

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. 37

Decided: September 18, 1997

The protective order previously adopted in this proceeding<sup>1</sup> provides that material designated Highly Confidential<sup>2</sup> "may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings,<sup>3</sup> 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." Protective Order ¶8 (emphasis added). See also Decision Nos. 15 and 22 (modifying the protective order to allow in-house counsel for two unions to review Highly Confidential material that would otherwise be available to outside counsel only). By motion filed September 3, 1997, the Port Authority of New York and New Jersey (the Port Authority) asks that the protective order be further modified to permit Hugh H. Welsh, its Deputy General Counsel, to review Highly Confidential information to the same extent as, and under the same restrictions applicable to, outside counsel. By reply filed September 8, 1997, applicants<sup>4</sup> urge the denial of the Port Authority's motion.<sup>5</sup>

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<sup>1</sup> See Decision No. 1, Appendix A (this appendix contains: the text of the protective order; the Exhibit A undertaking applicable to material designated Confidential; and the Exhibit B undertaking applicable to material designated Highly Confidential). See also Decision No. 4, slip op. at 8 (modifying the protective order in one respect not presently relevant).

<sup>2</sup> Protective Order ¶1(b) provides that "confidential documents" are documents and other tangible materials containing or reflecting confidential information. Protective Order ¶1(c) provides that "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. Protective Order ¶6 provides that particular confidential information, "such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information," may be designated "HIGHLY CONFIDENTIAL."

<sup>3</sup> Protective Order ¶1(e) defines "these Proceedings" as: 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 Surface Transportation Board.

<sup>4</sup> 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

(continued...)

## DISCUSSION AND CONCLUSIONS

The Port Authority contends: that Mr. Welsh is an experienced attorney of unquestioned integrity; that it is his responsibility to make recommendations to the Port Authority's Board of Commissioners with respect to the position the Port Authority should take in this proceeding; and that, to fulfill this responsibility, he must be able to review the entire record in this proceeding, and not merely portions of that record. The Port Authority adds that the commercial harm that could befall applicants as a result of information disclosure to commercial parties is not applicable vis-à-vis the Port Authority, a bi-state agency charged with the protection of the public interest of the States of New York and New Jersey.

While the Port Authority is a bi-state agency charged with protecting the public interest, its position in this proceeding is akin to that of a commercial party. We will therefore deny the NYNJ-8 motion.

The Port Authority has competitive interests in this proceeding: it seeks to protect the competitive position of the Port of New York vis-à-vis other East Coast ports. These interests, which distinguish the Port Authority from the two unions whose in-house counsel have been granted access to Highly Confidential material, is of a different character than the interests that a state agency might ordinarily be expected to have; as applicants note, CSX/NS-72 at 3-4, the revenues of the Port Authority, which are derived from tolls, fees, and rents, depend, at least in part, on the amount of traffic that uses its facilities. Applicants are correct in their assertion that Highly Confidential information that they have already produced (including traffic volume, identity of shippers, and the rates paid by shippers) would be of substantial relevance to the Port Authority's competitive interests.

The Port Authority's position in this merger proceeding is much like the positions of Phillips Petroleum Company (PPC) and Western Resources, Inc. (Western) in the BN/Santa Fe merger proceeding.<sup>6</sup> PPC and Western, which were represented in that proceeding both by in-house counsel and by outside counsel,<sup>7</sup> argued that the BN/Santa Fe protective order hindered the ability of their in-house counsel to review Highly Confidential documents, as well as depositions discussing such documents. Both parties were concerned that their in-house counsel would be able to view only redacted versions of the arguments made by their outside counsel because those arguments were likely to refer to Highly Confidential documents and depositions. Each party noted that it was a shipper-customer, not a railroad competitor, of primary applicants BN and Santa Fe, and that its business dealings with the primary applicants were geographically limited. The ICC denied that applicable protective order to permit in-house counsel to view Highly Confidential documents and depositions because:

[T]he disclosure of such proprietary information to entities such as PPC and Western, with which BN and Santa Fe have arms-length business relationships, could adversely affect the primary applicants' future business

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<sup>4</sup>(...continued)

Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

<sup>5</sup> The Port Authority's motion is designated NYNJ-8. Applicants' reply is designated CSX/NS-72.

<sup>6</sup> Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549.

<sup>7</sup> The Port Authority is similarly represented both by in-house counsel and by outside counsel.

dealings with those entities. And it is also manifestly clear that disclosure of such information to in-house counsel such as Messrs. Cooper and Green is regarded, for litigation purposes, as disclosure to their corporate employers.

Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 21, slip op. at 2 (ICC served May 3, 1995). Because much the same can be said of the Port Authority and its in-house counsel, Mr. Welsh, we will deny its motion.

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

It is ordered:

1. The NYNJ-8 motion is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary