STB FD 33388 10-23-97 C 28460

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SEC

SERVICE DATE - OCTOBER 23, 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

STB Docket No. AB-290 (Sub-No. 195X)

NORFOLK AND WESTERN RAILWAY COMPANY
--ABANDONMENT EXEMPTION--
BETWEEN DILLON JUNCTION AND MICHIGAN CITY
IN LA PORTE COUNTY, IN

Decision No. 48

Decided: October 22, 1997

On June 23, 1997, Norfolk and Western Railway Company (NW), a wholly owned subsidiary of Norfolk Southern Railway Company (NSR), filed, in STB Docket No. AB-290 (Sub-No. 195X), a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line between MP I-137.3 near Dillon Junction, IN, and MP I-158.8 near Michigan City, IN, a distance of approximately 21.5 miles in La Porte County, IN. See CSX/NS-22 at 42-63; Decision No. 12, slip op. at 18, 62 FR 39577, 39587 (July 23, 1997).

By notice (designated NS-28) filed October 6, 1997, NW has withdrawn the petition for exemption previously filed in STB Docket No. AB-290 (Sub-No. 195X). NW adds, however, that, if and when the Board approves the control application in STB Finance Docket No. 33388, the Board will be asked to authorize the sale of the Dillon Junction-Michigan City line to the Chicago, SouthShore & South Bend Railroad for continued rail use.

Because NW has withdrawn its Dillon Junction-Michigan City abandonment petition, the STB Docket No. AB-290 (Sub-No. 195X) proceeding will be discontinued.

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

It is ordered:

1. The STB Docket No. AB-290 (Sub-No. 195X) proceeding is discontinued.

2. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

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SERVICE DATE - OCTOBER 23, 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. 49

Decided: October 22, 1997

On October 22, 1997, CSX Corporation and CSX Transportation, Inc. (Collectively "CSX") and the Allied Rail Unions ("ARU") filed a Stipulated Motion for Entry of Agreed Protective Order together with the Protective Order. This proposed Protective Order is intended to control the use of documents and information provided by CSX in response to subparts a-f and h of ARU's Interrogatory No. 94.

It is ordered:

1. The Stipulated Motion, annexed to this decision as Appendix A, is granted.

2. The proposed Protective Order, annexed to this decision as Appendix B, is adopted.

3. This decision is effective immediately.

By the Board, Jacob Leventhal, Administrative Law Judge.

Vernon A. Williams

VERNON A. WILLIAMS
Secretary

Docket Nos. 28905 and 30053) (both chaired by Arbitrator Peter Meyers).

2. Disclosure:

Information produced pursuant to this Protective Order may be disclosed only to employees, members or officials of the Brotherhood of Maintenance of Way Employees ("BMWE") (the only union in the ARU that has an interest in this information) who are involved in this proceeding; to Richard S. Edelman, ARU's counsel in this proceeding; to other attorneys and staff of Highsaw, Mahoney & Clarke, P.C. assisting in the preparation of this proceeding; to expert witnesses in this proceeding; and any other witness in this proceeding to the extent necessary during the course of the deposition of such witness. Under no circumstances shall such documents or information be disclosed or otherwise conveyed to any other person not specifically identified herein. Further, it is agreed that such documents or information shall not be disclosed or otherwise conveyed to employees, members or officials of the BMWE or to attorneys, assistants or staff of Highsaw, Mahoney & Clarke, P.C. who are involved in the arbitration between CSX and the BMWE currently pending before the Special Board of Adjustment and the New York Dock Arbitration Panel.

3. Use:

Documents and information produced pursuant to this Protective Order may be used solely for the purposes of or in connection with this proceeding and not for purposes of any other arbitration or litigation, including but not limited to the

arbitration between CSX and the BMWE currently pending before the Special Board of Adjustment and the New York Dock Arbitration Panel, or for any business or other purposes whatsoever. Nothing contained in this Protective Order shall prevent a party to the Protective Order from using documents or information subject to this Protective Order in any paper or memorandum filed with the Surface Transporation Board ("STB") in this proceeding, or in any deposition, appeal, retrial, or other proceeding in this proceeding, provided that such use or disclosure is in accordance with this Protective Order. However, any mention of such documents or information in any paper or memorandum used in connection with this proceeding must be redacted from the publicly available version of such paper or memorandum.

4. Provision of Documents or Information:

Any person provided with any documents or information pursuant to the terms of this Protective Order shall also be provided with a copy of this Order, shall be informed that he or she is subject to the terms and conditions of this Protective Order, and shall be advised that any violation of this Protective Order may subject that person to sanctions as described in Paragraph 5 of this Protective Order. In addition, any person provided with such documents or information must complete the form attached to this Protective Order as Exhibit A.

5. Violation:

Any person who breaches this Protective Order or otherwise violates the terms of this Protective Order shall be subject to sanctions, damages, or other appropriate penalties.

6. Termination:

The provisions of this Protective Order shall not terminate at the conclusion of this proceeding.

IT IS SO ORDERED.

Dated: October 22, 1997

Administrative Law Judge

APPENDIX A

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STIPULATED MOTION FOR ENTRY OF AGREED PROTECTIVE ORDER

To expedite the flow of discovery material and to limit the use of certain documents and information produced in this proceeding, CSX Corporation and CSX Transporation, Inc. (collectively "CSX") and the Allied Rail Unions ("ARU"), by and through their undersigned counsel, hereby stipulate to the entry of an agreed Protective Order in the form attached to this Motion. The Protective Order shall control the use of documents and information provided by CSX in response to subparts a-f and h of ARU's Interrogatory No. 94.

Dated: 10/16/97

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APPENDIX B

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

PROTECTIVE ORDER

As evidenced by the signatures of counsel, CSX Corporation and CSX Transporation, Inc. (collectively "CSX") and the Allied Rail Unions ("ARU"), agree that any documents and information produced by CSX in response to subparts a-f and h of ARU's Interrogatory No. 94 shall be used only in the above-captioned proceeding, Surface Transporation Board Finance Docket No. 33388, and in no other proceeding, pursuant to the terms set forth below.

On this basis, it is stipulated and agreed that:

1. Scope of Protective Order:

This Protective Order applies to all documents and information produced by CSX in response to subparts a-f and h of ARU's Interrogatory No. 94. This Order does not, however, apply to information obtained by the ARU in other proceedings, including information that the Brotherhood of Maintenance of Way Employees ("BMWE") received from CSX in the arbitration between CSX and the BMWE currently pending before the Special Board of Adjustment and the New York Dock Arbitration Panel (STB Finance

Dated: 10/16/97

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Exhibit A

AGREEMENT

I hereby acknowledge receipt of information provided to me by [NAME OF PROVIDER OF INFORMATION] and embodied in the following: [DESCRIPTION OF INFORMATION PROVIDED].

I certify that I have read and understood the Protective Order entered by the Administrative Law Judge on the ____ day of _____, 1997, in Surface Transportation Board Finance Docket No. 33388.

I further certify my understanding that such information is provided to me solely for the purposes of assisting in the preparation of Finance Docket No. 33388, that I am prevented by the Protective Order from employing or disseminating such information for any other purpose, and that violation of the Protective Order may subject me to sanctions or penalties as set forth in the Protective Order.

I agree to be bound by all terms of the Protective Order and hereby agree not to use or to disclose any information disclosed to me, except for purposes of this proceeding as stipulated in the Protective Order.

For purposes of enforcement of the Protective Order, I agree to submit to the jurisdiction of the Surface Transportation Board or to any court with appropriate jurisdiction. I acknowledge that if I violate the terms of the Protective Order, I may be subject to sanctions, damages, or other appropriate penalties.

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Records: 323

STB FD 33388 10-17-97 C 28500

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SERVICE DATE - LATE RELEASE OCTOBER 17, 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. 46

Decided: October 17, 1997

The protective order that was entered in this proceeding in Decision No. 1[1] provides, in pertinent part, that discovery material designated "Highly Confidential" may be disclosed only to an outside counsel or an outside consultant, or to an employee of such outside counsel or outside consultant, who has executed the appropriate confidentiality undertaking. *See* Decision No. 1 at 4 (Protective Order, ¶8) and 7 (the Exhibit B undertaking applicable to Highly Confidential material).[2]

By petition (designated CLEV-8) filed October 15, 1997, the City of Cleveland, Ohio (petitioner) asks that we modify the protective order to allow (1) Sharon Sobol Jordan, Director of Law, City of Cleveland, (2) Richard Horvath, Chief Assistant Director of Law, City of Cleveland, (3) Hunter Morrison, Director, Cleveland City Planning Commission, and (4) Robert N. Brown, Assistant Director, Cleveland City Planning Commission (collectively, the Designated Personnel) to review material designated Highly Confidential. Petitioner indicates: that the Designated Personnel are responsible for making recommendations to the Mayor and other City leaders with respect to the matters raised by this proceeding; and that, to fulfill their responsibilities, the Designated Personnel must have access to all the records in this proceeding, including those designated Highly Confidential.

By letter (not designated) filed by petitioner on October 17, 1997, petitioner has advised that petitioner and applicants[3] have agreed that the protective order should be modified subject to this limitation: that the Designated Personnel shall be given access only to those Highly Confidential materials that will be produced in response to petitioners' First and Second Sets of Interrogatories and Document Requests to applicants.

In view of the agreement reached by petitioner and applicants, we will modify the protective order entered in Decision No. 1 to allow the Designated Personnel to review material designated Highly Confidential: (1) provided, in each instance, that such individuals execute the Exhibit B undertaking and otherwise abide by the terms of the protective order; and (2) further provided that the Designated Personnel shall be given access only to those Highly Confidential

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[1] That protective order was thereafter revised, in ways not presently relevant, in Decision No. 4. *See* Decision No. 4, slip op. at 8.

[2] The Highly Confidential designation is reserved for "material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information." *See* Decision No. 1 at 4 (Protective Order, ¶6).

[3] 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.

materials that will be produced in response to petitioners' First and Second Sets of Interrogatories and Document Requests to applicants.

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 entered in Decision No. 1 is further modified to allow each of petitioner's Designated Personnel to review Highly Confidential material: (1) provided, in each instance, that such individuals execute the Exhibit B undertaking and otherwise abide by the terms of the protective order; and (2) further provided that the Designated Personnel shall be given access only to those Highly Confidential materials that will be produced in response to petitioners' First and Second Sets of Interrogatories and Document Requests to applicants.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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Secretary

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Records: 294

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28498 SERVICE DATE - LATE RELEASE OCTOBER 16, 1997
EB

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. 45

Decided: October 16, 1997

By appeal (designated "EJE-9/WC-8" and referred to herein as EJE-9) filed October 14, 1997, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, and Wisconsin Central Ltd. (referred to collectively as appellants) ask that we reverse a discovery order issued on October 9, 1997, by Administrative Law Judge Jacob Leventhal. Appellants indicate that Judge Leventhal, in the order being challenged, refused to address the merits of appellants' request that applicants[1] be ordered to respond to all discovery requests, propounded by any party, seeking information within the possession or custody of Indiana Harbor Belt Railroad Company (IHB). Appellants claim that applicants, and more particularly Conrail, have refused to provide any such information, alleging that Conrail's 51% ownership of IHB's outstanding stock does not provide Conrail with "control" over IHB, as that term is used in 49 CFR 1114.30.

Appellants indicate that, on Tuesday, October 7, 1997, they notified Judge Leventhal's office that they intended to appear at the discovery conference to be held on Thursday, October 9, 1997. Appellants, however, appear to have overlooked that revised section 18 of the Discovery Guidelines provides that counsel for a party seeking a ruling on a discovery issue shall contact Judge Leventhal's office by 4:00 p.m. on Monday to request a discovery conference to be held at 9:30 a.m. on Thursday. See Decision No. 20 (served August 15, 1997), slip op. at 2. Appellants are correct that original section 18 of the Discovery Guidelines provided for notification by 4:00 p.m. on Monday for a discovery conference to be held at 9:30 a.m. on Wednesday. See Decision No. 10 (served June 27, 1997), Appendix at 8-9. But the 2-day (Monday-Wednesday) pattern of Decision No. 10 was changed by the revision of section 18 in Decision No. 20. The current pattern is a 3-day (Monday-Thursday) pattern. Appellants insist that they provided the 2-day notice required by Decision No. 10. The fact remains, however, that they did not provide the 3-day notice required by Decision No. 20.

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). Judge Leventhal's insistence upon compliance with the procedural requirements of Decision No. 20 constitutes neither a clear error of judgment nor a manifest injustice. The EJE-9 appeal will therefore be denied.

Nothing said herein touches upon the merits of the discovery dispute concerning IHB.

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

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[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.

It is ordered:

1. The EJE-9 appeal is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 44

Decided: October 15, 1997

This decision addresses: the NYNJ-13 motion filed September 25, 1997, by the Port Authority of New York and New Jersey (the Port Authority); and the CSX/NS-88 reply filed September 30, 1997, by applicants.[1] The NYNJ-13 motion requests that the applicants provide more detailed operating plans for certain areas affecting the Port Authority. We will grant the motion in accordance with the discussion herein.

BACKGROUND

1. The Port Authority's Interest. The Port Authority's focus in the CSX/NS/CR application is on the territory that applicants call the North Jersey Shared Assets Area, which encompasses all of CRC's northern New Jersey trackage east of and including Amtrak's Northeast Corridor (referred to as the NEC), and also (a) certain line segments north of the NEC as it turns east to enter the tunnel under the Hudson River, (b) the CRC Lehigh line west to Port Reading Junction, (c) the rights of CRC on the New Jersey Transit Raritan line, (d) the CRC Port Reading Secondary line west to Bound Brook, (e) the CRC Perth Amboy Secondary line west to South Plainfield, and (f) the NEC local service south to the Trenton area. Within the North Jersey Shared Asset. Area there are 20 yards[2] and approximately 189 route miles of track.

The CSX/NS/CR application envisions: that the North Jersey Shared Assets Area will be owned, operated, and maintained by CRC for the exclusive benefit of CSX and NS; that both CSXT and NSR will be permitted to serve shipper facilities located within the North Jersey Shared Assets Area; that, in connection with the North Jersey Shared Assets Area, CSXT and NSR will enter into a Shared Assets Area Operating Agreement with CRC, pursuant to which CRC will grant to CSXT and NSR the right to operate their respective trains, with their own crews and equipment and at their own expense, over any tracks included in the North Jersey Shared Assets Area; that CSXT and NSR will each have exclusive and independent authority to establish all rates, charges, service terms, routes, and divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the North Jersey Shared Assets Area; and that other carriers, if any, that previously had access to points within the North Jersey Shared Assets Area will continue to have the same access as before. See CSX/NS-18 at 46-47; Decision No. 12, slip op. at 8.

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[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 (CR). CSX, NS, and Conrail are referred to collectively as applicants.

[2] The Port Authority claims that the North Jersey Shared Assets Area includes 18 terminal operations. See NYNJ-13 at 2. Applicants claim that this Area contains 20 yards. See CSX/NS-18 at 47. For present purposes, the discrepancy is immaterial.

II. The Port Authority's Earlier Filing. In Decision No. 7 (served May 30, 1997), we addressed: (1) applicants' CSX/NS-10 petition for waiver or clarification of certain requirements of the 49 CFR Part 1180 Railroad Consolidation Procedures; and (2) the Port Authority's NYNJ-3 reply in opposition to one aspect of that petition. Applicants had requested, among other things, that the 49 CFR 1180.9 financial information requirements be waived or clarified to permit applicants to reflect Conrail financial information in the respective statements of CSX and NS, as appropriate. Applicants acknowledged that they intended that Conrail and its subsidiaries would continue to exist as separate entities following the CSX/NS/CR control transaction, but applicants maintained that the ultimate transportation and other economic effects of that transaction, including gains and losses from continuing Conrail operations, would be fully reflected in the respective statements of CSX and NS. Those statements, applicants claimed, would provide the most accurate reporting of the financial effects of the CSX/NS/CR control transaction.

The Port Authority, in its NYNJ-3 reply, urged, however, that applicants be required to file separate financial statements for Conrail and its subsidiaries. The Port Authority argued: that if, as applicants intended, Conrail was to be kept in place as the only carrier serving the New York/New Jersey metropolitan area (the NY/NJ Metro Area), there might be a lessened incentive to construct additional rail infrastructure in that area; that the incentives of CSX and NS to invest in Conrail rail facilities in the NY/NJ Metro Area would depend, in part, upon the profitability of Conrail and the return Conrail would provide on any such investment; and that the question of what, if any, investment CSX and NS planned to have Conrail make in NY/NJ Metro Area rail facilities would be critical in determining whether other parties, including the Port Authority, would file applications seeking to acquire Conrail assets located in the NY/NJ Metro Area.

In granting the petition of the applicants, we concluded that, because the CSX/NS/CR control transaction envisions that Conrail will cease to be an independent rail carrier, separate statements for Conrail on a freestanding basis would not be meaningful and would not contribute to our analysis of that transaction. We confirmed that, in the balance sheets, income statements, and statements of sources and application of funds required by 49 CFR 1180.9(a), (b), and (c), respectively, applicants could reflect information respecting Conrail in the statements of CSX and NS, as appropriate. But we added the following caveat:

> Applicants should be advised, however, that we expect that the primary application will fully describe the post-transaction Conrail, its structure, its management, and its operations, and, in particular, will address the concerns raised by the Port Authority (the nature of applicants' operations in the NY/NJ Metro Area, the competitive and economic effect of those operations, the investment CSX and NS anticipate making in the NY/NJ Metro Area, and the level of competition that the NY/NJ Metro Area will experience following the proposed transaction).

Decision No. 7, slip op. at 12.

The CSX/NS/CR application, which was ultimately filed on June 23, 1997, contains extensive information respecting, among other things, the post-transaction Conrail, its structure, its management, and its operations. See, generally, Decision No. 12 (served July 23, 1997, and published that day in the Federal Register at 62 FR 39577) (summarizing the key features of the CSX/NS/CR control transaction, and accepting the CSX/NS/CR application for consideration "because it is in substantial compliance with the applicable regulations, waivers, and requirements," Decision No. 12, slip op. at 18).

III. The Port Authority's Motion at Issue Here. In the NYNJ-13 motion, the Port Authority contends: that, within the North Jersey Shared Assets Area, rail facilities are complex and rail operations are congested; that the Shared Assets Area concept is untried, untested, and largely unprecedented; that the application did not address the Port Authority's concerns with respect to the North Jersey Shared Assets Area, neither as regards the operations of the surviving Conrail nor as regards the operations of CSX and NS; and that the North Jersey Shared Assets Area operating plans that are currently being developed by applicants are essential to an understanding of the rail services that applicants intend to conduct within the North Jersey Shared Assets Area. The Port Authority therefore asks: that applicants be directed to supplement the application by filing their operating plans for the North Jersey Shared Assets Area; and that the procedural schedule be modified so as to permit the Port Authority reasonable time and opportunity to examine the operating plans and to depose such witnesses as may be necessary to explain those plans.

DISCUSSION AND CONCLUSIONS

The Railroad Consolidation Procedures require, among other things, that a "major transaction" application like the CSX/NS/CR application include, as Exhibit 13, an operating plan. See 49 CFR 1180.8(a). The CSX/NS/CR application is in compliance with this requirement. See CSX/NS-20, Volume 3A at 81-473 (the CSX operating plan); CSX/NS-20, Volume 3A at 3-77 (V.S. of John W. Orrison, discussing the CSX operating plan); CSX/NS-20, Volume 3B at 68-489 (the NS operating plan); CSX/NS-20, Volume 3B at 1-67 (V.S. of D. Michael Mohan, discussing the NS operating plan). See also CSX/NS-35 (filed August 6, 1997) (errata filing). See also CSX-21 (filed August 29, 1997) (projected CSX trains schedules and classifications); NS-19 (filed August 29, 1997; consists of four books) (projected NS train schedules and classifications).

The operating plans submitted with the CSX/NS/CR application include, among other things, fairly general discussions of the operational arrangements that applicants intend to establish in the North Jersey Shared Assets Area. See CSX/NS-20, Volume 3A at 217-233 (discussion, in the CSX operating plan, of the North Jersey Shared Assets Area); CSX/NS-20, Volume 3B at 184-200 (discussion, in the NS operating plan, of the North Jersey Shared Assets Area). See also CSX/NS-25, Volume 8C at 57-96 (North Jersey Shared Assets Area Operating Agreement). As applicants themselves concede, the application "did not detail the minutiae of day-to-day implementation." CSX/NS-88 at 9.

The Port Authority now contends, in essence, that, as respects the North Jersey Shared Assets Area, the operating plans that applicants submitted on June 23 are not sufficiently detailed.[3] In opposition to the Port Authority's motion, applicants argue that, as a practical matter, the Port Authority wants them to produce documents describing the nuts and bolts of anticipated daily activities in the North Jersey Shared Assets Area, i.e., "the minutiae of the handling of switching operations, organization of forces, dispatching, etc., which are part of the evolving process of running a railroad's yard and similar activities, a process that changes over time and is continuously adapted to changing conditions." CSX/NS-88 at 3.

Although we appreciate the concerns raised by applicants in that regard, we nevertheless will require applicants to provide, in accordance with the procedural schedule indicated below,

[3] The Board notes that the Port Authority has filed its motion expressing its concerns some three months after the June 23 filing date, a lapse of time for which it provides no explanation.

more detailed operating plans for the North Jersey Shared Assets Area.[4] We are required, by statute, to consider, among other things, "the effect of the proposed transaction on the adequacy of transportation to the public." 49 U.S.C. 11324(b)(1). Arrangements such as those affecting the North Jersey Shared Assets Area can have a significant impact on the adequacy of transportation. Because the concerns raised by the Port Authority, though belated, are not insubstantial, we will require applicants to demonstrate, in advance, that, if the CSX/NS/CR control transaction is approved and thereafter consummated, the North Jersey Shared Assets Area operating arrangements that applicants have in mind will be feasible and will not unduly impact commuter and other rail operations in this densely populated, highly congested area.

The procedural schedule that we have crafted for the more detailed North Jersey Shared Assets Area operating plans is intended to dovetail with the overall procedural schedule adopted in Decision No. 6, and finalized (with dates inserted) in Decision No. 12. See Decision No. 12, slip op. at 26-27. Applicants will have until October 29 to file the more detailed North Jersey Shared Assets Area operating plans. The Port Authority, and other interested parties as well, will have until November 24 to file comments with respect to such plans. Responses to such comments will be due on December 15, and may be included with the responses already due to be filed that day.[5] We expect: that, no later than October 29, applicants will add the operating plans called for by this decision, and all work papers and other documentation relative thereto, to their document depository; that applicants will respond expeditiously to any written discovery requests propounded on or after October 29; and that applicants will make their operating plan witnesses available for depositions during the weeks of November 3, November 10, and November 17.[6]

We will allow applicants to decide how many operating plans they should provide.[7] Because CSX and NS will, to some extent, be working together in the North Jersey Shared Assets Area, they may think it best to produce one plan that coordinates all operations that will be conducted in that Area. It may be, however, that applicants will prefer to produce two plans, one for CSX and one for NS; such plans, however, should include the operations that will be conducted by CRC. Applicants may prefer instead to produce three plans: one for CSX; one for NS; and one for CRC.[8]

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[4] We agree with applicants that the operating plans submitted on June 23 were in compliance with the 49 CFR 1180.8(a) requirement. Applicants should recall, however, that, in Decision No. 12, in accepting the CSX/NS/CR application and the related filings, we explicitly "reserve[d] the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter." Decision No. 12, slip op. at 18 n.29.

[5] As noted in Decision No. 12, slip op. at 26, the overall procedural schedule provides that December 15 is the due date for filing: responses to responsive (including inconsistent) applications; responses to comments, protests, requested conditions, and other opposition evidence and argument; rebuttal in support of the primary application and related filings; rebuttal with respect to all related abandonments; and, in connection with the related abandonments, responses to requests for public use and Trails Act conditions.

[6] We trust that, if he deems it to be necessary, Judge Leventhal will make revisions to the Discovery Guidelines (adopted in Decision No. 10) to facilitate the conduct of discovery respecting the operating plans to be filed by applicants.

[7] Although we are requiring applicants to file North Jersey Shared Assets Area operating "plans" (plural), we understand that applicants may choose to file a single such plan.

[8] Applicants indicate that they "are at a loss to imagine how the present, independent, Conrail is to produce an individual plan as to how the continuing Conrail will operate in" the

(continued...)

The requirement that applicants produce more detailed operating plans for the North Jersey Shared Assets Area is not intended to "compel CSX and NS to make hasty, premature implementing decisions." CSX/NS-88 at 17. We understand that the planning process is ongoing, the requirement to file these plans is not intended to freeze that process. However, because of the unique situation that has been shown to exist in the North Jersey Shared Assets Area, we have concluded that it is appropriate to require applicants to produce more detailed projections of their proposed method of operations in that Area than would otherwise be required under our rules.

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-13 motion is granted, as indicated in ordering paragraphs 2, 3, and 4.

2. Applicants must file, no later than October 29, 1997, their North Jersey Shared Assets Area operating plans as discussed in this decision.

3. Interested parties may file, no later than November 24, 1997, comments with respect to applicants' North Jersey Shared Assets Area operating plans.

4. Responses to comments respecting applicants' North Jersey Shared Assets Area operating plans may be filed no later than December 15, 1997.

5. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[8](...continued)
North Jersey Shared Assets Area. CSX/NS-88 at 12 n.8. We do not expect the present Conrail to produce a plan as to how the continuing Conrail will operate. We expect CSX and NS to produce that plan, either as a stand-alone plan (in the 3-plan scenario) or as an aspect of a broader plan (in the 1- or 2-plan scenarios).

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SERVICE DATE - LATE RELEASE OCTOBER 7, 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. 43

Decided: October 7, 1997

NOTICE TO THE PARTIES:

On August 19, 1997, a Notice to the Parties (Decision No. 21) was served in this proceeding. The service list was attached to the Notice. The Notice directed that corrections to the service list be filed with the Board by August 29, 1997. The Notice also directed that all persons actively participating as a Party of Record in this proceeding must serve a copy of all filings submitted so far on all persons listed as Parties of Record, to the extent such filings have not previously been served upon such other parties.[1]

The Board received several timely-filed additions and corrections to the service list, and these additions/corrections are noted in the attached Appendix.

In the August 19, 1997 Notice, the Board stated that parties may file a motion for leave to late-file a notice of intent to participate certifying that they have served all other Parties of Record on the service list, and that the Board will address each request on a case-by-case basis.

Late-filed motions/requests for leave to late-file a notice of intent to participate. The Board has received motions or requests for leave to late-file a notice of intent to participate in this proceeding from several parties, including: (1) Alice C. Saylor, Vice President & General Counsel, American Short Line Railroad Association received August 26, 1997; (2) F. Ronalds Walker, Associate Counsel, Citizens Gas & Coke Utility received September 2, 1997;[2] (3) M. W. Currie, United Transportation Union GO-851, General Chairperson received September 3, 1997; (4) Leo J. Wasescha, Transportation Manager, Gold Medal Division, General Mills Operations, Inc., received September 5, 1997; (5) Martin T. Durkin, Esq., counsel for the Village of Ridgefield Park, New Jersey, received September 8, 1997; (6) Samuel J. Nasca, Legislative Director, State of New York Legislative Board, United Transportation Union, received October 2, 1997. These motions and requests for leave to late-file a notice of intent to participate in this proceeding are granted, and the names will be added to the service list as Parties of Record representing the specific entity, as noted.

On September 5, 1997, the Board received from Michael F. McBride, Attorney for The Ohio Valley Coal Company and Ohio Mining and Reclamation Association , a notice of intent to

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[1] On September 8, 1997, the Board received from Party of Record, the City of Lakewood, Ohio (Lakewood), a motion for leave to file a Certificate of Service in compliance with Decision No. 21, and serve a copy of its only filing, the notice of intent to participate, upon all Parties of Record. In addition, Lakewood moves for leave to file with the Board the Certificate of Service required by Decision No. 21. The motions are granted, and the Board accepts the late-filed Certificate of Service. (Lakewood's timely-filed correction to its address is noted on the attached Appendix).

[2] Mr. Walker previously submitted a timely-filed notice of intent to participate received on August 19, 1997, and is already shown on the service list as a Party of Record.

participate for the Ohio Mining and Reclamation Association (OMRA-1), a motion for leave to late file a notice of intent to participate (OMRA-2), and an amended notice of intent to participate by the Ohio Valley Coal Company (Ohio Valley-3). The notice and motion of the Ohio Mining and Reclamation Association are granted, and OMRA will be shown on the service list as being represented by Mr. McBride. The Ohio Valley Coal Company filed a notice of intent to participate in this proceeding on June 12, 1997 (See AEP, et al.-1). It is filing an amendment to its notice of intent to participate to include The American Coal Sales Company as an affiliated party. This notice is accepted, and Ohio Valley and The American Coal Sales Company will be shown on the service list as being represented by Mr. McBride.

On August 12, 1997, the Board received from Jay Westbrook, President of the Council of the City of Cleveland, Ohio, a request for additional time to file, on behalf of the City of Cleveland, a notice of intent to participate in this proceeding. Thereafter, on September 12, 1997, the Board received from Richard F. Horvath, Chief Assistant Director of Law, City of Cleveland, Ohio, a motion for leave to late-file a notice of intent to participate. On October 3, 1997, the Board received from Robert P. vom Eigen, of the Hopkins & Sutter law firm, a letter indicating, in essence, that Mr. vom Eigen would be representing the City of Cleveland in this proceeding. The City of Cleveland's motion for leave to participate is granted, with the understanding that its representative is now Mr. vom Eigen. Mr. vom Eigen's name will be added to the service list, and Mr. Westbrook's name will be deleted from the service list. Because Mr. Westbrook has already received filings from other Parties of Record, it will not be necessary for Parties of Record to serve copies of previous filings on Mr. vom Eigen. **Future filings**, however, should be served on Mr. vom Eigen.

The Board received on September 30, 1997, a motion for leave to late-file a notice of intent to participate filed by George R. Mesires, Assistant Attorney General, State of New York, by and through the State of New York Attorney General, Dennis C. Vacco. Mr. Mesires called the Board after he filed the motion to clarify his intent in filing the motion. A Board representative also contacted Mr. Mesires to obtain a further clarification. The State of New York Department of Transportation is represented in this proceeding by William L. Slover of the law firm, Slover & Loftus. The Attorney General's Office will be joining the State of New York Department of Transportation for any future filings submitted by Mr. Slover, but Mr. Mesires does not want a separate listing on the service list for the Attorney General's Office. Any future filings submitted by Mr. Slover, on behalf of the State of New York Department of Transportation, will have a signature block for the Attorney General's Office. The motion is granted and the clarification made by Mr. Mesires is duly noted. Mr. Slover will be jointly representing the State of New York Department of Transportation and the State of New York Office of the Attorney General, as specified in the Appendix attached.

On October 1, 1997, the Board received from Edward J. Fishman, counsel for Vermont Railway, Inc., a motion (VTR-1), for leave to file late a notice of intent to participate in this proceeding, and a notice of intent to participate in this proceeding (VTR-2). The motion and notice of intent are granted to permit Vermont Railway, Inc., to participate in this proceeding. Vermont Railway, Inc., will be added to the service list as being represented by Mr. Fishman.

Late-filed corrections. On September 4, 1997, the Board received a late-filed correction to the service list from William A. Mullins on behalf of Gary Edwards of Somerset Railroad Corporation (Somerset), stating that Somerset is representing themselves in this proceeding, and that the previously listed counsel representing Somerset, Michael F. McBride, should be deleted from the service list. The late-filed correction is accepted, and Mr. Edwards will be added to the service list as a Party of Record representing Somerset. Somerset will also be deleted as one of the entities represented by Mr. McBride.

On September 5, 1997, the Board received a late-filed correction to the service list from Andrew R. Plump of the law firm, Zuckert, Scoutt & Rasenberger, L.L.P., requesting that his name and Scott M. Zimmerman's name be removed from the service list because his clients are

already represented on the service list by Richard A. Allen of this firm. The late-filed correction is accepted, and Mr. Plump's name and Mr. Zimmerman's name will be removed from the service list as Parties of Record, as specified in the Appendix attached.

Motion to serve late on all parties of record a notice of intent to participate/correction to mailing address. On September 10, 1997, the Board received a motion (RETR-3) from Harry C. Barbin, Esq., counsel for the Former Employees of Consolidated Rail Corporation (Retirees), for permission to serve late on all Parties of Record in this proceeding their notice of intent to participate, and to correct their mailing address. The motion is granted and the mailing address for the Retirees will be corrected, as specified in the Appendix attached.

In some instances, because of the Board's new one party-one representative policy for service lists, the names of certain Parties of Record that were shown on the service list attached to Decision No. 21 have been deleted from the service list, even though the Board was not notified of the duplicate representation. See Surface Transportation Board Press Release No. 97-68, dated August 18, 1997.

The final service list incorporates the additions, deletions, and revisions shown in the Appendix attached to this Notice. All Parties of Record who have filed pleadings in this proceeding must, within 5 days of the service date of this Notice, serve a copy of those pleadings on the designated Parties of Record that are **added** to the service list, and submit an original and 10 copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished.

All future filings must each have a certificate of service indicating that all Parties of Record have been properly served with a copy of the filing. **Parties are reminded that, in addition to submitting an original and 25 paper copies of each document filed with the Board, parties are also requested to submit, on diskettes (3.5-inch IBM-compatible floppies formatted for WordPerfect 7.0 or formatted so that they can be converted into WordPerfect 7.0) or compact discs, one electronic copy of each such document.** (See Decision No. 12, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577).

Discovery-related pleadings need only be served on parties on the restricted service list established in the Administrative Law Judge's Order Adopting Discovery Guidelines, served June 27, 1997 (Decision No. 10).

Vernon A. Williams
Secretary

APPENDIX

THE FOLLOWING NAMES SHOULD BE **ADDED** TO THE SERVICE LIST AS PARTIES OF RECORD:

PARTY OF RECORD
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Central Railroad Company of Indianapolis
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Kokomo, IN 46903-0554

Represents: Central Railroad Company of Indianapolis

PARTY OF RECORD
M. W. Currie
UTU GO-851, General Chairperson
3030 Powers Avenue, Suite 2
Jacksonville, FL 32250

Represents: United Transportation Union GO-851

PARTY OF RECORD
Martin T. Durkin
Durkin & Boggia, Esqs.
Centennial House
71 Mt. Vernon Street
P.O. Box 378
Ridgefield Park, NJ 07660

Represents: Village of Ridgefield Park, New Jersey

PARTY OF RECORD
Gary Edwards
Superintendent of Railroad Operations
Somerset Railroad Corporation
7725 Lake Road
Barker, NY 14012

Represents: Somerset Railroad Corporation

PARTY OF RECORD
Peter A. Gilbertson
Louisville & Indiana Railroad Company
Suite 350, 53 W. Jackson Boulevard
Chicago, IL 60604

Represents: Louisville & Indiana Railroad Company

PARTY OF RECORD
R. Lawrence McCaffrey, Jr.
New York & Atlantic Railway
405 Lexington Avenue, 50th Floor
New York, NY 10174

Represents: New York & Atlantic Railway

PARTY OF RECORD
Samuel J. Nasca
Legislative Director
State of New York Legislative Board
United Transportation Union
35 Fuller Road, Ste. 205
Albany, NY 12205

Represents: State of New York Legislative Board, United Transportation Union

PARTY OF RECORD
Scott A. Roney, Esq.
Archer Daniels Midland Company
P.O. Box 1470
4666 Faries Parkway
Decatur, IL 62525

Represents: Archer Daniels Midland Company

PARTY OF RECORD
Alice C. Saylor, Vice President & General Counsel
American Short Line Railroad Association
1120 G Street, N.W., Suite 520
Washington, D.C. 20005-3889

Represents: American Short Line Railroad Association

PARTY OF RECORD
Thomas E. Schick
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209

Represents: Chemical Manufacturers Association

PARTY OF RECORD
Robert P. vom Eigen
Hopkins & Sutter
888 16th Street, N.W., Suite 700
Washington, D.C. 20006

Represents: City of Cleveland, Ohio

PARTY OF RECORD
Leo J. Wasescha
Transportation Manager
Gold Medal Division
General Mills Operations, Inc.
Number One, General Mills Blvd.
Minneapolis, MN 55426

Represents: General Mills, Inc.

THE FOLLOWING NAMES SHOULD BE **DELETED** FROM THE SERVICE LIST AS PARTIES OF RECORD:

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Detroit, MI 48226

Represents: Detroit Edison Company

Dinah Bear
Executive Office of the President
Council on Environmental Quality
Washington, D.C. 20503

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Brady, Brooks & O'Connell, L.L.P.
41 Main Street
Salamanca, NY 14779-0227

Represents: Southern Tier West Regional Planning and Development Board

Nicole E. Clark
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019-6150

J. Doyle Corman
Main Line Management Services, Inc.
520 Fellowship Road, Ste A-105
Mount Laurel, NJ 08054-3407

Jean M. Cunningham
Slover & Loftus
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Washington, D.C. 20036

Jo A. DeRoche
Weiner, Brodsky, Sidman & Kider
1350 New York Avenue, N.W., Suite 800
Washington, D.C. 20005-4797

Represents: Louisville & Indiana Railroad Company

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Eastern Shore Railroad, Inc.
P.O. Box 312
Cape Charles, VA 23310

Represents: Eastern Shore Railroad, Inc.

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Harkins Cunningham
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Washington, D.C. 20006

Charles M. Rosenberger
CSX Transportation
500 Water Street
Jacksonville, FL 32202

Denise J. Sejna, City Attorney
City of Hammond
5925 Calumet Avenue
Hammond, IN 46320

Represents: City of Hammond, Indiana

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180 N. Stetson Avenue
Two Prudential Plaza, 45th Floor
Chicago, IL 60601

Represents: Bessemer & Lake Erie RR Co.
Elgin, Joliet and Eastern Railway Company
Transtar, Inc.

Mary Gabrielle Sprague
Arnold & Porter
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Washington, D.C. 20004-1202

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Jay Westbrook
City Hall, Room 216
601 Lakeside Avenue, N.E.
Cleveland, OH 44114

Represents: City of Cleveland, Ohio

Scott M. Zimmerman
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, D.C. 20006

THE FIRM NAME, ADDRESS, AND/OR REPRESENTED ENTITY FOR THE FOLLOWING PARTIES OF RECORD SHOULD BE **REVISED** AS FOLLOWS **(REVISIONS ARE SHOWN IN BOLD AND UNDERSCORED).**

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Harry C. Barbin, Esquire
PA I.D. No. 08539
William M. O'Connell, III, Esquire
PA I.D. No. 20023
Barbin, Lauffer & O'Connell
608 Huntingdon Pike
Rockledge, PA **19046**

Represents: Paul J. Engelhart, William J. McIlfatrick, H. C. Kohout, Thomas F Meehan, **Jr.**, Lawrence Cirillo, Charles D. Nester, Jacqueline A. Mace, Donald E. Kraft, and Robert E. Graham.

PARTY OF RECORD
Sara J. Fagnilli
City of Lakewood
12650 Detroit Avenue
Lakewood, OH 44107

Represents: City of Lakewood, Ohio

PARTY OF RECORD
Edward J. Fishman
Oppenheimer, Wolff & Donnelly
1020 Nineteenth St., N.W., Suite 400
Washington, D.C. 20036

Represents: New Jersey Department of Transportation
New Jersey Transit Corporation
Northern Virginia Transportation Commission-Potomac and Rappahannock Transportation Commission
Vermont Railway, Inc. (Please add)

PARTY OF RECORD
Douglas S. Golden
Main Line Management Services, Inc.
520 Fellowship Road, **Suite A-105**
Mount Laurel, NJ 08054-3407

Represents: Pennsylvania Senate Transportation Committee

PARTY OF RECORD
Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Represents: National Grain and Feed Association
[Archer Daniels Midland Company] (Please delete)

PARTY OF RECORD
Paul H. Lamboley
1020 **Nineteenth** Street, N.W., Suite 400
Washington, D.C. 20036

Represents: Resources Warehousing & **Consolidation** Services, Inc.
Transportation Intermediaries Association
Southern Tier West Regional Planning & Development Board (Please add)

PARTY OF RECORD
C. Michael Loftus
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Represents: Centerior Energy Corporation
East Chicago, Indiana, Hammond, Indiana, Gary, Indiana, and
Whiting, Indiana – The Four City Consortium **(Please add Whiting, Indiana)**
Potomac Electric Power Company
The Detroit Edison Company

PARTY OF RECORD
George W. Mayo, Jr.
Hogan & Hartson **L.L.P.**
555 Thirteenth Street, N.W.
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Represents: Canadian Pacific Railway Company
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Soo Line Corp.
St. **Lawrence** & Hudson Railway Company Limited

PARTY OF RECORD
Michael F. McBride
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Represents: American Electric Power
Atlantic City Electric Company
Delmarva Power & Light Company
The Fertilizer Institute
The Ohio Valley Coal Company **and affiliated party The American Coal Sales Company (Please add)**
Indianapolis Power & Light Company (Please add)
Ohio Mining and Reclamation Association (Please add)
[Somerset Railroad Corporation] (Please delete)

PARTY OF RECORD
William A. Mullins
Troutman Sanders L.L.P.
1300 I Street, N.W., Suite 500 East
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Represents: New York State Electric & Gas
The Kansas City Southern Railway Company, Gateway Eastern Railway Company, Gateway Western Railway Company (Please add)

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Represents: State of New York Department of Transportation **jointly with the State of New York Office of the Attorney Genera] (Please add)**

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SERVICE DATE - LATE RELEASE OCTOBER 3, 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. 42

Decided: October 3, 1997

This decision addresses: (1) the CSX/NS-81 appeal filed September 22, 1997, by applicants,[1] and the ACE-15 reply[2] filed September 23, 1997, by movants;[3] and (2) the ACE-14 appeal[4] filed September 23, 1997, by movants, and the CSX/NS-85 reply filed September 26, 1997, by applicants.

BACKGROUND

Movants' First Discovery Requests. On July 3, 1997, movants submitted certain broad discovery requests to applicants, essentially asking for all documents concerning virtually all shipments of coal, and concerning all negotiations involving rates for shipments of coal, for the years 1978 through the present.[5] On July 11, 1997, applicants submitted their objections to these discovery requests. On July 16, 1997, Administrative Law Judge (ALJ) Jacob Leventhal granted in part and denied in part movants' motion to compel compliance with their discovery requests. Judge Leventhal limited the material that applicants were required to provide to shipments of the movants (as opposed to shipments of all shippers) to destinations solely served by Conrail,[6] and to certain years only (for CSX, 1978-1982 and 1995-1997; for NS, 1980-1984 and 1995-1997;

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[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] This pleading is designated "ACE, et al.-15", but is referred to herein as ACE-15.

[3] Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, Indianapolis Power and Light Company, and The Ohio Valley Coal Company are referred to collectively as movants.

[4] This pleading is designated "ACE, et al.-14", but is referred to herein as ACE-14.

[5] As of July 3, 1997, there were only four movants: Atlantic City Electric Company, American Electric Power, Delmarva Power & Light Company, and The Ohio Valley Coal Company. The fifth movant, Indianapolis Power & Light Company, although it was not a party to the discovery requests submitted on July 3, 1997, has been regarded, for all purposes presently relevant, as if it had been a party to those requests. See CSX/NS-81 at 6 n.7.

[6] This limitation has since been expanded to embrace shipments of two other shippers (New York State Electric & Gas Company and Niagara Mohawk Power Corporation) to destinations solely served by Conrail. See ACE-14 at 8.

for Conrail, 1988-1992 and 1995-1997).[7] 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.").[8] See also Decision No. 17 (served August 1, 1997) (we affirmed Judge Leventhal's partial denial of movants' motion to compel).

Applicants, not having filed a timely challenge to Judge Leventhal's partial grant of movants' motion to compel, were therefore required to provide the limited discovery that Judge Leventhal had ordered. Applicants thereafter produced much of the material they had been ordered to produce, but, over movants' objections, applicants redacted certain "commercially sensitive proprietary information," CSX/NS-70 at 1, from the material they produced. 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 directed applicants to produce the redacted information without further delay. 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). See also Decision No. 32 (served September 12, 1997) (we affirmed Judge Leventhal's decisions requiring the production, without further delay, of the redacted information).

Movants' Second Discovery Requests. In their second set of interrogatories and request for production of documents to applicants (designated "ACE, et al.-11", but referred to herein as ACE-11), served September 4, 1997, movants asked applicants to produce, for CSX, NS, and Conrail (including all predecessor railroads), the revenue masking factors applicable to the so-called "1% Waybill Samples" filed with the Board[9] for the years 1978 through the present.[10]

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[7] The 1978-1982 years for CSX, the 1980-1984 years for NS, and the 1988-1992 years for Conrail were chosen in order to provide data for periods beginning two years before and ending two years after certain mergers that involved CSX, NS, and Conrail, respectively.

[8] Applicants state: that ALJ Decision No. 11 resolved three document requests that movants had made; that one of these requests sought the production of each applicant's 100% traffic tapes since 1978; that, with respect to this request, the governing objection was lack of relevance; that Judge Leventhal's ruling on this request "essentially confirmed that traffic data as to shippers other than the [movants] themselves were not sufficiently relevant"; and that movants have acknowledged that the discovery request at issue in the CSX/NS-81 and ACE-14 appeals seeks "the same confidential rate data that [movants] would have obtained if [Judge Leventhal] had found the prior request for traffic tapes relevant." CSX/NS-85 at 5 & n.5.

[9] References in this decision to "the Board" embrace both the Surface Transportation Board (for the period beginning January 1, 1996) and the Interstate Commerce Commission (for the period ending December 31, 1995).

[10] The ACE-11 pleading contained one interrogatory and one document request, which were identical except in one respect: whereas the interrogatory asked applicants to "state," the document request asked applicants to "provide," the revenue masking factors for the years 1978 through the most recently-filed time period. See ACE-11 at 7.

In their initial objections to this request, designated CSX/NS-74 and served September 11, 1997,[11] applicants objected to the masking factors production request on the grounds that the request (a) sought material which was neither relevant nor likely to lead to relevant and admissible evidence, and (b) was unduly broad. See CSX/NS-74 at 1-2.

By letter dated September 12, 1997 (not designated), movants asked Judge Leventhal to convene a discovery conference to discuss their masking factors production request. In a response (designated CSX/NS-78) served September 16, 1997, applicants elaborated upon the objections contained in their CSX/NS-74 pleading.

In an oral decision issued after discovery conferences on September 17 and 19, 1997, Judge Leventhal granted in part and denied in part movants' motion to compel applicants to produce their 1978-1997 revenue masking factors. Judge Leventhal required applicants to produce their revenue masking factors for the years with respect to which he had previously required applicants to comply with movants' first discovery requests: for CSX, 1978-1982 and 1995-1997; for NS, 1980-1984 and 1995-1997; for Conrail, 1988-1992 and 1995-1997. See ACE-14 at 3. In addition, because the only masking factors Conrail could document were those being applied currently or recently, Judge Leventhal ordered Conrail to make, for the prior years back to 1988, a comparative special study, using (i) the traffic data previously produced to movants and (ii) the Waybill Sample. See CSX/NS-81 at 8. To allow applicants an opportunity to seek appellate relief, Judge Leventhal stayed his decision to 5:00 p.m., September 22, 1997.

On September 22, 1997, at about 2:00 p.m., applicants filed their CSX/NS-81 appeal. Applicants ask: that we continue the stay of Judge Leventhal's decision pending our resolution of the CSX/NS-81 appeal, see CSX/NS-81 at 1 n.1; that we reverse Judge Leventhal's decision insofar as it required the production of their revenue masking factors, see CSX/NS-81 at 14-15; that we further reverse Judge Leventhal's decision insofar as it required Conrail to make a comparative special study, see CSX/NS-81 at 9 n.10; and that, if we do not entirely reverse the assailed portions of Judge Leventhal's decision, we should, at the very least, provide that any revenue masking factors applicants might disclose can not be used to unmask revenues or rate information on movements to shippers other than the movants' destinations with respect to which applicants have previously produced traffic data pursuant to Judge Leventhal's prior rulings, see CSX/NS-81 at 15 n.16.

Recognizing that the objections raised by applicants were substantial, and recognizing also that there would be no effective way to "unring the bell" if we were to determine, after production had been made, that the production order should not have been entered, we stayed Judge Leventhal's decision, insofar as it required production of the masking factors, pending our resolution of applicants' CSX/NS-81 appeal. See Decision No. 39 (served September 22, 1997).[12]

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[11] While the CSX/NS-74 pleading is actually dated August 6, 1997, see CSX/NS-74 at 6, the fax markings on the CSX/NS-74 pleading suggest that it was served on September 11, 1997.

[12] The stay we entered in Decision No. 39 applied, by its terms, to Judge Leventhal's decision, but only "insofar as it requires production of the masking factors." See Decision No. 39, slip op. at 2, ordering paragraph 1. Although applicants indicated that their request for a stay applied also to that portion of Judge Leventhal's decision that required Conrail to make a comparative special study, see CSX/NS-81 at 9 n.10, the stay we entered in Decision No. 39 does not explicitly apply to that portion of Judge Leventhal's decision. The CSX/NS-81 appeal, which embraced applicants' stay request, was filed at about 2:00 p.m. on September 22; the stay request had to be acted upon almost instantly, because the stay that had been granted by Judge Leventhal was set to expire at 5:00 p.m.; and, in the short time available to consider and act on the stay request, we failed to observe that the request applied not only to that portion of Judge Leventhal's

(continued...)

On September 23, 1997, movants filed their ACE-14 appeal, which asks that we reverse Judge Leventhal's decision insofar as it denied movants' motion to compel applicants to produce their 1978-1997 revenue masking factors.

Movants' Arguments. Movants claim, in essence, that the crucial issue in this proceeding, from their perspective, is whether the acquisition and control of Conrail by CSX and NS will affect the rates charged either to movants themselves or to those who ship movants' coal. This issue, movants contend, goes beyond the "one lump" theory mentioned in ALJ Decision No. 11, and focuses instead on whether the "acquisition premium" paid by CSX and NS for Conrail would or could result in rate increases to shippers such as movants.

Their need for the revenue masking factors, movants contend, reflects the limitations inherent in the data produced by applicants pursuant to ALJ Decision No. 11. Movants maintain that these limitations, which include both (i) the gaps in the years with respect to which data have been produced, and (ii) the fact that the years are not consistent as between the three applicants, frustrate an intelligent comparison of the data produced by each applicant. Movants therefore contend that, if they are to provide a statistically reliable and useful study of applicants' ratemaking practices, they must have data applicable to the missing years, which necessarily means that they must "fill in" the missing years with data other than the data they were denied in ALJ Decision No. 11.

The other data that movants have in mind are data derived from the Waybill Sample. Movants acknowledge, of course, that they have had access to the Waybill Sample; such access, although tied to this proceeding, has been had outside the regular discovery process presided over by Judge Leventhal. See 49 CFR 1244.8 (describing procedures governing access to the Waybill Sample). Movants insist, however, that such access, in and of itself, is not sufficient for present purposes, because certain of the Waybill Sample revenue entries to which they have had access have been "masked" and are, for this reason, not technically accurate. Movants contend that, if they are to work with accurate revenue data, they must be given access to the revenue masking factors; these factors, movants note, will allow them to "unmask" the revenue entries contained in the Waybill Sample.

Movants argue that, to "fill in" the missing years, they need the revenue masking factors for the years with respect to which Judge Leventhal did not order production of the underlying data in ALJ Decision No. 11. They need these revenue masking factors, movants insist, in order to construct, for the years 1978-1997, "time lines" of applicants' ratemaking practices for a sufficient number of "origin-destination" pairs to result in a statistically reliable study.

Movants add that, in order to clarify certain matters, they also need the revenue masking factors for the years with respect to which Judge Leventhal did order production of the underlying data in ALJ Decision No. 11. They need the revenue masking factors with respect to these years, movants claim, because there are discrepancies in the data produced by applicants that the revenue masking factors may help explain,[13] and because the revenues in the Waybill Sample are or may be adjusted for credits or rebates, thus distorting the rates themselves.

Movants insist that the underlying data they would recreate via application of the masking factors to the Waybill Sample is relevant, notwithstanding that direct access to such data

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[12](...continued)
decision that required production of the masking factors but also to that portion of his decision that required Conrail to make a comparative special study.

[13] Movants claim that "there is at least one discrepancy on the Waybill Sample which the masking factors will help eliminate, and there could well be others (the analysis is now ongoing)." ACE-15 at 3 (emphasis in original).

was denied in ALJ Decision No. 11. That aspect of that decision, movants claim, was premised not upon relevance but upon burden. Judge Leventhal, movants insist, did not find that the material he allowed applicants not to produce was not relevant; rather, he found that production of such material would be burdensome, and that the burden of production would outweigh relevance. Production of the revenue masking factors, movants claim, should not be burdensome at all. And, movants add, the commercial sensitivity of the masking factors should not pose a problem; movants concede that the masking factors, if produced by applicants, would be entitled to Highly Confidential status under the protective order previously adopted in this proceeding.[14]

DISCUSSION AND CONCLUSIONS

The Waybill Sample,[15] a weighted random sample of carload waybills for terminating shipments by rail carriers,[16] is a comprehensive database on rail carload freight traffic flows and characteristics. Proc. On Release of Data From ICC Waybill Sample, 4 I.C.C.2d 194, 195-96 (1987).[17] This database contains, for each movement included in the Waybill Sample, the originating and terminating freight stations, the railroads participating in the movement, all railroad interchange points, the number of cars, the car types, the movement weight in tons, the commodity, and the freight revenue.

The waybills that make up the Waybill Sample are filed with the Board by the Nation's railroads. A railroad is required to file waybill sample information for all line-haul revenue waybills terminated on its lines if, in any of the three preceding years, it terminated: (1) at least 4,500 revenue carloads; or (2) at least 5% of revenue carloads terminating in any state. See 49 CFR 1244.2. A railroad that is required to file waybill sample information may file either authenticated copies of a sample of audited revenue waybills or a computer tape containing specified information from a sample of waybills. See 49 CFR 1244.3.

The primary purpose served by the Waybill Sample is regulatory oversight. The Waybill Sample is used in calculating: the productivity adjustment to the Rail Cost Adjustment Factor;[18] and the revenue-to-variable cost benchmark figures used as starting points under the recently adopted simplified evidentiary guidelines for determining maximum reasonable rail rates.[19] Prior to January 1, 1996, the Waybill Sample was also used in calculating the Cost Recovery

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[14] See Decision No. 32, slip op. at 3-4.

[15] Although the Waybill Sample is often referred to as the "one percent" Waybill Sample, this reference is not accurate. Many types of commodity movements included in the Waybill Sample are sampled at a rate well in excess of 1%. For example, waybills representing movements of 100 or more cars are sampled, by most railroads, at a rate of 50%.

[16] With respect to any shipment of freight by rail, a waybill is the document or instrument prepared from the bill of lading contract or shipper's instructions as to the disposition of the freight, which is used by the railroad(s) handling the freight as the authority to move the shipment and as the basis for determining freight charges and interline settlements. See 49 CFR 1244.1(c).

[17] See also Expansion of the ICC Waybill Sample Public Use File (49 CFR Part 1244), Ex Parte No. 385 (Sub-No. 3) (ICC served Jan. 31, 1990, and Jan. 23, 1992).

[18] See new 49 U.S.C. 10708 (requirement that the Board publish a rail cost adjustment factor, which must take into account changes in railroad productivity).

[19] See new 49 U.S.C. 10701(d)(3). See also Rate Guidelines -- Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996, and May 1, 1997).

Percentage.[20] But, because the Waybill Sample contains such comprehensive information, it has also been used for many additional purposes, including (1) studies of the impact of mergers and deregulation,[21] (2) analyses of rail traffic flows and patterns, (3) studies of movements of hazardous materials, coal, and other commodities, (4) development of marketing studies, (5) development of freight car manufacturing plans, (6) development of information for verified statements submitted in regulatory proceedings, and (7) development of information for use in academic research projects.

The Waybill Sample contains a great deal of confidential information, and, for this reason, it is made available only in limited circumstances and to certain persons. See 49 CFR 1244.8(b) (the Waybill Sample is available, in certain circumstances not presently relevant, to railroads, Federal agencies, and States; and, in connection with formal regulatory proceedings, it is also available to transportation practitioners, consulting firms, and law firms, but an appropriate confidentiality agreement must be signed). See also 49 CFR 1244.8(b)(5) (certain nonconfidential information contained in a so-called "Public Use Waybill File" is available to anyone).

The protection of confidential data contained in, or otherwise ascertainable from, the Waybill Sample has been a recurring problem. Although the names of the shipper and consignee are not included in the data submitted in connection with the Waybill Sample, data that are included, such as the origin and destination Freight Station Accounting Code (FSAC) and the 7-digit Standard Transportation Commodity Code (STCC), might, in their raw form, permit identification of a shipper and consignee, and might thereby disclose a railroad's significant customers and also the rate (including confidential contract rates) at which it transports the traffic. This is particularly troublesome because a railroad is required to include in its waybill samples data for traffic moving under contract, even though all aspects of the contract, including the rate charged and the revenue collected, are outside of the Board's jurisdiction. See new 49 U.S.C. 10709. It has been fairly easy to protect such data in the Public Use Waybill File; details are merely aggregated to a level that obscures the confidential aspects. It has not, however, been so easy to protect such data in the Waybill Sample itself.

The so-called "masking factors" were the solution ultimately devised to protect extremely confidential revenue data contained in the Waybill Sample itself. Beginning with the 1987 Waybill Sample, railroads have been allowed to "mask" the revenues attributable to contract traffic. Railroads applying masking factors to their waybill samples provide these masking factors to the Board; and the masking factors thus provided have been applied to the Waybill Sample by our staff in calculating the productivity adjustment to the Rail Cost Adjustment Factor, the revenue-to-variable cost benchmarks used as starting points under the Ex Parte No. 347 (Sub-No. 2) rate guidelines, and the now discontinued Cost Recovery Percentage. These masking factors have never been made publicly available, not even under a protective order; they have been held in the strictest confidence, and, at any time, have been known only by a few members of the Board's staff.[22]

We have made the Waybill Sample available to movants' outside consultants, but we have not given them (nor have they sought from us) access to the masking factors. If movants

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[20] See old 49 U.S.C. 10709(d)(1)(B)(i).

[21] See 49 CFR 1180.4(h)(6), as recently amended in Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556, 62 FR 9714, 9717 (Mar. 4, 1997), 62 FR 28375 (May 23, 1997) (in rail merger proceedings, the Board may take official notice of the Waybill Sample).

[22] Waybill Sample data is actually gathered and processed for the Board by a contractor; but even the contractor has not been allowed access to the masking factors.

had requested that we allow them access to the masking factors in our possession, we would have rejected their request, not for lack of a protective order[23] but because such masking factors have never been made available, and have never been intended to be made available, to any persons not on our staff.[24]

The issue now to be decided is whether movants can obtain from applicants, through the regular discovery process, the masking factors they would not be allowed to obtain under 49 CFR 1244.8(b)(4). We hold that they cannot,[25] and we will therefore grant the CSX/NS-81 appeal and deny the ACE-14 appeal.[26]

The total confidentiality of each railroad's masking factors has been essential to the Board's effort to gather the data it needs to fulfill its statutory duties. Masking factors have been used for a decade to protect the competitively sensitive, extraordinarily confidential, deregulated rates in contracts between shippers and railroads. Further, they are not relevant to any legitimate issue raised by movants here, and their forced disclosure would seriously harm an important element of the Board's efforts to gather useful transportation data while protecting the security of extraordinarily confidential, statutorily protected, shipper-railroad contract rate and revenue data.[27]

Release of the masking factors would undermine the confidentiality policies underlying the maintenance of the Waybill Sample and would raise serious concern in the transportation community as to the ability of railroads to protect confidential rail contract rates while at the same time participating in the Waybill Sample program. This consideration tips the scales

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[23] The confidentiality agreement called for by 49 CFR 1244.8(b)(4)(v) is akin to the Exhibit B "Highly Confidential" undertaking applicable under the protective order previously adopted in this proceeding. See Proc. On Release of Data From ICC Waybill Sample, 4 I.C.C.2d at 205 ("transportation practitioners, consultants, and outside counsel . . . serve as a protective buffer between the confidential data and the rail or shipper clients they represent").

[24] Movants' claim, see ACE-15 at 4, that the 49 CFR Part 1244 regulations do not preclude release of the masking factors overlooks that those regulations do not even reference the masking factors.

[25] Our holding is not premised on the argument advanced by applicants, see CSX/NS-78 at 10, that a procedural default now bars movants from seeking the masking factors. Because movants' July 3 discovery requests did not seek the masking factors, ALJ Decision No. 11 cannot be read as having ruled that the masking factors were not to be made available to movants.

Nor is our holding premised upon a belief that production of the masking factors would be burdensome. Production by CSX and NS of their revenue masking factors should not be particularly difficult. Production by Conrail of its masking factors (i.e., the preparation by Conrail of a comparative special study, see CSX/NS-81 at 8) might be difficult, but it would seem that any such difficulty should properly be charged to Conrail's recordkeeping practices.

[26] We are reversing that portion of Judge Leventhal's decision that granted in part movants' motion to compel, and we are affirming that portion of Judge Leventhal's decision that denied in part movants' motion to compel. Our reversal of that portion of Judge Leventhal's decision that granted in part movants' motion to compel nullifies both the requirement that applicants produce their masking factors and also the related requirement that Conrail conduct a comparative special study in view of its apparent inability to produce certain of its masking factors.

[27] The revenues that movants seek to unmask are, for the most part, revenues charged to shippers other than movants themselves. With regard to movants' own shipments, the masking factors would be of use to movants in a few atypical instances only.

against a finding of relevance, because the standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is 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." See Decision No. 34, slip op. at 2 n.9.

Moreover, the proposition that movants seek to prove with the unmasked revenues is highly questionable. Movants are asserting, in essence, that Conrail has some as yet unexercised market power that either CSX or NS will exercise if we allow them to acquire Conrail's lines. They are, in essence, challenging a basic principle of economics, that firms will generally attempt to maximize their profits. "This is the basic premise the ICC and the Board have long applied, with court approval, when viewing competitive issues in assessing mergers: if carriers have additional market power, they will use it." Decision No. 17, slip op. at 3. We cannot allow discovery of extraordinarily sensitive information simply to permit movants the ability to conduct what amounts to a "fishing expedition."[28]

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-81 appeal is granted. That portion of Judge Leventhal's decision that granted in part movants' motion to compel is reversed.

2. The ACE-14 appeal is denied. That portion of Judge Leventhal's decision that denied in part movants' motion to compel is affirmed.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

[28] Because the risk to our Waybill Sample program is so great, because movants have no real need for the data anyway, and because the proposition that movants seek to prove is so entirely unlikely, even the existence of the protective order applicable to this proceeding cannot justify the forced production of applicants' masking factors.

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SEC

SERVICE DATE - OCTOBER 2, 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. 41

Decided: September 30 , 1997

NOTICE TO THE PARTIES:

In anticipation of the high volume of documents that will be filed in this proceeding on October 21, 1997, the Board seeks to avoid any unnecessary delays in the timely processing of those documents. This notice serves to remind and notify persons of the Board's policies and procedures concerning the filing of pleadings, responsive applications, comments, protests, requests for conditions, any other opposition evidence and argument, and documents pertaining to the related abandonments.

The Board's office hours for receipt of public documents are from 8:30 am to 5:00 pm, Monday through Friday, and pleadings must be filed in Room 715. However, security procedures require that all packages must pass through the Board's x-ray machine on the **first floor**. No pleadings will be accepted for filing before 8:30 am or after 5:00 pm. Parties are urged to plan to file their documents as early on October 21, 1997, as possible. The Board welcomes the filing of the involved documents on October 20, 1997, or earlier. All filings must include the proper number of copies (25) and a certificate of service. **Diskettes** submitted with filings must be properly **labeled**, i.e. STB FD-33388, CSX-22. **Pleadings** submitted in **multiple volumes** must be identified (1 of 4, 2 of 4, etc.) and should be submitted in complete sets. Finally, **confidential** and **redacted** pleadings must be **clearly identified**.

If anyone needs any further information concerning the Board's filing procedures, please contact Bettye Uzzle, the Information Officer, Office of the Secretary, at 202/565-1764

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Records: 318

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SERVICE DATE - LATE RELEASE OCTOBER 2, 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. 40

Decided: October 1, 1997

In Decision No. 12 in this proceeding, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577, we affirmed the procedural schedule established in Decision No. 6, served May 30, 1997.[1] Under that schedule, we imposed due dates of: (1) August 22, 1997, for the filing of descriptions of anticipated responsive (including inconsistent) applications, and petitions for waiver or clarification, with respect thereto; and (2) October 21, 1997, for the filing of responsive (including inconsistent) applications, comments, protests, requests for conditions, and other opposition evidence and argument.

A number of potential responsive applicants filed petitions for waiver or clarification. During the course of resolving those requests, we addressed a variety of concerns related to the filing of responsive applications. In this decision, for the benefit of the parties, we will briefly review certain issues involving responsive applications and conditions, including applicable filing fees. In addition, on September 25, 1997, the New York City Economic Development Corporation (NYCEDC) and Philadelphia Belt Line Railroad Company (PBL) filed petitions for clarification in regard to our Decision No. 33.[2] This decision reviews those matters.

Rail Merger Responsive Applications and Conditions. Under our rules, responsive applications are filed in response to a primary application and seek affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, construction, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). See 49 CFR 1180.3(h). A responsive

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[1] In Decision No. 12, we also accepted for consideration the application filed June 23, 1997, by CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT) (collectively with their wholly owned subsidiaries, CSX), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR) (collectively with their wholly owned subsidiaries, NS), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC) (collectively, Conrail) seeking approval and authorization under 49 U.S.C. 11321-25 for: (1) the acquisition by CSX and NS of control of Conrail, and (2) the division of Conrail's assets by and between CSX and NS.

[2] Descriptions of NYCEDC and PBL and their waiver/clarification requests in regard to anticipated responsive applications appear in Decision No. 33, served September 18, 1997. In their current petition, NYCEDC and PBL acknowledge that they did not specifically request that their responsive applications be considered minor transactions, but that other parties seeking similar relief made such requests. Petitioners therefore request that their responsive applications also be designated as minor. Petitioners alternatively ask us to rule on their still pending request for waiver of the financial information requirements of 49 CFR 1180.9 applicable in major transactions.

application, however, is not necessary if the affirmative relief or condition sought does not fall within our jurisdiction. Some examples of activity not regulated by the Board include: mass transportation provided by local governmental authorities, see 49 U.S.C. 10501(c)(2); construction, acquisition, operation, or abandonment of spur, industrial, team, switching, or side tracks, see 49 U.S.C. 10906; and improvements to existing rail lines that do not extend a carrier's lines or involve the construction of an additional line, see City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).

Although we do not normally regulate activities or transactions such as those described above, we may impose them on the primary application under our conditioning authority found at 49 U.S.C. 11324(c). In particular, parties have indicated that they may seek conditions to ameliorate anticipated adverse affects on commuter rail services. We emphasize, however, that we follow specific criteria in imposing conditions. The criteria for imposing conditions to remedy anticompetitive effects were set out in Union Pacific--Control--Missouri Pacific, Western Pacific, 366 I.C.C. 462, 562-65 (1982). There, the Interstate Commerce Commission (ICC) stated that it would not impose conditions on a railroad consolidation unless it found that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. Additionally, the criteria for imposing conditions to remedy a claim of harm to essential services appear at 49 CFR 1180.1(d). The burden of proof is on petitioners to present substantial evidence that approval of the primary application without imposition of the conditions will harm their ability to provide essential services and/or competition. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

Until recently, we did not require a primary applicant to pay additional filing fees for directly related transactions that it filed with its primary railroad consolidation application. Because charging a single fee did not take into account all of our costs for processing a railroad consolidation proceeding, we concluded it was appropriate to assess a separate fee for each directly related application, petition, and/or notice that is filed with the primary application. See Railroad Consolidation Procedures--Modification of Fee Policy, STB Ex Parte No. 556 (STB served Mar. 4 and May 23, 1997), 62 FR 9714-18 and 62 FR 28375-76.

We also changed our fee policy with regard to responsive applications because the costs for handling the various types of transactions, ranging from trackage rights to construction proposals, were not accurately reflected by a single fee. Accordingly, under 49 CFR 1180.4(d)(4)(ii), the fee for any responsive application, other than an inconsistent application,[3] is the fee for that particular type of proceeding codified in our fee schedule at 49 CFR 1002.2(f). For example, if the responsive application is a petition for exemption involving trackage rights, the $5,600 fee codified in fee item (40)(vi) would be assessed for that proceeding. Similarly, because separate filing fees apply to proceedings under 49 U.S.C. 10902 (acquisitions or operations by Class II or III carriers) and 49 U.S.C. 10903 (abandonments), the fees codified in fee items (14)(i)-(iii) and items (21)-(23), respectively, will be assessed on the corresponding responsive applications. On the other hand, although our rules define a carrier inclusion application as a responsive application, there is no separate fee for such a transaction in our fee schedule. Therefore, the filing fee for an inclusion application will be $4,700 under fee items (38)(v)-(41)(v).

[3] An inconsistent application will be classified as a major, significant, or minor transaction as provided for in 49 CFR 1180.2(a)-(c). The fee for an inconsistent application will be the fee for the type of transaction as designated in 49 CFR 1002.2(f)(38)-(41).

In addition, our rules no longer presume that a responsive application that is not a major transaction is a significant transaction. We removed the presumption because responsive applications under 49 U.S.C. 11323-25 may also be found to be minor transactions.[4] The difference in the filing fee applicable to a significant, as opposed to minor, transaction is substantial. The filing fee for a significant transaction is $177,900 [fee items (38)(ii)-(41)(ii)], while the filing fee for a minor transaction is $4,700 [fee items (38)(iii)-(41)(iii)]. In order to qualify a responsive application as a minor transaction, responsive applicants will be required to make a prima facie showing that the applicable criteria under 49 CFR 1180.2, as discussed more fully below, have been met. Finally, if a responsive applicant seeks more than one transaction, such as authority to abandon a rail line as well as authority to operate over another rail line, the filing fee applicable to each type of transaction must be tendered with the filing(s).

Responsive applicants may seek the imposition of operating authority as trackage rights under sections 11323-25. If a responsive application for trackage rights is filed and it is not a major transaction,[5] there is no longer a presumption that the transaction is significant, as noted above. A significant transaction is a transaction that is of regional or national transportation significance. A transaction is not significant, and is therefore exempt[6] or minor, if it clearly will not have any anticompetitive effects, or if any anticompetitive effects will clearly be outweighed by the transaction's contribution to the public interest in meeting significant transportation needs. See 49 CFR 1180.2(a), (b), and (c).

If the responsive applicant is a Class II or Class III railroad, it may alternatively seek operating authority under section 10902, the provision added by the ICC Termination Act of 1995 addressing intercarrier acquisitions by carriers smaller than Class I. See Decision No. 33, at 5. The filing fee for an application under section 10902 will be $3,700 [fee item (14)(i)] and $3,900 for a petition for exemption [fee item (14)(iii)].[7]

Clarification Requests. NYCEDC and PBL (jointly petitioners) seek clarification in regard to two matters discussed in Decision No. 33. Petitioners concede that, in their prior waiver/clarification petitions, they did not specifically request that their responsive applications be considered minor, as opposed to significant, transactions. Petitioners indicate, however, that other parties seeking relief similar to theirs made such requests, which we granted. Because their standing is similar to that of other parties receiving minor transaction designations, NYCEDC and PBL request clarification that their prospective responsive applications be considered minor transactions.

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[4] In view of this change in our fee policy, we retract the statements in our previous waiver/clarification decisions where we cited the former presumption as if it were still in effect. See Decisions Nos. 28, 30, 33, and 36, slip op. at 3. We affirm those decisions in all other respects.

[5] A major transaction is a control or merger involving two or more Class I railroads. 49 CFR 1180.2(a).

[6] Although a requested condition may be found to be exempt, such a finding would be difficult or improbable in the context of a railroad consolidation proceeding.

[7] Because section 10902 was a new statutory provision when the Board revised its fee schedule in 1996, the Board had no specific cost study data for either of these two types of transactions. The Board therefore established these fees based on what it found were equivalent types of transactions for which it did have established fees. See Regulations Governing Fees for Service, 1 S.T.B. 179 (1996) (NPR served Apr. 4, 1996 and published on Apr. 5, 1996, at 61 FR 15208).

Petitioners' requested clarification is reasonable and will be granted. We did not give NYCEDC and PBL minor transaction designations in Decision No. 33 because they did not seek such waivers at the time. Because we are granting relief in this regard, petitioners' alternative clarification request, i.e., that the financial disclosure requirements applicable in major transactions do not apply, is moot. In any event, those requirements, along with other rules that petitioners sought to waive, would not apply because their responsive applications would not be considered major transactions.

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

It is ordered:

1. The petitions for clarification filed in NYC-6 and PBL-7 are granted to the extent set forth in this decision.

2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
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SERVICE DATE - LATE RELEASE SEPTEMBER 22, 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. 39

Decided: September 22, 1997

In a decision issued orally after discovery conferences on September 17 and 19, 1997, Administrative Law Judge (ALJ) Jacob Leventhal required applicants[1] to produce to the Ace Utilities[2] certain "masking factors" used by applicants in reporting revenue as part of the Board's Waybill Sample program. To allow applicants an opportunity to appeal his decision to the Board, Judge Leventhal stayed his decision (as respects the masking factors) to 5:00 p.m., Monday, September 22, 1997.

In their appeal (designated CSX/NS-81) filed Monday, September 22, 1997, applicants claim that Judge Leventhal's decision reflects a clear error of judgment, and results in manifest injustice, "because it requires disclosure of extraordinarily confidential information integral to the efficacy of an important Board program, without any showing of relevance." CSX/NS-81 at 3. Applicants further claim that neither the Board nor its predecessor (the Interstate Commerce Commission) has ever disclosed a railroad's masking factors to a third party. CSX/NS-81 at 5. Applicants therefore ask that we reverse Judge Leventhal's decision "and preserve the long-standing total confidentiality of the Waybill Sample masking factors." CSX/NS-81 at 15. Applicants add that, if we allow this discovery to proceed, we should, at a minimum, provide that the data disclosed may not be used to unmask revenues or rate information on movements to shippers other than the ACE Utilities' destinations for which applicants previously produced traffic data pursuant to Judge Leventhal's prior rulings.

Because the issues raised by applicants are substantial, and because, as applicants note, CSX/NS-81 at 2, there would be no effective way to "unring the bell" if we were to determine, after production had been made, that the production order should never have been entered, we will stay Judge Leventhal's decision, insofar as it requires production of the masking factors, pending our resolution of applicants' CSX/NS-81 appeal.

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

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[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] Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, Indianapolis Power and Light Company, and Ohio Valley Coal Company are referred to collectively as the Ace Utilities.

It is ordered:

1. Judge Leventhal's decision, insofar as it requires production of the masking factors, is stayed pending our resolution of the CSX/NS-81 appeal.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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SERVICE DATE - SEPTEMBER 18, 1997

SURFACE TRANSPORTATION BOARD

DECISION

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. 35

Decided: September 17, 1997

In a letter signed by 12 individuals (copy attached to this decision), various rail labor unions representing employees of the applicant carriers in this rail consolidation proceeding have requested that I recuse myself from further participation in this case. Given the serious nature of the allegations that their letter raises, I will treat it as if it were a formal petition, and will respond to it formally.

This case involves the application filed by CSX Corporation (CSX) and Norfolk Southern Corporation (Norfolk Southern) to acquire control of, and thereafter to partition the assets of, Conrail Inc. (Conrail). Petitioners argue that I should recuse myself because I have made public statements that compromise my ability to act impartially in this case. In particular, petitioners claim that, in a telephone interview that they say I initiated with a Washington Post reporter, I publicly expressed my support for "the breakup of Conrail assets between Norfolk Southern and CSX." My statements, according to petitioners, in essence directed CSX officials to abandon an earlier arrangement under which CSX and Conrail would have merged, and instead to "negotiate[] an agreement with Norfolk Southern to divide the assets of Conrail." Because I "publicly disapprove[d] a transaction [a CSX/Conrail combination] and indicate[d] a desire for another result [the CSX/Norfolk Southern application]," thereby giving CSX and Norfolk Southern a "road map," petitioners assert that I am unable to address the issues in this proceeding objectively.

The allegations on which petitioners' recusal request is based are entirely unfounded: to put it bluntly, I did not make the conclusory comments that petitioners attribute to me.[1] I did have a face-to-face conversation about railroad mergers with Don Phillips of the Washington Post on January 13, 1997, at Mr. Phillips' request. Shortly after that conversation, on January 21, 1997, the Washington Post printed an article discussing the likely disposition of Conrail's property. However, as the Washington Post article indicates, I "carefully avoided discussion of specifics in the [Conrail matter]." Indeed, Mr. Phillips did not meet with me to talk about the Conrail matter; he called me to discuss the already-consummated Union Pacific/Southern Pacific (UP/SP) merger,[2] and, as the article itself references, the thrust of my remarks concerned the

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[1] In particular, petitioners attribute the following to me: (1) "You have indicated in your public comments that you believe the breakup of Conrail assets between Norfolk Southern and CSX is the preferred option.", (2) "[Y]ou indicated publicly that you preferred the division of Conrail assets between the two carriers.", and (3) "[Y]ou made clear that you, as Chair of the Surface Transportation Board, preferred an outcome that satisfied the demands of both CSX and Norfolk Southern."

[2] 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, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996).

Board's action in that matter.

Thus, as the article points out, I stated that, with respect to the UP/SP merger, the Board acted so as to ensure that both of the remaining large western railroads would remain strong competitors. With respect to any Conrail restructuring proposal brought to the Board for consideration, and referring to the statutory requirement that the Board consider competition in its merger cases, I said that "an argument is clearly going to get made that what we must do is ensure some sort of competitive balance in the East." My comments did not describe precisely what the Board would do with any such proposal presented to it, what competitive balance would be reached, or what specific conditions might be used to achieve that balance. Rather, because, as I indicated in the interview, each situation must be assessed on a case-by-case basis, I said that "what is important is how the Board will define preservation of competition in the context of the record, the facts, the region and the arguments that are made."

Mr Phillips was clearly correct in concluding in his article that the Board "is prepared" to do whatever is necessary to carry out the law. People may draw different inferences and conclusions, in light of the Board's action in UP/SP and the well-established principles of rail merger review that I laid out in the interview, as to how the Board might specifically act in the Conrail matter. I can only say that in the pending Conrail proceeding, as in all other proceedings before the Board, I will base my actions on the law, the factual record developed, and the arguments that are made. My statements to Mr. Phillips provide no basis whatsoever on which I should recuse myself; they in no way indicate that I can not be objective or act impartially in this matter.

In further support of their request that I recuse myself, petitioners contend that the Board demonstrated bias by permitting CSX and Norfolk Southern to proceed with 7 minor construction proposals that relate to track necessary to carry out the proposed consolidation successfully. I am aware of no case in which an individual agency member has recused himself or herself on the ground that an on-the-record full agency decision in a formal adjudicative proceeding establishes personal bias. But in any event, I do not believe that the Board's action -- which was taken only after notice and comment -- allowing CSX and Norfolk Southern to seek construction authority reflects either personal or institutional bias in this proceeding.

In allowing CSX and Norfolk Southern to seek approval to undertake these 7 construction projects, involving short segments of track, the Board recognized that completion of these construction projects would facilitate competition between CSX and Norfolk Southern immediately if the overall transaction is approved. However, the Board indicated that, even if the construction proposals are approved,[3] CSX and Norfolk Southern would receive no authority to actually operate over these connecting lines unless and until the overall consolidation transaction is approved; it pointed out that approval of the constructions would not make approval of the merger any more likely; and it reflected CSX's and Norfolk Southern's recognition "that any resources they expend in the construction of these connections may prove to be of little benefit to them if we deny the [consolidation] application . . . ." Decision No. 9, at 6. The Board's action as to the construction applications, while it should facilitate competition if the transaction is approved, plainly did not indicate a predisposition to approve the consolidation transaction, and the decisions implementing the Board's actions are quite clear on this point.

Board members shall act impartially and shall not give, or appear to give, preferential treatment to any private organization or individual. 49 CFR 2635.101(b)(8), (14). It is up to each Board member to assess his or her own impartiality. See Supplemental Standards of Ethical Conduct for Employees of the ICC, 9 I.C.C.2d 838, 840 (1993).[4]

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[3] The approval process is not completed as to these projects.

[4] See ICC Termination Act of 1995, section 205, Pub. L. No. 104-88, 109 Stat. 803, (continued...)

The case law indicates that recusal is necessary in an agency adjudication such as the Conrail proceeding only if a disinterested observer would conclude that the agency member has in some measure prejudged both the facts and the law of the particular case in advance of hearing it. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1158 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). As previously discussed, my comments to Mr. Phillips did not indicate a prejudgment of the facts to be presented or the way in which the law would be applied to those facts; in fact, my comments clearly stated the contrary -- that what is important in any such Conrail matter brought to the Board is "how the Board will define preservation of competition in the context of the record, the facts, the region, and the arguments that are made." Furthermore, the fact that an agency member has policy views -- even strong views, such as the views about the Board's responsibility to preserve and promote competition that I have publicly expressed in various contexts -- does not dictate recusal. To the contrary, an agency head has the right to discuss the applicable law and how the agency has implemented that law in prior cases, as in the case of the UP/SP merger and its precedential value from a legal standpoint. Indeed, "[c]abinet officers and agency heads are not assumed to be silent, opinionless creatures. Even in adjudicatory proceedings, impartiality is not incompatible with strongly held views on law or policy publicly expressed, and a presumption of regularity applies to the actions of agency officials." United Steelworkers of America, etc. v. Marshall, 647 F.2d 1189, 1208 (D.C. Cir. 1980, as amended 1981), cert. denied, 453 U.S. 913 (1981). Accord, United States v. Morgan, 313 U.S. 409, 421 (1941); FTC v. Cement Institute, 333 U.S. 683 (1948).

Under these legal standards, and given the inaccurate allegations on which petitioners' recusal request is based, I see no reason why I should not participate fully in this case, and do the "job" that I was appointed to do. Petitioners state that "it is critically important that the decision made by the . . . Board be fair to all parties." I share that view, and I am prepared to act in a fair and evenhanded way in this case, as I do in all others in which I participate. As I stated in my interview with Mr. Phillips, however, I can only reach a decision on the basis of the law and the facts and argument formally presented on the public record. Therefore, if petitioners have substantive positions that they want the Board to take into account in assessing the public interest in the Conrail matter -- be they the competitive concerns that petitioners have raised here, or labor issues germane to our responsibilities under the law -- they should present their positions formally and completely so that they can be considered, along with the other pleadings filed in the case.

It is ordered:

Petitioners' request that I recuse myself is denied.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary

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[4](...continued)
943 (1995)(reference to ICC in federal regulations deemed to refer to the Surface Transportation Board). In making my determination, I have consulted with the Board's General Counsel and the Board's Designated Agency Ethics Official.

August 22, 1997

The Honorable Linda Morgan
Chair
Surface Transportation Board
1925 K Street, NW, Suite 820
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Dear Madam Chair:

As Unions which represent employees of Conrail, Norfolk Southern and CSXT who will be significantly and permanently affected by the proposed acquisition of Conrail by Norfolk Southern and CSX, we believe it is critically important that the decision made by the Surface Transportation Board be fair to all parties.

Unfortunately, we are obliged to ask you to recuse yourself from participating in the decision on this transaction. You have indicated in your public comments that you believe the breakup of Conrail assets between Norfolk Southern and CSX is the preferred option. When Conrail had an existing agreement with CSX, which did not include Norfolk Southern and which Norfolk Southern had indicated it would fight financially and politically, you indicated publicly that you preferred the division of Conrail assets between the two carriers.

In your phone call to a Washington Post reporter, Don Phillips, you made clear that you, as Chair of the Surface Transportation Board, preferred an outcome that satisfied the demands of both CSX and Norfolk Southern. The obvious and unsurprising result after Mr. Phillips' story in the Washington Post was that CSX abandoned its contract and intention to merge with Conrail, and negotiated an agreement with Norfolk Southern to divide the assets of Conrail. CSX officials and others have cited your comments in Mr. Phillips' story as their motivation in altering course. If the chief regulator publicly disapproves a transaction and indicates a desire for another result, it is no surprise that the parties change course.

The appearance of STB pre-judgment of the proposed Transaction was magnified by the recent decision to allow consideration of the proposals to build CSX-Conrail and NS-Conrail connecting tracks in advance of a decision on the Application as a means of saving Applicants' time in operating Conrail as their own property. The job of the Board is to review merger/control transactions to protect the public interest, not to enhance the financial circumstances of carriers in advance of such review. This recent decision amplifies our concern that you prejudged the proposed Transaction.

The members of the STB are charged with regulating the carriers and protecting the public interest, not with refereeing the intramural disputes among the carriers or advising them on how best to obtain regulatory approval to accomplish their ultimate goals. The Court of Appeals for the D.C. Circuit has repeatedly held that recusal of an agency

adjudicator is required when the adjudicator has made public statements which show that the adjudicator "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it". *United Steelworkers v. Marshall*, 647 F. 2d 1189, 1209 (D.C. Cir. 1980). *In Texaco, Inc. v. FTC*, 336 F. 2d 754 (D.C. Cir. 1964) and *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F. 2d 583 (D.C. Cir. 1970), public statements of agency Commissioners which indicated their predispositions about matters before the agencies were held to necessitate recusal of the Commissioner who made the remarks. Under those decisions the test for recusal is "whether a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" *Cinderella*, 425 F. 2d at 591. The fact only one member of a tribunal has apparently prejudged the case does not immunize the agency's decision from challenge when that member is not excluded from the decision-making process in that case. *Cinderella*, 425 F. 2d. at 592.

Under these decisions, we believe that your comments regarding the desirable outcome of the competing CSX and NS efforts to acquire control of Conrail necessitates your recusal. Any disinterested observer would reasonably conclude from your remarks that you approve, indeed encouraged, the joint acquisition of Conrail by CSX and NS and the division of its routes between those carriers; the only remaining questions are subsidiary issues as to the technical details as to how that division is to be accomplished. Having given CSX and NS a road map as to how they can reach their desired ends, you have compromised your ability to fully perform the functions assigned to you under the statute.

This transaction is of profound importance to the transportation system of this country and to the employees of the three railroads involved. Because the Surface Transportation Board, and the predecessor Interstate Commerce Commission, have approved thirty-one of thirty-five mergers in the last [four decades], we will face, if this transactions is approved, four major railroads in this country, two in the East and two in the West. Every knowledgeable observer believes that the approval of this transaction means that East-West mergers will immediately follow, leaving only two railroads in the country.

At a time when every other industry (such as energy, telecommunications, health care, financial services) is being challenged by federal regulators to compete, it is strange that the federal regulator of the rail industry is instead offering advice on how competitors should get together to eliminate a vigorous rival in the Northeast. While individuals are, of course, entitled to their views on what is the best course for the rail industry in this country, as a federal regulator whose job is to judge the merits under the Statute of proposals made to the Surface Transportation Board, your actions in speaking out on this matter and changing the course of this Transaction indicate to us that you have made judgements in this matter which will prevent the objective exercise of your statutory responsibility.

We therefore respectfully request that you recuse yourself in this matter.

Sincerely,

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American Train Dispatchers Division

Clarence V. Monin, President
Brotherhood of Locomotive Engineers

Mac A. Fleming, President
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SERVICE DATE - LATE RELEASE SEPTEMBER 18, 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. 34

Decided: September 18, 1997

As noted in Decision No. 32, applicants[1] have, in certain instances, redacted from documents they have produced in discovery certain items of asserted[ly] "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

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[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

(continued...)

applicable to this proceeding, pursuant to which applicants have established a document depository and have 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 order[6] 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.

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[5](...continued)
derived or ascertained from the document).

[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.

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, 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] This assumes that Judge Leventhal has not upheld some other objection (e.g., attorney-client privilege) to production of such material.

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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[1] provides that material designated Highly Confidential[2] "may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings,[3] 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

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[1] 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).

[2] 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."

[3] 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.

applicable to, outside counsel. By reply filed September 8, 1997, applicants[4] urge the denial of the Port Authority's motion.[5]

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-a-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.[6] PPC and Western, which were represented in that proceeding both by in-house counsel and by outside counsel,[7] 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

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[4] 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.

[5] The Port Authority's motion is designated NYNJ-8. Applicants' reply is designated CSX/NS-72.

[6] 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.

[7] The Port Authority is similarly represented both by in-house counsel and by outside counsel.

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 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.

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