counsel or outside consultants for the parties. The provision is similar to provisions approved in protective orders in other control cases. *See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (UP/SP)*, Finance Docket No. 32760, Decision No. 2 (ICC served Sept. 1, 1995).

Good cause exists to grant the petition. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

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<sup>1</sup> CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRI and CRC are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as Applicants.

<sup>2</sup> In orders served on April 16, 1997, proceedings for the proposed control of Conrail by CSX and NS, respectively, were discontinued in STB Finance Docket Nos. 33220 and 33286.

The Board also assigns and authorizes Administrative Law Judge Jacob Leventhal to entertain and rule upon all disputes concerning discovery in this proceeding. In addition to filing pleadings with the Board and with applicants' representatives, parties must send a copy of all filings and documents in this proceeding to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 [202 219-2538, FAX: (202) 219-3289], and must refer to STB Finance Docket No. 33388.

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

*It is ordered:*

1. The petition for a protective order is granted and the parties to this proceeding must comply with the protective order in the Appendix.<sup>3</sup>
2. This proceeding is assigned to Administrative Law Judge Jacob Leventhal for handling of all discovery matters and the initial resolution of all discovery disputes.
3. This decision is effective on the service date.
4. A copy of all filings and documents must be sent to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426 and refer to STB Finance Docket No. 33388.
5. Administrative Law Judge Jacob Leventhal shall be added to the service list in this proceeding and a copy of this decision shall be served on Administrative Law Judge Jacob Leventhal at the address listed in the preceding paragraph.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

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<sup>3</sup> This decision protects the information, materials, and data set forth in the attached Appendix whether contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX A

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Application" means the Primary Application (and all related applications of CSX and/or NS and Conrail) to be filed in these Proceedings.

(b) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(c) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

(d) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraphs 5 or 6 of this Protective Order, and any Confidential Information contained in such materials.

(e) These "Proceedings" consist of STB Finance Docket No. 33388, any related proceedings before the Surface Transportation Board, and any judicial review proceedings arising from STB Finance Docket No. 33388 or from any related proceedings before the Board.

2. Personnel of CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), and their affiliates (collectively, CSX), and of Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR) and their affiliates (collectively, NS), including outside consultants and attorneys for CSX and NS (representatives), may exchange Confidential Information obtained from CSX, NS or Conrail, Inc. (CRI), Consolidated Rail Corporation (CRC) and their affiliates (collectively, Conrail) (and, in the case of Conrail information, whether received directly by CSX or NS or by one of them from the other) with any other personnel or representatives of CSX or NS, and personnel of Conrail may furnish information to personnel or representatives of CSX or NS, in each case for the purpose of preparing for or participating in the Proceedings, but not for any other business, commercial, or other competitive purpose, provided that, if the Application in these Proceedings is approved, and control of Conrail by CSX and NS is authorized and effected, then CSX and NS may respectively use Confidential Information obtained from Conrail pertinent to their respective operations under operating agreements with Conrail or operating agreements with Conrail in connection with such operations. Information previously exchanged or furnished under the protective orders entered in either of STB Docket Nos. 33220 or 33286 shall be deemed to have been exchanged or furnished under this order.

3. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of CSX, NS, and Conrail or their affiliates are held and carried out for purposes of these Proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995.

4. If the Application is disapproved by the Board, or if the Application is approved but control is not effected, or if no Application is filed, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these Proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

5. If any party to these Proceedings determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL"

shall be handled as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective Order.

6. Any party producing material in discovery to another party to these Proceedings, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information, as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraph 2 of this Protective Order.

7. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

8. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

9. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

10. Designated Material may not be used for any purposes other than these Proceedings, including without limitation any business, commercial, strategic, or competitive purpose.

11. Any party who received Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other documents submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." *See* 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

13. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require that the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

14. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and

other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

15. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 12 of this Protective Order.

16. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, 5, or 6 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11323 or 11904 or of any other relevant provision of the ICC Termination Act of 1995.

17. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

18. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING -- CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, have read the Protective Order served on \_\_\_\_\_, 1997 governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33388, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33388, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 33388 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_

Dated: \_\_\_\_\_

Exhibit B

UNDERTAKING -- HIGHLY CONFIDENTIAL MATERIAL

I am outside [counsel] [consultant] for \_\_\_\_\_, for whom I am acting in this proceeding. I have read the Protective Order served on \_\_\_\_\_, 1997, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 33388, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 33388, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 33388 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_