

SURFACE TRANSPORTATION BOARD 11/18/97 FD #33388 1-23

UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

+ + + + +

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

Tuesday,  
November 18, 1997

Washington, D.C.

The above-entitled matter came on for a  
oral argument in Hearing Room 4 of the Federal  
Energy Regulatory Commission, 888 First Street, N.E.  
at 8:45 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

APPEARANCES:On behalf of Conrail:

PAUL A. CUNNINGHAM, ESQ.  
GERALD P. NORTON, ESQ.  
of: Harkins Cunningham  
Suite 600  
1300 19th Street, N.W.  
Washington, D.C. 20036  
(202) 973-7601 (PAC)  
(202) 973-7605 (GPN)

On behalf of CSX:

JEFFREY A. BURT, ESQ.  
of: Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004  
(202) 942-5929 (JAB)

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 New York Cross Harbor Railroad  
Terminal Corporation:

JOHN D. HEFFNER, ESQ.  
of: Rea, Cross & Auchincloss  
Suite 420  
1920 N Street, N.W.  
Washington, D.C. 20036  
(202) 785-3700

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



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

(8:45 a.m.)

JUDGE LEVENTHAL: We'll go  
make a brief appearance. All right, the discovery  
conference will come to order. This is a discovery  
conference on the motion of the New York Cross Harbor  
Railroad Terminal Corp. The motion is to quash a  
deposition. We will take appearances for the New York  
Cross Harbor Railroad Terminal Corp.

MR. HEFFNER: Good morning, your Honor.  
My name is John Heffner and I am representing New York  
Cross River.

JUDGE LEVENTHAL: All right, for Conrail.

MR. NORTON: Gerald Norton, Harkins  
Cunningham for Conrail. With me is Paul Cunningham  
who does not have a good voice today.

JUDGE LEVENTHAL: All right.

MR. BURT: Jeffrey Burt with Arnold &  
Porter, representing CSX.

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

JUDGE LEVENTHAL: All right. I have the

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 motion filed by New York Cross Harbor and the reply of  
2 Conrail and the Consolidated Rail Corporation. It's  
3 your motion Mr. Heffner.

4 MR. HEFFNER: Thank you.

5 JUDGE LEVENTHAL: Do you have anything  
6 further you wish to tell me?

7 MR. HEFFNER: Yes sir. Conrail would have  
8 you believe that this motion is untimely. That's not  
9 true.

10 The dispositive section, it seems to me,  
11 of the discovery rules provides very simply that a  
12 responding party shall within five business days after  
13 receipt of service state a response stating all of its  
14 objections to any discovery, any discovery.

15 What happened in this case is we received,  
16 and I believe it was the probably about the close of  
17 business Friday, November the 7th, a request to take  
18 -- a notice to take Mr. Crawford's deposition. The  
19 following Monday I contacted the client and also its  
20 New York counsel and we decided that it would be  
21 inappropriate for Conrail to take Mr. Crawford's  
22 deposition for the following reason. Cross Harbor has

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 pending antitrust litigation against Conrail in  
2 federal court in New York and there is a discovery bar  
3 in that proceeding requested by Conrail. In fact,  
4 requested by the very same law firm, Mr. Cunningham's  
5 law firm, that is also before you today.

6 My recollection is, and it might have been  
7 on Monday and it may have -- but it was certainly by  
8 no later than Wednesday, that we contacted Conrail's  
9 counsel and in fact I believe I contacted Mr. Norton  
10 because it was his signature on the notice, and said  
11 "Can we handle this another way? We simply cannot  
12 agree to let Mr. Crawford be deposed." Conrail was  
13 unbending and unwilling to compromise except they  
14 would compromise by doing it their way.

15 And we then prepared the appropriate  
16 papers and sent them to Conrail and to yourself. I  
17 contacted your office on Friday morning and got voice  
18 mail. My recollection is that we talked right after  
19 lunch on Friday and then this matter is before you.

20 Now apparently there is an ambiguity in  
21 the rules. There is another provision, Section 18,  
22 that deals with discovery disputes. But the way I

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 read this, the first thing that must be done is for  
2 the parties to attempt to resolve a discovery dispute  
3 voluntarily. It would seem to me it would be much  
4 better to resolve it voluntarily before invoking your  
5 good offices. And that is exactly what we did.

6 And then in our conversation you said I  
7 basically hold -- if I might put it this way, hold  
8 court on Thursdays, but I'd be happy to entertain this  
9 anytime Tuesday through Thursday. Conrail and myself  
10 talked and we said that today would be fine.

11 And so the simple fact of the matter is  
12 that it's timely and in fact under the normal rule  
13 that you don't count the day you received something,  
14 and the next two days, Saturday and Sunday were not  
15 business days. The first business day would be Monday  
16 of last week. Tuesday was a federal holiday so that  
17 doesn't count. Wednesday would be the second day,  
18 Thursday the third day. In fact, we were one day  
19 early. The fourth day.

20 JUDGE LEVENTHAL: All right. How about  
21 discussing the merits of the reply that Conrail has  
22 filed? They say there is no basis. The facts set

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1       forth in your motion is no basis for refusing a  
2       deposition.

3               MR. HEFFNER: It seems to me, your Honor,  
4       that if CSX or perhaps Norfolk Southern wanted to take  
5       Mr. Crawford's deposition, that you might say what's  
6       good for the goose is good for the gander. They would  
7       be within their rights in taking his deposition.

8               In reviewing his, what he called verifying  
9       statement, it basically concerns -- the three  
10       paragraphs contained in this statement are a mixture  
11       of New York Cross Harbor history and concerns about  
12       what CSX will do post merger.

13              And in fact, the entire thrust of our  
14       comments really deal with two issues. One, what use  
15       of Cross Harbor will CSX make once this acquisition  
16       transaction has been consummated? And two, kind of a  
17       subsidiary issue which concerns both NS and CSX.  
18       Namely, if Cross Harbor prevails in its antitrust suit  
19       against Conrail, or if the suit is settled with the  
20       result that Cross Harbor does get some monetary  
21       relief, our concern is that if the post transaction or  
22       post acquisition Conrail has insufficient assets to

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 pay a judgement or settlement that could be in the sum  
2 several hundreds of millions of dollars -- and I'm  
3 sure there will be other claims on what I guess you  
4 might loosely call the Conrail estate -- there won't  
5 be enough assets to pay.

6 We want to make sure that CSX and Norfolk  
7 Southern stand by their statement in the merger filing  
8 or the acquisition that should Conrail's post  
9 acquisition assets be inadequate to satisfy claims,  
10 that they will guarantee those claims.

11 So, this issue here is really not a  
12 Conrail issue, it's a Norfolk Southern and/or CSX  
13 issue. If they wish to take Mr. Crawford's deposition  
14 or seek other testimony from him or seek other  
15 discovery from him, then we will have to deal with  
16 that in the appropriate manner.

17 So its the wrong deposer. That's what I  
18 have to say. Thank you.

19 JUDGE LEVENTHAL: All right. Mr. Norton?

20 MR. NORTON: Your Honor, on the timeliness  
21 point, because this is a significant threshold issue,  
22 the rules, the discovery guidelines are not at all

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1       ambiguous in the way that Mr. Heffner suggests. What  
2       he is referring to is a provision that deals with  
3       written discovery which you have 15 days to respond.

4               And, as your Honor is aware, there is a  
5       provision that says if you are not going to respond to  
6       a request for documents or interrogatories at all,  
7       then you should indicate that at five days and then we  
8       can get a ruling on that objection.

9               That does not apply to depositions.  
10       Depositions are dealt with in other paragraphs of the  
11       Guidelines. It is crystal clear that a party who  
12       files a verified statement must submit to a  
13       deposition. It's in the Board's Decision No. 6, it's  
14       in the Guidelines, Paragraph 11, 11-13 deal with  
15       depositions, and subsequent paragraphs deal with  
16       written discovery.

17              Mr. Heffner's reliance on the five day  
18       initial objection is simply out of place. It has  
19       nothing to do with depositions.

20              If you took his approach, the Guidelines  
21       at this point in time, because of the time pressure on  
22       applicants in responding to the various comments that

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 were submitted on October 21, even the December 15  
2 deadline, your Honor may recall that the notice for  
3 deposition at this time was shortened from two weeks  
4 to five days, five business days. Recognition of the  
5 intricacies of the moment.

6 Under his approach, if we give him five  
7 days notice, he could come in on the day of the  
8 deposition was due with his objection and seek a --  
9 and make a motion to quash. And five days would  
10 become two weeks or something more. It just doesn't  
11 make any sense to read the rules that way.

12 If he wanted to avoid a deposition, it was  
13 his duty to come in and get a ruling before the  
14 deposition was to occur. That's all -- that's what  
15 you have to do in court and that's what you have to do  
16 here. You can't just file the papers when you want  
17 and think that because you filed papers you are off  
18 the hook and you don't have to show up for deposition.

19 Mr. Heffner called me last Monday and said  
20 he hadn't -- you know, the objection based on the stay  
21 order in the New York antitrust litigation. And he  
22 was going to file with your Honor to block the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 deposition.

2 I told him then basically what was in our  
3 reply, that the stay order had nothing to do with  
4 discovery in this proceeding. We needed the  
5 deposition. We wanted it. And if he had an objection  
6 about particular questions, he had an adequate remedy  
7 by raising them at the deposition.

8 Monday passed, Monday was the day if he  
9 wanted a hearing last week to get a ruling before  
10 today, the deposition being scheduled today. He  
11 should have raised the question with your Honor to  
12 seek a Thursday hearing last week.

13 Monday passed, we had no word of a  
14 hearing, no motion to quash. I thought he had been  
15 persuaded that he had a sufficient remedy at the  
16 deposition and then the issue had passed for the  
17 moment.

18 But that was the time when he could and  
19 should have acted. And he can't come in later and on  
20 the premise that just because he files a motion at  
21 some point before the deposition, he is off the hook  
22 and his client doesn't have to show up, assuming your

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Honor rejects his argument.

2 So that's the story on the timeliness. He  
3 had an ample remedy under the Guidelines, under the  
4 normal process that is established there. And the  
5 five day provision for initial objection simply has no  
6 application in this context.

7 Now --

8 JUDGE LEVENTHAL: How about his argument  
9 that you have the wrong party. That Conrail should  
10 have no interest in deposing this witness?

11 MR. NORTON: Well, your Honor, discovery  
12 requests have been served by a variety of the parties  
13 here, sometimes joint, sometimes separate. There is  
14 nothing that says that all parties have to join in  
15 every request to make it legitimate.

16 The applicants are joint applicants  
17 seeking approval of this transaction. Conrail is  
18 seeking approval as much as NS and CSX are. So I  
19 think that right away is a false distinction.

20 How we divide up the work, that's an  
21 internal matter. Conrail knows the most about this  
22 matter because of its experience in dealing with Cross

NEAL R. GROSS  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 Harbor and, you know, the facts that underlie their  
2 comments. And it's quite natural that we would take  
3 the lead on this particular item.

4 The notion that the same questions could  
5 be asked by another party would make a difference in  
6 form over substance, it seems to me.

7 In addition, Conrail doesn't disappear  
8 when this transaction goes through. Conrail continues  
9 to exist and particularly in the area, the North  
10 Jersey shared assets area, which is the one that is  
11 most directly implicated here. Conrail will be an  
12 operating entity which will be working and handling  
13 trains for the benefit of both CSX and NS. So Conrail  
14 will continue to be an entity which will have  
15 operations and revenue and assets. So it's not as if  
16 it just -- it goes off the screen once this is  
17 approved.

18 So Conrail has an interest. Conrail as a  
19 continuing entity has an interest in issues that are  
20 raised here.

21 Now, the -- I didn't hear anything from  
22 Mr. Heffner about the fact that there was a stay order

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 which he relied on earlier. That stay order plainly  
2 has nothing to do with this litigation. And I don't  
3 think he can even pretend to try to suggest that it  
4 does here.

5 If he has any questions that he thinks are  
6 problematic because of discovery restrictions of some  
7 kind in the New York case, they can be raised at the  
8 deposition. That is the normal process for resolving  
9 questions about particular questions in a deposition.  
10 It is not to say you can't ask the first question.  
11 And the Board's decision No. 6 said makes clear that  
12 a deposition -- a person who submits a verified  
13 statement must submit to a deposition. And that,  
14 again, is emphasized in Paragraph 11 of the  
15 Guidelines.

16 Now, and here in this case, what you have  
17 is the comments of Cross Harbor. They don't just say  
18 that well there is a lawsuit between Cross Harbor and  
19 Conrail which could theoretically result in a  
20 judgement and they have a large prayer for relief so  
21 maybe it would be a large judgement and therefore they  
22 want some protection. That might be a different

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 matter.

2           What their comments do is go at great  
3 length into the relationship between the two railroads  
4 and the particulars of -- and they make a lot of  
5 factual assertions dealing with the underlying  
6 gravamen of the antitrust complaint. Which is  
7 obviously -- I don't think they are trying to try that  
8 case here, but they are obviously trying to do  
9 something about muddying the waters with these  
10 allegations in the context of saying they want CSX and  
11 NS to be obliged to stand for the judgement.

12           It is extraordinary relief that they are  
13 seeking in any event, but the way in which they are  
14 doing it is something that has to be borne in mind  
15 here.

16           Now, Mr. Crawford's verified statement  
17 addresses facts concerning Cross Harbor and the  
18 relationship, some of the points covered in the  
19 comments of Cross Harbor. And again, we are not  
20 expected to, should not have to, nor should the Board  
21 accept them at face value without the opportunity to  
22 probe them and to see how they relate to the comments.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1           So it is a perfectly legitimate exercise  
2           and it makes no difference that it is being conducted,  
3           at least in form by Conrail, rather than another of  
4           the applicants. There is no, absolutely no basis for  
5           saying that the deposition is precluded by anything  
6           that's happened in the New York litigation and the  
7           relief sought is untimely.

8           If your Honor rules a deposition should be  
9           allowed, and there is no grounds presented for not  
10          going forward, I don't know whether Mr. Crawford is  
11          going to show up this morning. We have a reporter who  
12          is going to be there at 10:00. We are going to be  
13          ready to go.

14          If he doesn't show up, I think your Honor  
15          should make clear that he does so -- Cross Harbor does  
16          so at its peril in terms of possible subsequent relief  
17          that might be appropriate or sanctions based on that  
18          failure. Whether its striking the verified statement  
19          or verifying statement as he calls it, or the  
20          comments, or whatever else might be appropriate.

21                 JUDGE LEVENTHAL: All right, Mr. Heffner.  
22          Mr. Norton makes a very serious argument here. Moving

1 aside the timeliness, on the merits of your motion I  
2 have to tell you I don't see that their stay from  
3 proceeding before the Board with regard to your  
4 antitrust action. You feel that the stay you  
5 received, that's in existence in the federal court,  
6 stops this deposition here?

7 MR. HEFFNER: The way I see that it could  
8 be used, your Honor, is to ask questions in this case  
9 that really pertain more to the federal court case.  
10 If I might --

11 JUDGE LEVENTHAL: Mr. Norton rightfully  
12 says you can always object.

13 MR. HEFFNER: He is correct theoretically.  
14 But as I'm sure your Honor can understand, when you  
15 are in an oral -- like a deposition environment as  
16 opposed to just looking at a series of  
17 interrogatories, you have more time to think and react  
18 when you are dealing with something in writing than  
19 when you are dealing with an oral question where you  
20 are anticipating what the next question might be or  
21 thinking about the previous question and so on and so  
22 forth.



1 As I've stated, we would certainly -- I  
2 cannot conceive that a deposition taken by CSX or  
3 conceivably NS would -- I would have the same level of  
4 problem with.

5 If I might point out several things. One,  
6 if I can just --

7 JUDGE LEVENTHAL: You say you wouldn't  
8 have the same problem if the deposition was taken by  
9 NS? Is that --

10 MR. HEFFNER: CSX or conceivably NS. I  
11 don't have any problem --

12 JUDGE LEVENTHAL: Why would that be  
13 different though? Why would that be different?

14 MR. HEFFNER: Because there is no  
15 litigation between New York Cross Harbor and CSX --

16 JUDGE LEVENTHAL: But Mr. Norton would  
17 probably be at the deposition anyway. You know, they  
18 are joint applicants and so far in virtually all the  
19 conferences we have had, all the attorneys for the  
20 applicants have been present.

21 MR. HEFFNER: I'm sure that's --

22 JUDGE LEVENTHAL: Regardless of whose

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 motion it was.

2 MR. HEFFNER: Right, but I don't know that  
3 it would be Conrail making up the questions.

4 JUDGE LEVENTHAL: Oh I'm sure that they  
5 speak to each other.

6 MR. HEFFNER: I'm sure they do. One  
7 thing, if I can just dwell on the timeliness issue for  
8 one more minute.

9 JUDGE LEVENTHAL: Let me tell you, I've  
10 got to decide this on the merit. I've heard the  
11 arguments on timeliness.

12 MR. HEFFNER: Okay, fine.

13 JUDGE LEVENTHAL: But I prefer to decide  
14 it on the merits. I'm going to rule on both, however.

15 MR. HEFFNER: I understand.

16 JUDGE LEVENTHAL: So if you wish to make  
17 your argument on timeliness, all right. But your  
18 bigger problem is on the merits of the motion.

19 MR. HEFFNER: Okay. One comment on the  
20 timeliness. If your Honor decides to require a  
21 deposition, we would work out with Conrail a date, but  
22 that date won't be today. I have no idea what Mr.

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 Crawford's plans are. But I can tell you that he is  
2 not available. But we would make him available on a  
3 timely basis.

4 JUDGE LEVENTHAL: Well, you know we have  
5 discovery guidelines in effect. And the fact that you  
6 made a motion didn't stay the deposition. So I think  
7 we have to defer that to after my ruling.

8 MR. HEFFNER: Fine. I think a question  
9 that your Honor might direct to -- I guess really to  
10 Conrail. The question to me is how many depositions  
11 has Conrail taken in this case of short line railroad  
12 executives who have taken a position in this merger  
13 either for or against the merger?

14 JUDGE LEVENTHAL: All right, we'll let Mr.  
15 Norton --

16 MR. NORTON: I can't imagine the relevance  
17 of the question. But I believe no depositions have  
18 been taken by anyone so far. We've -- as your Honor  
19 is well aware of, we have been dealing with written  
20 discovery as a prelude for depositions which we are  
21 now just beginning. That's all I can say.

22 JUDGE LEVENTHAL: All right. That's your

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 answer.

2 MR. HEFFNER: We believe it's a fishing  
3 expedition.

4 JUDGE LEVENTHAL: No, but you see you have  
5 a bigger problem, Mr. Heffner. Our discovery rules  
6 are quite explicit. They have a right to discover of  
7 any witness. And you have a witness that has provided  
8 testimony. They have an absolute right to discover.

9 Whether its a fishing expedition or not,  
10 how can we tell that now? We don't know what  
11 questions they are going to ask. I don't know and you  
12 don't know. But you always have remedy. If they ask  
13 an improper question, you object.

14 MR. HEFFNER: And in the appropriate case,  
15 we will. Anyhow, that is our position. The issues  
16 once again, just to emphasize, the issues in the one  
17 page verified statement concern CSX and to a lesser  
18 extent Norfolk Southern. Thank you.

19 JUDGE LEVENTHAL: All right. Anybody  
20 else? Any further arguments?

21 All right. I'm going to deny the motion  
22 to quash. I find that the Guidelines are specific on

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1322 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



1 the timeliness and I would deny the motion to quash on  
2 the basis that it's untimely made.

3 However, as I stated earlier, I prefer to  
4 rule on the merits. On the merits, I find the  
5 Guidelines are very specific that the joint applicants  
6 have a right to depose any witness. I find that the  
7 argument that Conrail is not the proper deposer, I  
8 find that that has no merit for two reasons.

9 Number one, the applicants are joint  
10 applicants and as Mr. Norton argued, during the course  
11 of this proceeding which has been going on for  
12 approximately three months now, we have been having a  
13 discovery conference virtually every Thursday and on  
14 many occasions on other days during the week. The  
15 applicants have all appeared jointly in response to  
16 their motion, regardless of who made the motion.

17 So I find there is no merit to that  
18 contention and the motion is denied completely.

19 Now with respect to the time of the  
20 deposition, there has been no stay of the deposition  
21 and under our rules I don't know that I would have  
22 granted a stay. The parties have throughout this

**NEAL R. GROSS**  
COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 proceeding been stressing the compressed time to  
2 conduct discovery and also to present their cases to  
3 the Board. Let's go off the record.

4 (Whereupon, the foregoing matter went off  
5 the record at 9:05 a.m. and went back on  
6 the record at 9:16 a.m.)

7 JUDGE LEVENTHAL: In our off the record  
8 discussion, counsel for Conrail has agreed that they  
9 will reschedule the deposition for some day next week  
10 at a mutually agreeable time between the parties. The  
11 deposition will take place in Washington as provided  
12 for in the discovery guidelines.

13 Anything further before me this morning?

14 [No response.]

15 JUDGE LEVENTHAL: All right. Conference  
16 stands closed.

17 PARTICIPANTS: Thank you, your Honor.

18 (Whereupon, the above matter was concluded  
19 at 9:17 a.m.)  
20  
21  
22