

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. 34

Decided: September 18, 1997

As noted in Decision No. 32, applicants¹ have, in certain instances, redacted from documents they have produced in discovery certain items of assertedly "commercially sensitive proprietary information"² that, in their view, are not relevant to any matters properly at issue in this proceeding. By petition (designated NYSEG-8) filed September 5, 1997, New York State Electric & Gas (NYSEG) asks that we clarify that the protective order resolves all issues relating to the discovery of commercially sensitive information, so that applicants cannot assert "commercial sensitivity" as a basis either for objecting to discovery requests or for redacting information from documents designated Highly Confidential.³ See NYSEG-8 at 11. By reply (designated CSX/NS-73) filed September 10, 1997, applicants ask that we either deny the NYSEG-8 petition or clarify that applicants, at least in certain circumstances, are not precluded from redacting "extraordinarily sensitive cost information," CSX/NS-73 at 11-12, from documents they produce in discovery.⁴

DISCUSSION AND CONCLUSIONS

The clarification sought in the NYSEG-8 petition relates to: (1) the regular discovery process applicable to this proceeding, pursuant to which parties such as NYSEG have directed document production requests to applicants;⁵ and (2) the supplemental discovery process applicable to this proceeding, pursuant to which applicants have established a document depository and have

¹ 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 Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

² CSX/NS-70 at 1, quoted in Decision No. 32, slip op. at 1.

³ See Decision No. 32, slip op. at 3 n.7 (explanation of the term "Highly Confidential").

⁴ The NYSEG-8 and CSX/NS-73 pleadings were followed by the NYSEG-9 pleading (filed September 11, 1997) and an undesignated letter from applicants (filed September 12, 1997). The NYSEG-9 pleading purports to be a reply to applicants' CSX/NS-70 appeal from two decisions entered by Administrative Law Judge (ALJ) Jacob Leventhal; we addressed that appeal in Decision No. 32 and will not address further the NYSEG-9 pleading. NYSEG subsequently has filed a pleading (designated NYSEG-10) on September 17, 1997, that purports to supplement the NYSEG-8 petition but that essentially reiterates the relief sought in NYSEG-8.

⁵ A written interrogatory that can be answered by document production is, for present purposes, a kind of document production request. See 49 CFR 1114.26(b) (production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document).

there made available to parties such as NYSEG numerous documents some of which have been, and some of which have not been, the subject of document production requests directed to applicants. The clarification sought by NYSEG implicates both the protective order⁶ and the discovery guidelines.⁷

Document Production Requests. We reject NYSEG's argument that any redaction of responsive documents is necessarily inconsistent with the protective order except where privilege is legitimately asserted. In addition to their right to assert that the document or certain information therein is privileged, the applicants may also assert that the document or information is not relevant. But, if applicants believe that a responsive document contains material that they should not be required to produce in the discovery process in this proceeding, they are required to object to production within the appropriate time period provided for in the discovery guidelines.⁸ Applicants generally have one opportunity to object to discovery requests; they cannot unilaterally hold an objection in reserve until after Judge Leventhal has overruled their initial objections and ordered production. An ALJ order directing applicants to produce certain documents must generally be read as having resolved any and all objections that applicants presented, or could have presented, to Judge Leventhal. See Decision No. 32, slip op. at 2-3 (carryover paragraph). Only with this approach will disputes be resolved quickly, allowing the case to proceed as scheduled.

Applicants can assert in response to a document production request that, although a particular document is responsive to that request, it contains material that is not relevant to any matter properly at issue in this proceeding.⁹ If either the requesting party or Judge Leventhal accepts applicants' assertion, applicants are not required to produce that material. The mechanics of non-production depend on the extent of the irrelevant material. If the document contains only such material and nothing else, applicants are not required to produce the document. If the document contains both irrelevant material and relevant material, applicants must produce the document, but can redact the irrelevant material.

If both the requesting party and Judge Leventhal reject applicants' assertion that certain material contained in a responsive document is not relevant to any matter properly at issue in this proceeding, applicants are required to produce the document in its entirety.¹⁰ If, in that case,

⁶ The protective order was adopted in Decision No. 1, and, as noted in Decision No. 32, slip op. at 3 n.6, has since been modified in several minor respects.

⁷ The discovery guidelines were adopted by Judge Leventhal in ALJ Decision No. 10, and were modified in one minor respect in ALJ Decision No. 20.

⁸ Discovery Guidelines ¶16 (attached to ALJ Decision No. 10) provides: that within 5 business days after receipt of a document production request, applicants shall serve a response stating all of their objections to any discovery request as to which they have then decided that they will be providing no affirmative response; and that within 15 days after receipt of a document production request, applicants shall answer or object to any other discovery request.

⁹ The relevance standard applicable to such an objection is the broad standard applicable to discovery matters. See 49 CFR 1114.21(a)(2) ("It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). We note that the standard against which the relevance of commercially sensitive information should be judged may well be higher than the standard against which the relevance of less sensitive information should be judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.

¹⁰ This assumes that Judge Leventhal has not upheld some other objection (e.g.,
(continued...))

applicants believe that the disputed material is commercially sensitive, applicants may apply the Highly Confidential designation to the document. See Decision No. 32, slip op. at 4 (first and second full paragraphs) (rejecting the argument that relevant material can be redacted from documents designated Highly Confidential under the terms of the protective order).

Applicants' Document Depository. The discovery guidelines require applicants to "endeavor, to the greatest extent possible, to produce documents by placing those documents in [their] document depository" within 15 days after receipt of a document production request. Discovery Guidelines ¶17 (attached to ALJ Decision No. 10). NYSEG claims that applicants have made inconsistent redactions in certain documents that applicants have both (i) produced to parties that have made document production requests, and (ii) placed in their document depository and thereby made available to parties other than the requesting parties. NYSEG claims, in essence, that the copies produced in the regular discovery process have been subject to less extensive redactions, and that the copies placed in the document depository have been subject to more extensive redactions. See NYSEG-8 at 2 n.3.

The discovery guidelines were adopted by Judge Leventhal, to whom this proceeding has been assigned for the handling of all discovery matters and the initial resolution of all discovery disputes. See Decision No. 1, slip op. at 2 (ordering paragraph 2). The inconsistent redactions aspect of the NYSEG-8 clarification petition should therefore be addressed, in the first instance, to Judge Leventhal.

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

It is ordered:

1. The protective order previously adopted in this proceeding is clarified as indicated in this decision.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁰(...continued)
attorney-client privilege) to production of such material.