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ALJ

SERVICE DATE: JUNE 27, 1997

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.10

Decided: June 26, 1997

The merging parties filed a motion on June 5, 1997, requesting that a conference be convened to consider the setting of discovery guidelines.

At the conference held on June 17, 1997, the parties agreed upon revised discovery guidelines which include changes to the original proposal submitted by the Applicants and either agreed to by the parties present at the conference or ordered by me at the conference.¹

At the conference, counsel for Canadian National Railway Company stated that its discovery dispute with Conrail had been resolved. Consequently, its Motion to Compel Discovery Responses by Conrail, which had been previously filed, was withdrawn. Tr. at p. 14.

The Discovery Guidelines, attached to this Decision, is adopted.

This decision is effective on the service date.

¹Paragraph 13 of the guidelines includes a revision not considered at the conference but which the Applicants represent is not opposed by the parties present at the conference.

By the Board, Jacob Leventhal, Administrative Law Judge.

Vernon A. Williams
Secretary

DISCOVERY GUIDELINES

A. General

1. In consideration of the expedited procedural schedule governing this proceeding, all discovery requests must be tailored to be consistent with the procedural schedule adopted in the proceeding. The parties shall avoid any duplicative discovery requests.

2. The Board's discovery rules set forth at 49 C.F.R. pt. 1114 will apply to this proceeding except as modified by Board decision or by these discovery guidelines. Any of the discovery guidelines contained herein may be varied by agreement between any two or more parties (except if such a variance would adversely affect any third party). The Administrative Law Judge (the "ALJ") may vary any discovery guideline contained herein for good cause.

3. Persons wishing to engage in discovery in this proceeding must complete and fax to Zuckert, Scoutt & Rasenberger, L.L.P., Attention: Patricia Bruce at 202-342-1608 the attached Request to be Placed on the Restricted Service List ("Request") no later than 45 days following the date of filing of the primary application. On July 8, 1997 and each Tuesday thereafter through August 12, 1997, Zuckert Scoutt & Rasenberger, L.L.P. shall provide the Restricted Service List to persons thereon reflecting the Requests received through the prior Friday.

4. Discovery requests, objections, motions to compel and responses shall be labeled and numbered in a manner consistent with the labeling/numbering requirement for filings (e.g., CSX/NS-1).

5. All workpapers and documents produced in response to a discovery request will be numbered such that each page can be uniquely identified and will include the acronym the producing party has chosen pursuant to 49 C.F.R. § 1180.4(a)(2) (e.g., CSX/NS or CSX or NS or CR) and alpha digits which correspond to the level of confidentiality assigned to the document ("P" meaning not confidential and public, "CO" meaning confidential, and "HC" meaning highly confidential).

6. Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (i.e., workpapers supporting the filing and documents relied upon by the witnesses), other than documents that are privileged or otherwise protected from discovery, in a depository open to all parties. Norfolk Southern, CSX, and Conrail shall maintain a joint depository located at the offices of Arnold & Porter, 555 12th Street, N.W., Washington, D.C., with reference to all evidentiary filings.

7. Parties maintaining depositories shall provide suitable indices which identify the general classes of documents in their depositories and which identify documents relating to each

witness statement contained in their evidentiary filings. Such indices shall be made available to any party utilizing the depository. When a party responds to a discovery request by referring to documents in a document depository, the responding party must provide a description of the document's location within the depository that is reasonable under the circumstances.

8. All depositories shall be maintained in the Washington, D.C. area, unless a party requests and receives written permission from the ALJ, after notice to all other parties and for good cause shown, to maintain its depository outside of the Washington, D.C. area. All depositories shall be open to any other party during normal business hours on weekdays and, on notice of a request to visit, Saturdays, and the party operating the depository shall provide staffing assistance reasonable under the circumstances. The party maintaining the depository shall establish reasonable procedures for the operation of the document depository, which may include requirements that notice be provided in advance of a planned visit and must provide that persons reviewing documents marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" first execute an appropriate undertaking pursuant to the protective order entered in Finance Docket No. 33388. Parties' depositories shall provide services for the making of copies of all documents contained therein, may charge a reasonable amount for reimbursement of duplication expenses, and

shall use their best efforts to provide copies of depository documents within two (2) business days of receiving a request from a party for such documents.

9. Any discovery response containing confidential information or data as defined in the protective order issued in Finance Docket No. 33388 shall be designated and stamped "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and shall be handled pursuant to the procedures contained in the applicable protective order. Discovery responses (other than with respect to documents which are placed in the document depository) which contain information designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be served only in redacted form on parties who have not represented on the Request to be Placed on the Restricted Service List that they have executed the relevant protective order.

B. Discovery Requests

10. On or after the thirtieth day following the filing of the primary application, the ALJ will hold a further discovery hearing to consider whether specific limitations on the number of discovery requests permitted to be made by one party against another party are needed.

C. Depositions

11. A person who has submitted written testimony in this proceeding shall be made available for deposition upon request. A person who has not submitted written testimony in this proceeding shall be deposed on notice in accordance with 49 C.F.R. 1114.22, which notice shall identify the specific subject matter relevant to the issues raised in this proceeding on which that witness' testimony is sought. Any party seeking a ruling as to a deposition shall follow the procedures set forth in Paragraph 18 below.

12. Absent agreement among all interested parties or prior approval from the ALJ, all depositions of persons submitting verified statements shall be conducted in the Washington, D.C. area. Absent agreement among all interested parties or prior approval from the ALJ for good cause shown, (1) no witness shall be deposed more than one time as to any written initial statements or more than one time as to any written rebuttal statements submitted by that witness in this proceeding, and (2)

no other person shall be deposed more than one time. Parties shall use their best efforts to complete depositions as promptly as practicable, and if possible within two days.

13. Any party wishing to depose a witness shall, at least two weeks prior to the scheduled deposition, and five business days if the deposition is to be after October 21, 1997, notify the counsel to the party with whom that witness is affiliated that the party will depose the witness. Any other party who wishes to depose the witness shall, at least two business days prior to the scheduled deposition, confirm with counsel to the party with whom that witness is affiliated that the party will participate in the deposition. To the extent reasonably practicable, at least twenty-four hours or one business day, whichever is greater, prior to the scheduled deposition, the party deposing the witness shall advise the counsel to the party with whom the witness is affiliated of the identity of the documents (including Bates numbers, where applicable) about which the witness will be questioned. Any party who, after giving the notice required by these guidelines, decides not to depose that witness, shall submit a written notice of such decision to counsel for the party with whom that witness is affiliated and to all persons on the Restricted Service List.

D. Service

14. All discovery requests, objections and motions to compel shall be served (a) in the most expeditious manner possible, by hand delivery in the Washington, D.C. area and by overnight mail outside the Washington D.C. area, or by facsimile, on the party to which the requests, objections or motions are directed, and (b) by mail on other parties on the Restricted Service List.

15. Discovery responses shall be served only on the party that propounded the discovery and any party requesting copies of such responses in writing, except that the documents produced by a party in response to a discovery request shall be placed in the depository in lieu of being served. All discovery responses shall be immediately placed in the depository of the responding party (and in the case of any of the Applicants, in the joint depository), and that party shall simultaneously provide written notice to all parties on the Restricted Service List that it has responded to a particular discovery request of another party (which shall be identified in the notice) and that it has placed its responses in its depository. The party propounding the discovery or any other party may request copies, which shall be supplied at a reasonable cost.

E. Responses

16. A responding party shall, within five business days after receipt of service, serve a response stating all its

objections to any discovery request as to which the responding party has then decided that it will be providing no affirmative response (i.e., no information or documents), so that disputes as to such requests may be resolved as quickly as possible.

Responding parties shall, within fifteen days after receipt of service, answer or object to all other discovery requests.

17. The responding party shall endeavor, to the greatest extent possible, to produce documents by placing those documents in its document depository within the fifteen-day response period. If the responding party is not able to produce such documents within the fifteen-day period, it shall contact the propounding party at the earliest possible time within the fifteen-day period and indicate its best judgment as to the date the documents will be provided. Upon request by the propounding party, the responding party shall produce, whenever reasonable, documents on an "as-available" basis rather than in a lump-sum production.

F. Resolution of Disputes

18. Discovery disputes shall be resolved voluntarily among the parties whenever possible; otherwise, counsel for the party seeking a ruling on a discovery issue shall contact Jennifer Schmidt in ALJ Leventhal's office at (202) 219-2542 by 4:00 p.m. Monday to request a prehearing discovery conference to be held at 9:30 a.m. on Wednesday of the same week at a hearing room at 888

1st Street, N.E., Washington, D.C. Written notice specifically identifying the discovery in dispute shall be served by the party requesting the conference by facsimile or hand delivery on all parties on the Restricted Service List; in addition, good faith efforts shall be made to give telephone notice prior to 4:00 p.m. on Monday to the opposing party. The opposing party may file a written response one business day before the conference or may respond orally at the hearing. If the opposing party or any other party submits a written response, that response must be served on the ALJ and all parties on the Restricted Service List no later than 5:00 p.m. on the business day immediately preceding the conference. No later than 5:00 p.m. on the business day immediately preceding the conference, the primary applicants shall send notice by facsimile to the ALJ and to all parties on the Restricted Service List indicating, based on the status of such settlement discussions as may have been held, whether or not the conference will be held. If there is no request for a conference, there will be no conference. At any discovery conference, those parties seeking and resisting discovery are expected to be represented by counsel authorized to speak for the party on the matter at issue. If discovery is ordered, the ALJ shall require it as soon as can practicably be accomplished.

G. DISCOVERY MORATORIUM

19. No discovery may be served on any party between October 6, 1997 and October 21, 1997. All discovery served prior to that period shall be completed by October 21, 1997.

REQUEST TO BE PLACED ON
THE RESTRICTED SERVICE LIST

NOTE: ALL INFORMATION MUST BE PROVIDED -- Please print

The following persons should be placed on the Restricted Service List in Finance Docket No. 33388:

Name/Address:	Affiliation:	Protective	Order Signed?
_____	_____		_____
_____	_____		_____
_____	_____		_____
Confidential			
_____	Telephone Number:	_____	Highly
_____	_____	_____	_____
	Facsimile Number:	Confidential	
	_____	_____	

Name/Address:	Affiliation:	Protective	Order Signed?
_____	_____		_____
_____	_____		_____
_____	_____		_____
Confidential			
_____	Telephone Number:	_____	Highly
_____	_____	_____	_____
	Facsimile Number:	Confidential	
	_____	_____	

Name/Address:	Affiliation:	Protective	Order Signed?
_____	_____		_____
_____	_____		_____
_____	_____		_____
Confidential			
_____	Telephone Number:	_____	Highly
_____	_____	_____	_____
	Facsimile Number:	Confidential	
	_____	_____	

Date: _____