

SURFACE TRANSPORTATION BOARD 12/03/97 FD #33388 1-25

## 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

Wednesday,  
December 3, 1997

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

(9:35 a.m.)

JUDGE LEVENTHAL: The Discovery Conference  
will come to order.

This is Discovery Conference and STB  
Finance Docket number 33388.

We will take appearances at this time.

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

MR. HARKER: Drew Harker from Arnold &  
Porter for CSX.

MS. KRASNOFF: Helene Krasnoff from Arnold  
& Porter for CSX.

MR. NORTON: Gerald Norton of Harkins  
Cunningham for Conrail.

MR. GREENBERG: For International Paper,  
Edward Greenberg.

JUDGE LEVENTHAL: All right, anybody want  
to report on any developments, if any, since our last  
session?

MR. HARKER: I would be glad to, Your  
Honor.

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1 I believe that there were three matters on  
2 your calendar for this morning. Let me report to you  
3 on each one.

4 I believe that you have received various  
5 communications reporting on two of the three.

6 The first one that I would like to report  
7 on is the CSX and NS motion to compel with respect to  
8 SEPTA.

9 We received yesterday a copy of a letter  
10 from Mr. John Ehlinger on behalf of SEPTA. I notice  
11 that you are shown as receiving a copy of it.

12 This does reflect our understanding which  
13 is basically that they are going to be faxing us the  
14 responses today by noon, then putting the documents  
15 responsive to our requests in overnight mail, such  
16 that they will be received tomorrow.

17 But in any event, if we do not get the  
18 responses today by noon, they have agreed that the  
19 motion to compel can be relisted for tomorrow. So we  
20 are hopeful that this issue has been resolved. But I  
21 think that at this point it is essentially in abeyance  
22 pending what happens at noon today.

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1 All right. Very well.

2 MR. HARKER: The second issue; I have been  
3 authorized by counsel of Centerior Energy Corporation  
4 to report to you.

5 Centerior had filed a motion to compel the  
6 applicant's production of documents relating to a  
7 settlement agreement. Applicant and Centerior worked  
8 out their dispute and that issue is not before Your  
9 Honor this morning.

10 It is my understanding, talking to Mr.  
11 Pergolizzi, counsel for Centerior, that he has  
12 communicated that to you.

13 JUDGE LEVENTHAL: Yes, I received a  
14 communication from him.

15 MR. HARKER: And that brings us to the  
16 third and final issue of the day which I hope we will  
17 be able to work out. This involves International  
18 Paper and applicant's motion to compel with respect  
19 to, I believe, the first set of discovery requests  
20 that had been filed on International Paper. Those  
21 were the subject of extensive discussion last week.

22 We have received, yesterday, responses to

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1 all but one of the requests which were the subject of  
2 the motion to compel. Those that we received  
3 yesterday do look to be responsive to the request.

4 The only problem is with respect to  
5 interrogatory number 12.

6 Counsel for International Paper furnished  
7 us with a response to that interrogatory which we  
8 though was not responsive and was not consistent with  
9 what had been discussed at last week's discovery  
10 conference.

11 And this morning about 8:30 we received  
12 some additional information from International Paper  
13 which counsel for International Paper and we were  
14 discussing when you came in this morning.

15 We are trying to determine to what extent  
16 the information provided this morning is essentially  
17 responsive and answers the particular interrogatory  
18 number 12.

19 So, unless there is an objection, what I  
20 would propose is I think that if you gave us some more  
21 time I think I would like to meet with counsel for  
22 International Paper, go through these computer

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1 printouts that show some data so that I can better  
2 understand what is identified in the various data  
3 columns.

4 Assuming that I do that and it seems it  
5 answers the interrogatory, I don't think we would need  
6 to take any more of your time this morning.

7 MR. GREENBERG: Your Honor, ordinarily I  
8 would agree, but in this case I actually don't agree  
9 and I think we ought to deal with the issue very  
10 briefly.

11 JUDGE LEVENTHAL: All right.

12 MR. GREENBERG: I am looking at the  
13 printout now and I think it probably is not fully  
14 responsive to the information as I understand they  
15 want it.

16 So, I think we ought to deal with the  
17 motion to compel on the merits. That is my view.

18 If it turns out, Your Honor, that you  
19 instruct us to provide additional information than  
20 what we have already provided, then we are going to go  
21 back and do it.

22 As I read this the information is not

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1 responsive because what I understand they are asking  
2 for in interrogatory number 12, and I think that is  
3 where the dispute is, they are asking for all traffic  
4 that is originated or received by International Paper,  
5 and this is literally a quote from interrogatory  
6 number 12, "That could be handled by using single line  
7 service by either CSX or NS if the transaction is  
8 approved."

9 That means to me that they are looking for  
10 all traffic that is originated at any facility of  
11 International Paper that is local to CSX or NS and  
12 which is terminated on Conrail, or vice versa.

13 If Your Honor needs it, I have the  
14 interrogatory here.

15 JUDGE LEVINTHAL: I am looking for my  
16 copy.

17 MR. GREENBERG: Let me show you this; it  
18 is number 12 I believe.

19 We had originally objected that it was way  
20 beyond the scope of any of the documents that we filed  
21 in this proceeding.

22 Before addressing that issue, I am just

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1 saying, Your Honor, that we did provide them with a  
2 fax this morning that I am just looking at now. I  
3 didn't even see it; I was out of town yesterday when  
4 this data came into us.

5 I am looking at it, and on its face, true,  
6 it does not appear to be responsive fully to your  
7 interrogatory. I am just looking at it and plainly  
8 this is not all of International Paper's traffic.  
9 This couldn't be, because Conrail is a major  
10 destination and I don't see a large number of  
11 facilities that are on NS and CSX on here.

12 So, it is just not fully responsive.

13 So, I think an adjournment for that reason  
14 is not going to resolve that issue unless he is going  
15 to accept this in substitute for all the information  
16 he has been seeking.

17 But I would like to address the question  
18 of what information he is seeking.

19 JUDGE LEVENTHAL: Well, let's find out.  
20 Mr. harker, do you have any response or do you agree?

21 MR. HARKER: What am I responding to, Your  
22 Honor. I don't know now what this is. I got a voice

1 mail this morning from Mr. Greenberg's colleague who  
2 was here last week arguing, Mr. Avitabile, telling me  
3 that he thought this information would be sufficient.

4 I had a conversation with Mr. Greenberg  
5 this morning where that was my impression as well.  
6 That this information was sufficient although he  
7 didn't have the benefit of having the document in  
8 front of him.

9 All I have asked is what is this document?  
10 It is a computer printout, it has seven columns of  
11 information on it, and all I have asked what is this?  
12 What is in the columns and nobody has been able to do  
13 that, so I have no idea.

14 JUDGE LEVENTHAL: Why don't we resolve  
15 this. Why don't we take a short recess and explain to  
16 Mr. Harker what it is you are giving to him, and then  
17 we will hear arguments.

18 MR. GREENBERG: Your Honor, our problem is  
19 that I am not even sure what this is, but it is plain  
20 to me that it is not responsive. It says, for  
21 example, that there are a total of 989 shipments in  
22 the period of a year. That is impossible

1 I just know that is impossible.  
2 International Paper has 40 facilities, I don't know  
3 how many are on CSX, NS and Conrail, but a large  
4 number of them. There is a rail budget of over \$ 350  
5 million. It is inconceivable that this is it.

6 So, I am telling Mr. Harker now that this  
7 is not responsive. It is plain it lists some traffic  
8 that originates and terminates on CSX. There is no  
9 traffic on NS so by definition it is not responsive.

10 I don't want to argue against non-  
11 production. What I am telling Your Honor is that this  
12 is not fully responsive, I know it is not.

13 So, I would like to argue on the merits,  
14 I want to argue against producing any further  
15 information. We don't want to go back, we don't want  
16 to spend ten minutes talking to Mr. Harker now and  
17 come back to you another week and argue about this  
18 because I don't think that we should be required any  
19 more information, and I want to explain why.

20 JUDGE LEVENTHAL: Mr. Harker says he  
21 doesn't know what you have given to him, so I don't  
22 know where we go from there.

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1 Is that right, Mr. Harker? Or do you want  
2 to argue?

3 MR. HARKER: I am at a loss. I don't like  
4 to argue. I like to try to work things out; I think  
5 that is more productive.

6 But if my counterpart tells me that there  
7 is no point in discussing it because he knows that  
8 this information is not responsive, although as I said  
9 his colleague represented that it was, but he looks at  
10 it and knows it is not, then I am not in a position to  
11 accept it.

12 MR. GREENBERG: I don't want to get into  
13 a long argument, but this includes a printout that has  
14 origins, destinations and routings.

15 It has, for example, a routing Conrail  
16 Potomac Yards CSX, which means that it originated on  
17 Conrail and terminated on CSX.

18 I see no NS routing on here. By  
19 definition there is no NS traffic on this printout.  
20 By definition, therefore, it is not fully responsive.

21 All I am suggesting to Your Honor, is I  
22 don't mind sitting down with Mr. Harker for five

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1 minutes. And at the end of five minutes he is going  
2 to say that it is not responsive.

3 But my view is that I would just as soon  
4 argue the substance of the motion now, because if you  
5 are going to order us to produce information that is  
6 full responsive, we are going to have to go back and  
7 do a special study to produce this information.

8 It is not here before us, I can tell that  
9 it is not here.

10 MR. HARKER: Well, they didn't do a  
11 special study to produce this information, Your Honor.  
12 This looks like it is maybe half of it because it  
13 does cover Conrail and CSX.

14 They didn't do a special study to present  
15 this, it is a computer printout. Maybe there was a  
16 breakdown in communication at International Paper.  
17 The top of the chart says, "Requested Data: Rail Cars  
18 Moving CR/NS CR/CSXT"

19 So, it looks like they got it in the  
20 computer, and it is pushing a button and spitting out  
21 a printout.

22 I am not sure, frankly, that a printout is

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1 responsive, but given that I don't know what is on the  
2 printout I can't tell you.

3 So, I don't know why there is suddenly a  
4 concern about doing a special study, when we have a  
5 three or four page fax that appears to be at least  
6 partially responsive.

7 JUDGE LEVENTHAL: I don't know that that  
8 is Mr. Greenberg's argument yet.

9 MR. GREENBERG: That's right.

10 JUDGE LEVENTHAL: Is that your argument?

11 MR. GREENBERG: No, no, you are right Your  
12 Honor that is not the argument given.

13 My argument is that it is irrelevant. I  
14 have a number o things that I would like to say. All  
15 I am suggesting now is whether we ought to adjourn for  
16 five minutes and talk about this and then call you  
17 back here in five minutes. Then Mr. Harker is going  
18 to tell you in five minutes that it is non-responsive.

19 JUDGE LEVENTHAL: All right. Let's go off  
20 the record.

21 (Whereupon, the proceedings recessed from  
22 9:49 a.m. until 9:49 a.m.)

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1 JUDGE LEVENTHAL: Back on the record. We  
2 have discussed the usefulness of having a recess to  
3 see if this matter could be resolve. Mr. Greenberg  
4 says that the answer they have given is non-  
5 responsive.

6 I raised the question as to whether or not  
7 we covered this issue in our telephone conference of  
8 last week.

9 Mr. Harker is going to respond.

10 MR. HARKER: Yes, Your Honor, we did. I  
11 am reading now from pages 55 to 56 of the transcript  
12 from last Tuesday, the November 25, 1997 discovery  
13 conference.

14 I won't read all of it, but I am happy to  
15 give it to Your Honor and Mr. Greenberg if you would  
16 like to look at it.

17 The quote from Mr. Avitabile, the entire  
18 dialogue begins on page 54. I am only picking up --

19 JUDGE LEVENTHAL: Just a moment Mr.  
20 Harker, I have the transcript. Do you have the  
21 transcript?

22 MR. GREENBERG: I do not, Your Honor.

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1 JUDGE LEVENTHAL: Let me pass you that to  
2 look at it.

3 MR. GREENBERG: Thank you.

4 JUDGE LEVENTHAL: Again, let's go off the  
5 record.

6 (Whereupon, the proceedings recessed from  
7 9:50 a.m. until 9:54 a.m.)

8 JUDGE LEVENTHAL: All right, Mr.  
9 Greenberg, you have had an opportunity to read the  
10 transcript, what do you have to say?

11 MR. GREENBERG: I've read the transcript,  
12 Your Honor, and I now recall what Mr. Avitabile  
13 reported when he came back.

14 It was his impression that all the  
15 interrogatories were limited with respect to responses  
16 to issues pertaining to the Erie and Lock Haven  
17 facilities.

18 So, I am looking at this printout and it  
19 appears to be traffic that, in large part, is  
20 originating at Erie, although it looks like there is  
21 other traffic on here as well. I am really not sure  
22 what this provides.

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1 But I am unclear, and I think that we need  
2 to go back to what exactly your ruling was. But it is  
3 unclear to me from the transcript, I understand the  
4 disagreement from the other side of the table, about  
5 whether we are required to produce system-wide  
6 information on all of International Paper's traffic  
7 that originates NS, CSX, and Conrail that is going any  
8 place, or is it just traffic that relates to the Erie  
9 facility which is all that we had talked about in our  
10 comments.

11 So, it is not clear to me what the  
12 resolution of the question was as to number 12. So,  
13 I am not sure what that ruling was.

14 JUDGE LEVENTHAL: Okay. Mr. Harker, what  
15 is your impression of the ruling?

16 MR. HARKER: I think the transcript is  
17 very clear. At the outset, we were talking about the  
18 scope of the disagreement here between International  
19 Paper and the applicants. Mr. Avitabile said, "Your  
20 Honor, whatever the scope of the disagreement, there  
21 ain't no disagreement over interrogatory number 12."

22 I will read it into the record because I

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1 love the language. And I will tell you that Mr.  
2 Avitabile, when I read it to him yesterday, didn't  
3 remember it, but he doesn't dispute it.

4 This is what he says on the bottom of page  
5 55.

6 "And we have even agreed to respond fully  
7 to interrogatory number 12, without limitation. That  
8 interrogatory, in my understanding, from my discussion  
9 with counsel, is essentially an effort to determine  
10 what current movements involving CSX/CR or NS/CR will  
11 become single line movements with either NS or CSX.

12 And although we don't concede the  
13 relevance of that, that is not something that is so  
14 obtrusive that we couldn't obtain that information, at  
15 least informing them of what routes we are currently  
16 using that joint service.

17 That would be reasonable to us and we  
18 would be happy to provide that information."

19 JUDGE LEVENTHAL: My recollection is that  
20 I didn't make any ruling on that. That was a  
21 concession made with Mr. Avitabile.

22 MR. GREENBERG: Avitabile.

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1 JUDGE LEVENTHAL: I have a lot of trouble  
2 pronouncing his name. But the record speaks for  
3 itself. I didn't rule. He said we're giving them  
4 everything with regard to interrogatory number 12 and  
5 I took it at face value. I wasn't asked to make a  
6 ruling, a s a matter of fact.

7 MR. GREENBERG: All right; we are before  
8 you now and we want to object.

9 JUDGE LEVENTHAL: Well I think you are out  
10 of court at this time; we can't keep re-arguing the  
11 same issues.

12 In our last session, last Tuesday, you  
13 made a complete concession.

14 MR. GREENBERG: Your Honor, in fairness,  
15 let me bring back the record here about what occurred  
16 last week. And I am not saying that Mr. Avitabile was  
17 not authorized to speak.

18 But last week, at the applicant's notice  
19 of hearing before Your Honor when you weren't here,  
20 and I could not attend because I was also unavailable  
21 and it was on short notice and we objected to that and  
22 we asked that the matter be put off to a time when I

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1 was going to be able to be here. Mr. Avitabile was,  
2 nonetheless summoned simply to argue on the question  
3 of the timing of the hearing.

4 So, he goes to the hearing so we have  
5 somebody to send, and he wasn't prepared to argue,  
6 substantively, the issue. Now he made this statement  
7 Your Honor, but I can tell you, had I been here, I  
8 would not have said that. And I would not have said  
9 that for a couple of reasons.

10 One of which is, Your Honor, the  
11 information they are asking for, they have that  
12 information. We are talking about traffic that  
13 originates on Norfolk Southern and CSX. They have all  
14 that. Traffic that also terminates on Conrail.

15 They have done a traffic study in this  
16 proceeding, supposedly to look at all that traffic.  
17 Now, why on earth are we supposed to duplicate the  
18 work that they have already done; it doesn't make any  
19 sense.

20 I would bring you back to the question of  
21 the whole issue of burden and harassment. I don't  
22 what Mr. Avitabile said about this, but I brought with

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1 me just a copy of a map showing the rail system and I  
2 am going to show you what it is that we are talking  
3 about.

4 We are talking about an operation that  
5 runs between International Paper's Erie mill to Lock  
6 Haven, that is a single line route. That is all there  
7 is. That is all we are talking about here. We are  
8 talking about trying to preserve a single line unit  
9 train operation. We responded to the petitioners in  
10 discovery, that it is the only unit train operation  
11 that is currently carrying any of International  
12 Paper's traffic.

13 They are asking us an enormous traffic  
14 study of all the traffic, none of which has anything  
15 to do with the issues we raised in this case. Not a  
16 single bit.

17 Your Honor, with all due respect, I  
18 understand that we are arguing sort of a dead horse  
19 here, but if I had been here last week I would have  
20 made this argument to you and would have made  
21 additional arguments to say this is ridiculous, we  
22 shouldn't have to do this.

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1 JUDGE LEVENTHAL: Well, Mr. Harker?

2 MR. HARKER: Your Honor, I really don't  
3 think you want to go here.

4 Mr. Avitabile made an agreement, on the  
5 record. He is authorized counsel for International  
6 Paper. I believe that he is on their filing along  
7 with Mr. Greenberg. He knows the case. He couldn't  
8 have ben more clear about what he was doing.

9 And on that basis, you will recall that  
10 when we finally did get around to discussing some  
11 other interrogatories, I was willing to concede a  
12 couple of key points on those interrogatories.

13 So, I would suggest that we are not going  
14 to re-argue what we did last week on interrogatory  
15 number 12 because we are going to have to open the  
16 whole thing. Time is not our friend here.

17 We have an agreement.

18 We have seen before here in other  
19 proceedings before you where you made a ruling and  
20 when other counsel tried to get you to reverse that  
21 ruing you were very clear. Mr. McBride, at one point  
22 when we were talking about masking factors and how

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1 that was going to be limited, Mr. McBride tried to get  
2 you to go back on an earlier ruling and you were very  
3 firm that that was your ruling and you wouldn't go  
4 back on it.

5 That is your principle, it is the right  
6 one. Right now the law of the case is that  
7 interrogatory number 12 should be answered in full.  
8 That was the basis on which I was willing to concede  
9 my position with respect to the other interrogatories.  
10 Those have been answered and now is the time to answer  
11 interrogatory number 12.

12 It certainly looks like they have some  
13 information that is responsive to it. But in any  
14 event, that was the agreement and I think that  
15 International Paper should live up to it.

16 JUDGE LEVENTHAL: There is one further  
17 item we left open last week. Has that been resolved?

18 MR. HARKER: Mr. International Paper, Your  
19 Honor?

20 JUDGE LEVENTHAL: Let's go off the record.

21 (Whereupon, the proceedings recessed from  
22 10:03 a.m. until 10:07 a.m.)

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1 JUDGE LEVENTHAL: Let's go back on the  
2 record. During the off-the-record period I tried to  
3 see if we could reach some kind of amicable resolution  
4 between the parties. It wasn't possible.

5 Anything further, Mr. Greenberg, before I  
6 rule?

7 MR. GREENBERG: Yes, Your Honor, that is  
8 in terms of timing I will make the request that we get  
9 another computer run as quickly as possible.  
10 Hopefully, it will be done by the close of business  
11 tomorrow, if that is acceptable to you.

12 JUDGE LEVENTHAL: My ruling is that this  
13 issues was decided at our last conference on November  
14 25, 1997 and it is reflected on pages 55 through 56.  
15 the record shows that International Paper agreed to  
16 respond fully to interrogatory number 12.

17 Once an issue is decided, we can't re-  
18 argue it.

19 My ruling then is I grant the motion with  
20 respect to interrogatory number 12.

21 Counsel, Mr. Harker has requested that the  
22 information be furnished by close of business on

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1 December 4, 1997. In view of the fact that my ruling  
2 was made last week on November 25, 1997, required that  
3 International Paper be ready to furnish the  
4 information at today's session if I ruled against  
5 them, although that did not apply to interrogatory  
6 number 12 because I thought interrogatory number 12  
7 had been fully disposed of.

8 Accordingly then, I will rule that the  
9 information shall be furnished by close of business,  
10 December 4, 1997.

11 Is there anything else before us?

12 MR. HARKER: No, Your Honor.

13 JUDGE LEVENTHAL: All right. The  
14 conference stands closed.

15 (Whereupon, the proceedings adjourned at  
16 10:10 a.m.)

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