

SURFACE TRANSPORTATION BOARD

02/12/98

FD #33388

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UNITED STATES OF AMERICA

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DISCOVERY CONFERENCE

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 --
TRANSFER OF RAILROAD LINE BY
NORFOLK SOUTHERN RAILWAY COMPANY
TO CSX TRANSPORTATION, INC.

Finance Docket
No. 33388

Thursday,
February 12, 1998

Washington, D.C.

The above-entitled matter came on for a
oral argument in Hearing Room 3 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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WASHINGTON, D.C. 20005-3701

(202) 234-4433

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APPEARANCES:On Behalf of Conrail:

GERALD P. NORTON, ESQ.
of: Harkins Cunningham
Suite 600
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 973-7605 (GPN)

On Behalf of CSX:

DREW A. HARKER, ESQ.
of: Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5022 (DAH)

On Behalf of Norfolk Southern Corporation and
Norfolk Southern Railway Company:

PATRICIA E. BRUCE, ESQ.
of: Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Washington, D.C. 20006-3939
(202) 298-8660

On Behalf of API, Limited:

LOUIS E. GITOMER, ESQ.
of: Ball Janik, LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

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P-R-O-C-E-E-D-I-N-G-S

(9:34 a.m.)

JUDGE LEVENTHAL: All right. The
Discovery conference will come to order. This is
Discovery Conference in Finance Docket STB 33388.
This morning we have the CSX Motion to Quash the
deposition of John Q. Anderson.

We'll take appearances at this time. For
CSX?

MR. HARKER: Drew Harker with Arnold &
Porter.

MS. BRUCE: Patricia Bruce, Zuckert,
Scoutt & Rasenberger for Norfolk Southern.

MR. NORTON: Gerald Norton, Harkins
Cunningham on behalf of Conrail.

MR. GITOMER: Louis Gitomer, Ball Janik
for APL, Limited.

JUDGE LEVENTHAL: All right. I have the
CSX Motion to Quash the deposition and I have a letter
addressed to me by Mr. Gitomer setting forth their
position with regard to the deposition.

All right, we'll hear argument. Mr.

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1 Harker, it's your Motion.

2 MR. HARKER: Your Honor, just a point of
3 clarification. You mentioned a letter from Mr.
4 Gitomer. This is the letter dated February 9th?

5 JUDGE LEVENTHAL: Yes, yes.

6 MR. HARKER: Very good. Your Honor, in
7 order to understand CSX's position as to the Notice of
8 Deposition for Mr. Anderson we need to review some
9 history. Fortunately it's not ancient history, but it
10 is some history and I think that will put CSX's
11 position here in some better context for you.

12 And it goes back to January 8. You will
13 recall, Your Honor, that on January 8 we had a hearing
14 before you with respect to the 84 Mining and Erie
15 Niagara Rail Steering Committee's Motion to Compel
16 production of discovery from the applicants.

17 And the basis for the Motion to Compel was
18 an objection that the applicants had filed to written
19 discovery requests that Erie Niagara and the 84 Mining
20 Company had made, both with respect to written
21 interrogatories as well as with respect to document
22 production requests. So we had both discovery tools,

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1 if you will, before you that day.

2 And CSX took the position at that time
3 that as commenters, neither 84 Mining nor Erie Niagara
4 were entitled to any discovery; be it written
5 discovery or depositions.

6 And at that point, Your Honor, you ruled
7 that -- and the basis for the position was essentially
8 that as commenters, those parties had no right to file
9 any additional evidence with the Board.

10 We were -- the applicants were permitted
11 to close the record on their case and discovery was
12 obviously directed at discovering new evidence which
13 -- the purpose of which could only be put in new
14 evidence in the proceeding.

15 And we indicated that that violated Board
16 precedent that said that the applicants were entitled
17 to close the case and there should be no new evidence
18 submitted with the briefs.

19 Your Honor ruled that day that as to the
20 written discovery, you sustained the applicant's
21 objection and did not permit 84 Mining or Erie Niagara
22 to take written discovery against the applicants.

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1 However, you also ruled that Norfolk
2 Southern, who had offered to make witnesses --
3 rebuttal witnesses that had submitted verified
4 statements as part of the applicant's rebuttal case --
5 they were required to be made available for
6 deposition.

7 And you also ordered that CSX make one
8 witness available who would be in a position to answer
9 questions that Erie Niagara had. Although I think in
10 fairness, I understood your ruling to be that you
11 expected that if other rebuttal witnesses of CSX had
12 been noticed for deposition, I think your expectation
13 was that we would make them available -- although that
14 issue wasn't in front of you. The issue was
15 specifically Mr. Jenkins.

16 And in explaining your ruling that day --
17 I'm reading from page 130 of the transcript from
18 January 8, 1998, of the Discovery Conference -- you
19 indicated, "Essentially" -- I'm sorry, you stated,
20 "Essentially I have adopted the argument made by both
21 Mr. Harker and Mr. Edwards. I find that our schedule
22 does not permit the commenters to file rebuttal

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1 testimony; I find that written replies to discovery
2 cannot have a reasonable use.

3 "There's a difference between documents
4 applied in response to a Discovery Request and the
5 cross examination of the rebuttal witness by
6 deposition. The cases cited to me by the movements
7 deal with the ability to attach a deposition to a
8 brief by commenters, but no case has been cited where
9 a document may be attached to a brief by the
10 commenters.

11 "In this respect there is a major
12 difference between a documentary response from the
13 oral cross examination of a witness under deposition."

14 Your Honor, that you will recall that
15 there were cross appeals taken from that decision of
16 yours on January 8th. And basically 84 Mining, Erie
17 Niagara appealed your denial of their right to written
18 discovery, and CSX took an appeal on the issue of
19 whether or not we were required to make any witness,
20 even a rebuttal witnesses as you had ordered us,
21 available for deposition.

22 And by Decision Number 64 decided January

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1 28, 1998, you will recall that the Board upheld your
2 decision, both with respect to written discovery as
3 well as with respect to depositions.

4 And again, I will read to you from
5 Decision 64. It says in pertinent part: "Although
6 parties are not permitted to submit new evidence in
7 their briefs, there is case precedent that supports
8 Judge Leventhal's decision permitting circumscribed
9 discovery of applicant's rebuttal witnesses and
10 inclusion of the resulting cross examination testimony
11 in the deponent's briefs".

12 Now, while this was going on, APL served
13 a second set of interrogatories and document requests
14 -- specifically on January 13th, a few days after your
15 ruling indicating that written discovery was out of
16 order at this point in the case.

17 And one of the -- there were two
18 interrogatories and one Document Production Request.
19 The interrogatories essentially focused on providing
20 information on when Conrail rail transportation
21 contracts would expire.

22 CSX objected to that Discovery Request in

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1 toto, basically based on your January ruling that said
2 that written discovery at this point of the case was
3 out of order.

4 There was a hearing on January 29th to
5 take up APL's Motion to Compel based on the CSX
6 objections. And at that point Mr. Gitomer on behalf
7 of APL, agreed to defer the ruling -- I'm sorry,
8 ruling on his specific request until the appeals --
9 the cross appeals that I referred to earlier -- had
10 been decided.

11 And then at that point you stated the
12 understanding that I think everybody had been reached,
13 that if the Board comes down with its decision prior
14 to the next Discovery Conference and if that satisfies
15 the movement, I trust that he will withdraw his
16 Motion.

17 And you had earlier said that, you know,
18 if the Board -- earlier on -- this is on page 20 of
19 the deposition -- I'm sorry, of the Discovery
20 transcript -- you say, "If the commission, if the
21 Board sustains me in my prior ruling, that certainly
22 will dispose of the -- at least the first half of the

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1 Motion made today. That is, with respect to the
2 interrogatories."

3 So, you know, the understanding was when
4 we were before you on January 29th -- at least it was
5 CSX's understanding that pending the outcome of the
6 Discovery -- of the appeals, this issue would be
7 decided once and for all.

8 That brought us up to, so the Board
9 sustained you and it was certainly our impression that
10 that would resolve the issue as to APL. Well, we
11 found out last week that it didn't, because at last
12 week's hearing Mr. Gitomer came back and he indicated
13 that he had narrowed his request.

14 He was still interested in written
15 Discovery but that he had narrowed his request, and
16 now his request was a list of expiration dates of
17 Conrail contracts which he understood existed. And in
18 this manner, he narrowed the earlier request.

19 Nevertheless, you found last week that the
20 request for a list of the expiration dates of the
21 Conrail contracts was controlled by Decision 64, which
22 I referred to earlier, as well as Decision 65.

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1 Essentially being a decision by the Board
2 that a commenter who sought to file rebuttal on
3 January 14th would be responsive applicants in the
4 case.

5 Because you will recall that responsive
6 applicants could file rebuttal on January 14th and a
7 commenter came in late and sought the leave to file
8 rebuttal. The Board ruled that no, that's new
9 evidence, the case is closed for the commenters, and
10 that's it.

11 So in any event, relying on Decisions 64
12 and 65 you found Mr. Gitomer's request for the list
13 was out of order, essentially.

14 Well, later that day we come to the next
15 chapter in this long saga. On February 5th, a few
16 hours after the hearing, we were served with a Notice
17 of Deposition for Mr. John Anderson who is an
18 executive vice president in CSX Transportation, Inc.
19 He is essentially the railroad's senior commercial
20 officer.

21 And among the things that -- in addition
22 to noticing his deposition, the deposition notice also

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1 required that he bring with him a list of the
2 expiration dates of the Conrail transportation
3 contracts.

4 So the very document that earlier in the
5 day you ruled APL -- that CSX -- none of the
6 applicants were required to produce, suddenly shows up
7 as part of a request to bring documents to a
8 deposition.

9 I want to set that issue aside because I
10 don't think you have to get to the issue of whether or
11 not a deponent, any deponent, can be required to bring
12 documents in this proceeding to a deposition.

13 And I'm prepared if we have to, to get
14 there, but begging your indulgence, what I want to
15 focus on is basically the right to take Mr. Anderson's
16 deposition at all, because I think that's where --
17 aside from the fact that the request for documents is
18 flawed -- APL's ability or anybody's ability at this
19 point to take Mr. Anderson's deposition I think is
20 absent. And I think we can dispense with all of this
21 on that basis.

22 Now, just very simply, Mr. Anderson was

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1 not one of the rebuttal witnesses. CSX made -- or I
2 should say, the applicants made a filing on December
3 15th. It was our rebuttal filing. It consisted of
4 many pages of narrative, argument by lawyers talking
5 about the evidence, and also about 40 or so rebuttal-
6 verified statements submitted by a variety of
7 witnesses.

8 However, Mr. Anderson is not one of them.
9 And what you ruled on January 8th and what the Board
10 ruled as part of Decision 64 as I read it, essentially
11 says that there's an acknowledgement that there's no
12 right to put new evidence in the record. There's an
13 acknowledgement that the applicants have the right to
14 close the record on their case.

15 But nevertheless, there is a right in
16 parties in the case to cross examine applicant's
17 rebuttal witnesses. So if a witness put in rebuttal,
18 a rebuttal-verified statement, the other side has the
19 right to test that evidence through cross examination.

20 Well, with Mr. Anderson there's nothing to
21 cross. He didn't submit a rebuttal-verified statement
22 and based on research that we've done, there is no

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1 precedent for this stage of the case to allow a non-
2 testifying witness to have their deposition taken at
3 this point. We couldn't find any examples of that,
4 and none have been brought to our attention.

5 Precedent as indicated by you on January
6 8th and by the Board in supporting you in sustaining
7 your decision in Decision 64 was that, there is a
8 right to cross examine rebuttal witnesses. And as I
9 say, nothing that we have seen indicates that the
10 right to take depositions goes beyond that.

11 And I think, to me there's a certain logic
12 in it because if the rule is, is that no new evidence
13 can be submitted in the briefs, you know, what is
14 taking somebody's deposition that didn't submit any
15 rebuttal evidence in the first place, but new
16 evidence?

17 Mr. Anderson didn't testify on December
18 14th so anything that he testifies to now it seems to
19 me, is clearly new evidence and it doesn't have the
20 imprimatur of cross examination to allow it to be
21 brought into the record at this point in time.

22 And as I said, I think I'll rest at this

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1 point, reserving any comments on the issue of the
2 production of the list.

3 JUDGE LEVENTHAL: All right. Very well.
4 Mr. Gitomer.

5 MR. GITOMER: Thank you, Your Honor. I
6 think the matter of whether a deposition is available
7 is clear that it is available under the statute
8 governing the commission, 49 U.S.C., Section 721(d),
9 and Section 11 of the Discovery Guidelines which
10 provides for depositions of parties of people other
11 than witnesses.

12 The reason APL chose Mr. Anderson is very
13 simple. Mr. Anderson is a signatory to the settlement
14 agreement between the National Industrial
15 Transportation League and CSX and Norfolk Southern.
16 Part of that agreement involved the issue of railroad
17 transportation contracts between Conrail and its
18 shippers.

19 That is the main issue that APL has been
20 interested in throughout this case, and we felt that
21 since the applicants have introduced this settlement
22 agreement and said it will resolve a number of

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1 problems in the case, that we had some questions as to
2 one section of the agreement involving contracts.

3 And we felt that since Mr. Anderson was
4 one of the signatories to the agreement which is
5 contained in the applicant's rebuttal, line one,
6 beginning at page 768 and on page 769 as Mr. -- is the
7 indication of Mr. Anderson's signature.

8 On that basis we sought to take his
9 deposition. With regard to requesting documents with
10 his deposition, we just requested one document; we
11 didn't request a thousand documents. And if CSX
12 doesn't have that document then all they need to do is
13 tell us that they don't have that document and we will
14 determine whether it is necessary to even take Mr.
15 Anderson's deposition.

16 But to produce documents, that's also
17 provided for in the statute, 49 U.S.C., Section
18 721(d)(1) which states, " A party to a proceeding
19 pending before the Board may take the testimony of a
20 witness by deposition and may require the witness to
21 produce records".

22 I think that's very clear. I think that

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1 allows us to request the records. I think the fact
2 that Mr. Anderson is a signatory to an agreement
3 allows us to take his deposition; that that is
4 provided for by Section 11 of the Discovery Guidelines
5 and by the statute governing the commission.

6 Mr. Harker's history was correct but keep
7 in mind, this is not a request for written discovery;
8 it's a request for a deposition. Again, the
9 applicants raised the issue of closing the record and
10 no new evidence.

11 We're not seeking to submit new evidence.
12 We want an answer to one question from Mr. Anderson
13 that the applicants should know. If they don't know,
14 that's an answer as well. That's all we're looking
15 for.

16 Thank you, Your Honor.

17 JUDGE LEVENTHAL: How do you differentiate
18 your position from Decision Number 64? Particularly
19 the one portion read into the record by Mr. Harker?
20 The Board has sustained my ruling about the
21 examination of a rebuttal witness.

22 MR. GITOMER: Your Honor, the only issue

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1 before the Board at that point in time were rebuttal
2 witnesses. There was no issue before the Board of
3 other people who conceivably could produce information
4 that would be necessary for the record.

5 JUDGE LEVENTHAL: All right. Do you have
6 anything further, Mr. Harker?

7 MR. HARKER: (Shakes head negatively.)

8 JUDGE LEVENTHAL: I'm going to grant the
9 Motion to Quash the subpoena on the same grounds that
10 I had earlier ruled with regard to the obtaining of
11 additional discovery by written documents and the
12 right to further examine a rebuttal witness.

13 As Mr. Harker read into the record, I
14 ruled at that time that the examination of a rebuttal
15 witness might produce a document that the seeking
16 party could annex to a brief and that would not
17 constitute new evidence.

18 However, my ruling was limited to the
19 examination of a rebuttal witness. The Board in
20 affirming my ruling on appeal in Decision Number 64,
21 specifically upheld my ruling with regard to the
22 further examination of rebuttal witnesses.

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1 Now, let's go off the record.

2 (Whereupon, the foregoing matter went off
3 the record at 9:58 a.m. and went back on
4 back on the record at 9:59 a.m.)

5 JUDGE LEVENTHAL: All right. The
6 conference stands closed.

7 (Whereupon, the Discovery Conference was
8 adjourned at 9:59 a.m.)
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