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SERVICE DATE - LATE RELEASE DECEMBER 5, 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. 58

Decided: December 5, 1997

On November 24, 1997, CSX and NS<sup>1</sup> filed an appeal (designated as CSX/NS-171) requesting that we reverse discovery rulings issued by Administrative Law Judge Jacob Leventhal on November 20, 1997. In his discovery decision, Judge Leventhal denied applicants' motion to compel certain responsive applicants (respondents) to produce information relative to the conditions they seek in this proceeding. Applicants contend that Judge Leventhal's discovery rulings are erroneous and result in manifest injustice by denying access to information relevant and necessary to prepare their rebuttal filing. Respondents replied to the appeal on December 1, 1997.

BACKGROUND

Respondents Illinois Central Railroad Company (ICR) and Wisconsin Central, Ltd. (WCL) filed responsive applications on October 21, 1997. A separate responsive application was filed jointly by Transtar, Inc. (Transtar), and respondents Elgin, Joliet and Eastern Railway (EJE) and I&M Rail Link, LLC (IMRL). In each instance, the responsive applications seek divestiture or acquisition of track or property to redress adverse competitive impacts allegedly resulting from the

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<sup>1</sup> CSX refers to CSX Corporation and CSX Transportation, Inc. NS refers to Norfolk Southern Corporation and Norfolk Southern Railway Company. In this proceeding, CSX and NS seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (Conrail); and (2) the division of Conrail's assets by and between CSX and NS. Conrail did not join in the appeal by CSX and NS that is under consideration here. CSX and NS are referred to as applicants for the purposes of this decision.

sought approval of the primary application.<sup>2</sup> On November 5 and 6, 1997, CSX and NS served respondents with interrogatories and document requests to determine the relationship between the relief sought and the proposed transaction. In the case of EJE and IMRL, applicants sought information with respect to the timing of discussions regarding IMRL's joinder with EJE in their responsive application.

Respondents, all represented by the same counsel, objected to applicants' interrogatories and document requests on the ground that the information sought is not relevant nor reasonably calculated to lead to the discovery of admissible evidence. WCL also objected on the ground that the discovery requests sought information already within CSX's possession, custody, or control. CSX and NS subsequently filed a motion to compel (See CSX/NS-163), seeking an appropriate discovery order from Judge Leventhal. At the discovery oral argument, Judge Leventhal denied the motion to compel as it related to all of applicants' discovery requests, finding that the information sought was not relevant to the merits of the responsive applications.<sup>3</sup>

#### DISCUSSION AND CONCLUSIONS

On appeal, applicants indicate that, in previous rail merger proceedings, when the Board, or its predecessor, the Interstate Commerce Commission, was asked to apply its conditioning authority, the agency has repeatedly cited the principle that conditions will not be imposed to remedy problems that existed before the merger at hand. Because there must be a nexus between the merger and the alleged harm that the proposed condition would remedy, applicants argue that it is entirely appropriate for them to inquire about conditions as they existed prior to the transaction. According to CSX and NS, Judge Leventhal's denial of the motion to compel limited their ability to obtain evidence that would determine whether respondents' alleged problems are in fact merger-related or, as applicants will evidently assert, predate the proposed acquisition of Conrail. With respect to discovery directed to EJE and IMRL, applicants maintain that, because IMRL had not previously appeared in the proceeding, inquiry into the time period involved in the carriers' negotiations over IMRL's participation is relevant to a determination of how much advance thought and planning

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<sup>2</sup> ICR and WCL seek Board orders compelling CSX to sell, respectively: (1) approximately 2 miles of track from Leewood to Aulon in Memphis, TN, to ICR; and (2) the Altenheim Subdivision of the Baltimore & Ohio Chicago Terminal Railroad to WCL. Transtar, EJE, and IMRL seek to acquire Conrail's 51% stock ownership in the Indiana Harbor Belt Railroad Company.

<sup>3</sup> See discovery conference transcript, November 20, 1997, at 135 (denying the motion to compel with respect to EJE), at 155 (denying the motion to compel with respect to IMRL), at 198 (denying the motion with respect to WCL), and at 211 (denying the motion with respect to ICR). NS does not join in the appeal insofar as it relates to the Judge's decision with respect to ICR.

went into their responsive application. Applicants indicate that their requests regarding timing are similar to questions asked repeatedly of CSX and NS witnesses during discovery without objection.

Respondents contend that applicants failed to meet the strict standards that would justify overturning the Judge's discovery decision. Respondents indicate that, to the extent applicants believe the harms described by ICR and WCL previously existed, applicants have asked, and ICR and WCL have answered, numerous interrogatories designed to elicit evidence of those past conditions. In regard to information about past purchase offers and inquiries, respondents state that, by definition, applicants already possess the evidence they seek. Respondents maintain that, accordingly, denial of discovery related to past purchase offers will not deny applicants the opportunity to conduct discovery to determine whether the competitive harms predate the proposed transaction. With regard to the discovery sought from EJE and IMRL, respondents maintain that information relative to the timing of discussions has no bearing on whether the condition requested is designed to address an anticompetitive effect of the proposed transaction.

Appeals from discovery decisions issued by the Administrative Law Judge will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). Appeals from discovery orders "are not favored," *id.*, and the standards for prevailing on such appeals are "stringent." See Decision No. 17, slip op. at 2 (July 31, 1997).

It is apparent that applicants have not been denied the opportunity to conduct discovery in the areas they are concerned with here. Applicants have asked and ICR and WCL have answered a number of interrogatories designed to adduce evidence as to whether the competitive harms described by ICR and WCL in their responsive applications predate the proposed transaction. Respondents objected to some, but not all, of applicants' discovery requests related to IMRL's agreement with EJE. Judge Leventhal exercised his discretion in denying discovery as to these additional requests by applicants. Judge Leventhal's denial of discovery is not a clear error of judgment, nor does it constitute manifest injustice. The appeal (CSX/NS-171) will be denied.

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-171 appeal of Judge Leventhal's discovery order is denied.

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2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary