

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. 32

Decided: September 12, 1997

On July 3, 1997, Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company (referred to collectively as movants)¹ submitted certain broad discovery requests to applicants,² essentially asking for all documents concerning virtually all shipments of coal, and concerning all negotiations involving rates for shipments of coal, for the last 20 years. On July 11, 1997, applicants submitted their objections to these discovery requests. On July 16, 1997, Administrative Law Judge (ALJ) Jacob Leventhal limited the discovery authorized to shipments of the movants, and to a period of 2 years before and after various mergers that involved applicants. See Decision No. 11 (ALJ written decision served July 18, 1997, confirming the ALJ oral decision announced on July 16, 1997), slip op. at 2 ("I find that the discovery as limited below may lead to admissible evidence that may enable the movants to prove that the 'one lump' economic theory does not apply in this proceeding. Balancing the burden asserted by the respondent[s] against the need of the movants to know, I find that the need to know outweighs the burden, subject to the limitations described below. The discovery ordered below is necessary for the movants to establish their premise."). See also Decision No. 17 (served August 1, 1997) (we denied movants' petition for reconsideration of Decision No. 11).

Judge Leventhal's decision of July 16, 1997, while denying movants much of the discovery they sought, also granted movants some of the discovery they sought. Applicants, not having filed a timely challenge to the latter part of Judge Leventhal's decision, were therefore required to provide the discovery that Judge Leventhal had ordered. Applicants have produced much of the material covered by this part of Judge Leventhal's decision, and have designated this material Highly Confidential. Over the objections of movants, however, applicants have redacted certain "commercially sensitive proprietary information," CSX/NS-70 at 1, from the material they have produced.³

¹ As noted below, there is, in the record, a discrepancy respecting the precise identification of the movants.

² 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.

³ Movants contend that the redacted information pertains to: rates/divisions/revenues, operating costs, "contribution" (the difference between revenue and cost), contract term(s) and volume(s), escalations and adjustments, and other matters. See ACE-13 at 4. Applicants claim that the redacted information consists of: (1) internal rail management cost information relating to rates offered to movants or considered during the course of negotiations with movants; and (2) internally considered rate proposals, and internal market analyses relating to such proposals, that CSX, NS, or
(continued...)

The redactions were brought to Judge Leventhal's attention at a hearing held on August 20, 1997, and were thereafter the subject of briefs filed August 25, 1997, by applicants, and August 29, 1997, by movants. In Decision No. 26 (ALJ written decision served September 5, 1997), Judge Leventhal: noted that the essence of applicants' argument was a claim that the redacted information was not relevant to any matters at issue in this proceeding; held that relevance had been decided in Decision Nos. 11 and 17; directed applicants to produce the redacted information without further delay; and noted that the non-redacted documents could be designated Highly Confidential and would be subject to the terms of the protective order previously adopted in this proceeding. In an ALJ oral decision announced at a hearing held on September 5, 1997, Judge Leventhal confirmed that Decision No. 26 applied to certain additional redactions as well ("the redactions we have been arguing about this morning," see CSX/NS-70, Transcript at 73), but stayed his decisions respecting redacted material until 5:00 p.m., Friday, September 12, 1997, to allow applicants time to file an appeal, see CSX/NS-70, Transcript at 73-75.

On September 8, 1997, applicants filed their appeal (designated CSX/NS-70), which applies both to Decision No. 26 and also to the ALJ oral decision announced at the hearing held on September 5, 1997, see CSX/NS-70 at 1 n.3. On September 9, 1997, movants filed their reply (designated "ACE, et al. -13" but referred to herein as ACE-13).⁴

DISCUSSION AND CONCLUSIONS

Appeals from discovery decisions issued by Judge Leventhal will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). See Decision No. 6, slip op. at 7, 62 FR 29387, 29390 (May 30, 1997). Because applicants have not met this standard, we will deny the CSX/NS-70 appeal.

Applicants contend that Judge Leventhal's challenged decisions should be reversed: because the redacted material is not relevant to issues properly before the Board; because the redacted material is extraordinarily commercially sensitive; and because, in rate negotiations conducted outside the context of the Conrail merger proceeding, the redacted material may be used against applicants by movants' outside counsel and outside consultants, who have heretofore represented movants and may be expected to continue to represent movants in rate negotiations with applicants.

Applicants' objection respecting relevance has come much too late. Applicants should have argued relevance in their July 11 submissions objecting to movants' July 3 discovery requests. Applicants had one opportunity, not multiple opportunities, to object to movants' discovery requests; we cannot accept the premise that relevance was an objection that applicants could hold in reserve until after Judge Leventhal had overruled applicants' initial objections and ordered production. Judge Leventhal's oral decision of July 16 (which was confirmed in his Decision No. 11, served July

³(...continued)

Conrail developed in the course of previous or current contract negotiations with movants. See CSX/NS-70 at 2.

⁴ Five parties (Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, Indianapolis Power & Light Company, and The Ohio Valley Coal Company) are identified as the movants in the CSX/NS-70 appeal, see CSX/NS-70 at 2 n.4, and in the ACE-13 reply, see ACE-13 at 1. We note, however, that only four parties (Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, and The Ohio Valley Coal Company) are identified as the movants in Decision No. 17, slip op. at 1, and in ALJ Decision No. 26, slip op. at 1 n.1. Because the precise identification of the movants is irrelevant to the issues addressed in this decision, we have no need to resolve this discrepancy.

18) must be read as having resolved any and all objections that applicants presented, or that they could have presented, in their July 11 submissions.⁵

Applicants' other objections reflect a certain discontent with the workings of the protective order that governs this proceeding. That protective order, which was drafted by applicants and adopted at their request,⁶ provides, as pertinent, that material designated Highly Confidential⁷ "may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings,⁸ 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

⁵ Applicants indicate that they did not raise a relevance objection in their July 11 submissions because they "had not yet undertaken their search for responsive documents and discovered the highly sensitive materials at issue." CSX/NS-70 at 14. We realize that, when confronted with a truly massive document production request, a party may be unable to review, in the time ordinarily allowed, all potentially responsive documents, and may therefore be unable to raise, within the time ordinarily allowed, all appropriate objections. Applicants, however, should have attempted to make a relevancy objection in some form or should have at least informed the Judge of the potential problem at the time of his ruling. Moreover, the material that applicants have already provided without raising a relevancy objection would appear to have the same relevancy problems as the material they now seek to redact as being extraordinarily sensitive.

In Decision No. 17, we said that the evidence ordered released by Judge Leventhal might be relevant. Applicants are correct that Judge Leventhal incorrectly construed this as a "ruling" on relevance. We did not need to rule on relevance because that issue was not appealed by applicants. The material redacted by applicants and sought by movants may ultimately turn out not to be relevant. Applicants, however, cannot argue relevance now; in the discovery context the time for that argument has come and gone.

⁶ The protective order was submitted by applicants as Appendix A to their CSX/NS-3 "petition for protective order" (filed April 10, 1997). In Decision No. 1 (served April 16, 1997), the CSX/NS-3 petition was granted, and the parties to this proceeding were directed to comply with the protective order that applicants had proposed. See Decision No. 1 (Appendix A to Decision No. 1 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"). The protective order adopted in Decision No. 1 has since been modified in minor respects, none of which is presently relevant. See Decision No. 4, slip op. at 8 (modifying the protective order with respect to certain exchanges of information among applicants themselves); 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).

⁷ 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."

⁸ 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.

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). The protective order further provides that material designated Highly Confidential may not be used for any purposes other than these Proceedings, "including without limitation any business, commercial, strategic, or competitive purpose." Protective Order ¶10 (this usage restriction also applies to any material designated Confidential).

Applicants' objection respecting the "extraordinary commercial sensitivity" of the redacted material, CSX/NS-70 at 3, is not entirely without merit, but we agree with Judge Leventhal's observations on this point:

The Applicants do raise a serious claim as to the highly confidential commercial sensitivity of the information they are required to produce. The Protective Order in effect in this proceeding should suffice to allay Applicants' concerns. Violation of the Protective Order would be a serious offense and could lead to significant consequences.

ALJ Decision No. 26, slip op. at 3. Applicants argue, in essence, that the Highly Confidential designation provided for in the protective order will not suffice to protect the extraordinarily sensitive material they wish to redact. It bears repetition, however, that the protective order governing this proceeding was drafted by applicants and adopted at their request; and, given the procedural schedule applicable to this proceeding, now is not the time for applicants to be urging a de facto modification of the protective order that would restrict the discovery available to their opponents.⁹

Finally, we recognize that outside counsel and outside consultants for railroads, shippers, and other parties tend to have continuing professional relationships with the parties they represent. This is not a new phenomenon. It is a situation that requires outside counsel and outside consultants to exercise extreme care in preserving confidentiality, but it is not a sufficient reason to grant the relief applicants seek here.

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

It is ordered:

1. The CSX/NS-70 appeal is denied.

⁹ The protective order provides that material designated Highly Confidential may not be used for any purposes other than these Proceedings, "including without limitation any business, commercial, strategic, or competitive purpose." As Judge Leventhal noted, a disclosure of Highly Confidential material in violation of the protective order would expose the disclosing party or person to "significant consequences." ALJ Decision No. 26, slip op. at 3. Such consequences include "all remedies available at law or equity," including specific performance and injunctive and/or other equitable relief. See Protective Order, Exhibit B (Decision No. 1, slip op. at 7). Applicants not so long ago agreed that these remedies should suffice to deter violations of the protective order. See CSX/NS-3 at 2 (emphasis added) (the protective order drafted by applicants will facilitate discovery "by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and/or proprietary information").

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary