

SURFACE TRANSPORTATION BOARD 01/29/98 FD #33388 1-27

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,
January 29, 1998

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 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

(9:30 a.m.)

JUDGE LEVENTHAL: All right, the discovery conference will come to order, this discovery conference dealing with the motion of APL, Limited to compel discovery responses.

All right, for the movement.

MR. GITOMER: Good morning, Your Honor.

Louis Gitomer representing APL, Limited.

JUDGE LEVENTHAL: All right.

MS. BRUCE: Good morning, Your Honor.

Patricia Bruce, Zucker, Scoutt & Rasenberg for Norfolk Southern.

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

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

JUDGE LEVENTHAL: All right.

Well, I'm ready to hear argument, and I have your motion. I have the motion of APL and the Applicant's opposition to the motion to compel.

Before I hear argument, it seems to me

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1 that we're revisiting the ruling I made on January 8th
2 with regard to the motion to compel written responses
3 to discovery.

4 My ruling is up on appeal, and it seems to
5 me that whatever the Commission rules on the appeal to
6 my ruling is going to control what should be done with
7 this motion.

8 Having said that, I think that this is a
9 slightly different situation which confronted me on
10 January 8th.

11 And let's go off the record.

12 (Whereupon, the foregoing matter went off
13 the record at 9:32 a.m. and went back on
14 the record at 9:46 a.m.)

15 JUDGE LEVENTHAL: Let's go back on the
16 record.

17 All right, on our off record discussion,
18 I attempted to see if we could broker a compromise
19 between the parties. My attempt was futile.

20 All right, let me hear argument from you,
21 Mr. Gitomer.

22 MR. GITOMER: Thank you, Your Honor.

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1 There are two points which APL is seeking
2 discovery on. One involves the NIT League settlement
3 and the other is the CSC acquisition of the South
4 Kearney terminal in New Jersey. Let me address the
5 NIT League settlement first.

6 Section 2(c) of the NIT League agreement
7 seeks to solve the problem involving contracts between
8 shippers and Conrail. The NIT League agreement was
9 entered between the Applicants and the NIT League on
10 December 12, 1997, three days before rebuttal and
11 after all parties had had an opportunity to respond in
12 opposition to the application.

13 The NIT League settlement was filed on
14 December 15th. And the Applicant said this will
15 resolve problems involving contracts. It will give
16 shippers an option.

17 APL has a contract with Conrail which will
18 be affected by this transaction. APL is seeking to
19 determine whether the NIT League agreement actually
20 provides any relief to other shippers.

21 It may well be that the APL contract and
22 several others are the only ones which will continue

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1 to exist by the time the mechanism created by the NIT
2 League settlement takes effect.

3 The NIT League settlement provides that,
4 after the closing date, which is a date unknown at
5 this point in time, shippers and the railroads can
6 negotiate and talk about service.

7 But if the shipper is unhappy with
8 service, has notified the railroad, and then six
9 months after the closing date, the shipper can file
10 for arbitration with the Applicants to have its
11 contract moved from perhaps CSX to Norfolk Southern or
12 Norfolk Southern to CSX.

13 But it has to prove that service is poor,
14 that it's tried to work with the Applicant to improve
15 that service.

16 Six months after closing. According to
17 Mr. Prillaman's definition of the closing date, that's
18 October 1, 1998. It can't be any earlier than that.
19 So we're now looking at April 1, 1999 before contract
20 shippers can receive any relief.

21 And the only possible relief is moving
22 from one carrier to another.

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1 We want to know how many contracts there
2 are. Is it one? Is it ten? Is it 5,000? And the
3 way we've done that is we've asked how many contracts
4 are there today -- or how many contracts were there on
5 December 15th, how many contracts will expire between
6 December 15th and August 22nd, which we will expect
7 will be the control date, which is 30 days after the
8 Surface Transportation Board has said it will issue a
9 decision.

10 We then want to know what -- how many
11 contracts will further expire by the closing date to
12 reduce this universe. Some contracts are very long
13 term. Some are short term. There could be contracts
14 expiring, entered into and expire again.

15 We're not really looking for that. We're
16 just looking for a base period, December 15th, how
17 many contracts expire by the control date, the closing
18 date and then how many expire by the April 1st date
19 when shippers can first seek relief.

20 We think this is a brand new issue that
21 was first introduced on December 15th. Up until that
22 time, the parties couldn't know that the Applicants

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1 would be making this claim, so we couldn't take
2 discovery.

3 And that's why we sought this discovery.
4 We just want these raw numbers from Applicants. We're
5 not asking for confidential information. We don't
6 even need to have the exact number. Conrail doesn't
7 have to say we have 4,325 contracts.

8 If they say there are 4,300 contracts
9 today or on December 15th, that would be fine with us.
10 But we need this information, and we would not present
11 a witness to argue about this information. We would
12 take the information, present it as an exhibit to our
13 brief and then go ahead and argue it.

14 Or, if we find it not favorable, we
15 wouldn't argue it and the Applicants would probably
16 argue it. But this is just a testing of the
17 Applicant's case. We're not putting on new APL
18 evidence.

19 As APL argued before the Board on the
20 appeals from your prior discovery rulings, in the
21 past, when the ICC heard merger cases, there were
22 provisions for cross examination of all witnesses.

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1 Those witnesses were cross examined after discovery
2 had been had on their verified statements.

3 That discovery included deposition and
4 written discovery, interrogatories, admissions and
5 requests for documents. That was specifically
6 provided for.

7 All the Board has done in this proceeding
8 has said we will grant the Applicant's request to
9 expedite. The Board has not said we will eliminate
10 the due process rights of the other parties. And
11 that's what the Applicants are seeking to do here.

12 They're seeking to say we can come to the
13 Board at the last minute and our last filing, when
14 nobody can respond to us and tell the Board here's a
15 solution, and nobody can seek to test that.

16 APL is seeking to test that.

17 As far as the second issue --

18 JUDGE LEVENTHAL: Let's stick with the
19 first --

20 MR. GITOMER: Yes, Your Honor.

21 JUDGE LEVENTHAL: -- and then we'll hear
22 argument on the second.

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1 Are you telling me that, in the case you
2 cited, that the Interstate Commerce Commission
3 permitted all types of discovery prior to the filing
4 of rebuttal testimony or after?

5 MR. GITOMER: After the filing of rebuttal
6 testimony because that's when cross examination was
7 scheduled.

8 Between the time the rebuttal testimony
9 was filed and the witnesses sat for cross examination,
10 the ICC allowed discovery on their rebuttal testimony.

11 JUDGE LEVENTHAL: In my last ruling on
12 January 8th, I drew a line between discovery by
13 written interrogatories or discovery of documents and
14 discovery by deposition.

15 What would you do with it if you got a
16 document -- well, you're asking for a compilation of
17 contracts and revenue, etc. What would you do with
18 it?

19 MR. GITOMER: Your Honor, to respond to
20 our discovery request, we would expect that that
21 information be placed on one page and we would attach
22 it to our brief. If the Board wanted to accept it,

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1 they would accept it. If they didn't, they would
2 reject it.

3 In the past, the Board has accepted
4 excerpts of discovery and depositions as attachments
5 to briefs.

6 JUDGE LEVENTHAL: The cases that were
7 cited to me in our last argument indicated the
8 acceptance of deposition testimony. It did not
9 indicate that there were any written documents that
10 were permitted standing alone.

11 Isn't there a difference between a
12 document and oral testimony that is subject to cross
13 examination and redirect examination?

14 MR. GITOMER: Well, let me -- let's go
15 back to the past again, Your Honor, to when the ICC
16 held oral hearing for cross examination of witnesses.
17 And discovery had been taken of these -- on these
18 verified statements.

19 And counsel for the party that was
20 conducting cross examination would take a document,
21 present it to the witness, make it an exhibit as part
22 of the cross examination, cross examine the witness on

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1 the document.

2 There would be redirect on the document,
3 and that would then be part of the record in the case
4 before the Commission.

5 JUDGE LEVENTHAL: That's right, but we
6 don't have oral testimony now, do we?

7 MR. GITOMER: We do not, but I think the
8 use of depositions in discovery and in an attempt to
9 expedite this case, the Board has replaced cross
10 examination with these other types of discovery.

11 JUDGE LEVENTHAL: All right.

12 Mr. Norton.

13 MR. HARKER: Your Honor, if it --

14 JUDGE LEVENTHAL: Or Mr. Harker.

15 MR. HARKER: -- is all right with you,
16 what I'm going to do is address the -- I guess this
17 issue from 30,000 feet, if you will, from the point of
18 view of APL's rights to discovery at all.

19 Mr. Norton, to the extent it's necessary,
20 will discuss the specifics of the request and the
21 burden to Conrail basically of the request.

22 But, you know, in the immortal words of

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1 Yogi Berra, I feel like this is déjà vu all over
2 again. You know, we have heard today no new arguments
3 than what you heard on January 8th.

4 You very perceptively indicated at the
5 beginning your reaction to the issue. Nothing that
6 Mr. Gitomer has said is any different than what you
7 heard from Mr. Bercovici and Mr. Wood.

8 You know, he said this was a brand new
9 issue. Well, that's what Mr. Wood told you. If you
10 will recall, Mr. Wood's issue was that there was a
11 settlement agreement that was entered into between CSX
12 and Canadian Pacific.

13 And that agreement was entered into after
14 October 21, after Mr. Wood, on behalf of Erie Niagara,
15 submitted his comments. And he argued that, since
16 that was "brand new evidence," he needed the
17 opportunity to get written discovery as to the
18 agreement.

19 And you -- that argument was unavailing
20 for Mr. Wood. It is no more appropriate here for you
21 to grant relief for Mr. Gitomer than it was for you to
22 grant relief for Mr. Wood.

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1 He indicates clearly that his -- that Mr.
2 Gitomer indicates that his plan is to attach this to
3 a brief. It is going to be new evidence going to the
4 Board -- new written evidence going to the Board.

5 Again, you drew the line in your ruling on
6 January 8th and indicated that that was inappropriate.
7 That basically means that we don't get an opportunity
8 to close the record on our case.

9 Mr. Gitomer, both in his paper and today,
10 says this is testing of the Applicant's case -- all
11 he's doing is testing the Applicant's case. Well,
12 this is exactly -- these are exactly the same words
13 that Mr. Bercovici used on January 8th in support of
14 his request for written discovery against Norfolk
15 Southern.

16 And again, you found that the way to test
17 Applicant's case was to cross examine witnesses who
18 have offered rebuttal verified statements. And
19 indeed, you ordered the Applicants to make those
20 people available for testing.

21 So there really is nothing new here. In
22 the law of the case -- the law of the case is that

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1 commenters are not entitled to written discovery. And
2 neither in his paper nor today during argument has Mr.
3 Gitomer given you any reason why it is -- why APL is
4 entitled to a different ruling than Eighty-Four Mining
5 or Erie Niagara.

6 Indeed, as we've indicated in our paper,
7 we -- there is no basis to distinguish whether you're
8 talking about testing the Applicant's evidence or
9 whether or not the existence of this NIT League
10 settlement is so-called new evidence or what have you.

11 Or this notion that, quite honestly, I
12 still haven't been able to fathom as there's a
13 difference between APL evidence and Applicant's
14 evidence when they attach the document to their brief.

15 I mean, that's just -- that doesn't make
16 any sense. It's clearly APL's evidence. They're
17 putting it in. It's their evidence no matter the
18 source of it.

19 APL has taken the deposition of Mr.
20 Prillaman. He did testify about the application of
21 Section 2.2(c) of the transaction agreement. NS
22 voluntarily made him available. Under your ruling,

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1 they have the right to take his deposition, and they
2 took it.

3 They had the opportunity to test his
4 understanding of 2.2(c). And they in fact did take
5 the deposition. I don't think anybody else did. But
6 they did take the deposition.

7 So I don't want to belabor this because
8 you heard from me, chapter and verse, on January 8th.
9 But clearly, this is not -- this discovery is
10 prohibited both by decision number six and your
11 January 8th ruling.

12 The other thing that I think Mr. Gitomer
13 points out, and we can get into this in more detail if
14 you desire, but the discovery that he is seeking --
15 what is interesting here is, is that APL concedes that
16 the NIT League settlement, the terms of -- whether
17 they take advantage of the arbitration or not, who
18 knows.

19 But nevertheless, APL's contract, rail
20 transportation contract, will be in effect and will be
21 -- could be subject to the terms of the NIT League
22 settlement. It is not expiring. They can take

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1 advantage of it.

2 All they are doing is engaged in a big
3 fishing expedition as to who else may or may not be
4 benefitted by it.

5 But it's interesting that the NIT League
6 settlement -- NIT League being the largest rail
7 transportation association in the country with many
8 hundreds, if not thousands of members -- endorse this
9 agreement. They clearly thought it was in their
10 interest.

11 APL can take advantage of the agreement
12 because they fit within its terms. But nevertheless,
13 they're on a big fishing expedition as to other
14 shippers who are not -- who may not benefit by it.

15 Well, where are the other shippers? Why
16 aren't they here today with APL? Where are all the
17 180 parties in the case if they have the same concern
18 that Mr. Gitomer does?

19 So all you're doing, if you rule in Mr.
20 Gitomer's favor, is you're imposing a very significant
21 burden on Conrail, which, if you want to hear from Mr.
22 Norton, he will tell you about, in exchange for

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1 basically irrelevant evidence because, as far as APL
2 is concerned, the NIT League settlement works for them
3 and we have no indication at all that any other
4 shipper is dissatisfied by the NIT League settlement.

5 Your Honor, I'm glad to answer any
6 questions that you have at this point.

7 JUDGE LEVENTHAL: All right.

8 Now, Mr. Norton, do you wish to be heard?

9 MR. NORTON: Well, Your Honor, I have a
10 lot I can say about the problems of the burden and
11 relevance, but maybe there's a threshold question
12 which --

13 JUDGE LEVENTHAL: No, I'm going to give
14 Mr. Gitomer an opportunity to give me further argument
15 if he so desires. On your side, I'm ready to rule.

16 However, let me point out to you a
17 difficulty. In the event that the Board overrules me,
18 you're going to be faced with the same problem once
19 again.

20 So I don't know whether you want to make
21 your complete argument now and have the Board rule, if
22 they get to it, on whether or not you're entitled --

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1 APL's entitled to this discovery or not.

2 Let's go off the record.

3 (Whereupon, the foregoing matter went off
4 the record at 10:02 a.m. and went back on
5 the record at 10:11 a.m.)

6 JUDGE LEVENTHAL: In our off the record
7 discussion, I noted that, at least with the first
8 portion of the motion to compel before us this
9 morning, was subject really to the same type of ruling
10 that I had made on January 8th denying further written
11 discovery -- further discovery of written evidence by
12 commenters.

13 My prior ruling is subject to an appeal
14 before the Board. Well, I've inquired of the parties
15 whether they would be interested in my deferring my
16 ruling to next Thursday.

17 The movement indicated that he was, so he
18 -- that he was willing to go along with that
19 suggestion, and Mr. Harker indicated he'd prefer a
20 ruling this morning, and Mr. Norton was noncommittal.

21 However, I do think that that is the most
22 efficient way of disposing of the argument before me

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1 this morning.

2 If the Commission -- if the Board sustains
3 me in my prior ruling, that certainly will dispose of
4 the -- at least the first half of the motion made
5 today. So I'm going to reserve decision until next
6 Thursday, which is -- what's the date?

7 MR. GITOMER: February 5th, Your Honor.
8 I believe February 5th.

9 JUDGE LEVENTHAL: February 5th at 9:30.

10 If the Board comes down with its decision
11 prior to that time, and if that satisfies the
12 movement, I trust that he will withdraw his motion.

13 MR. GITOMER: Certainly, Your Honor.

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

15 (Whereupon, the foregoing matter went off
16 the record briefly.)

17 JUDGE LEVENTHAL: On the record.

18 In our off the record, I indicated that my
19 comments and my reservation of decision apply to the
20 first half of Applicant's motion. The second half of
21 Applicant's motion, APL -- I'm sorry, not Applicant.

22 MR. GITOMER: APL's motion.

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1 JUDGE LEVENTHAL: In the second half of
2 the motion, APL is seeking documents relating to the
3 allocation of APINY, which is within the New Jersey
4 shared asset area.

5 I'll hear argument on that. I indicated
6 I don't really understand what you're looking for
7 here.

8 You state APL wants to understand the
9 reason why CSX is concerned about APL's lease of
10 APINY, and that relates to a lease agreement which you
11 furnished the Applicants voluntarily at an earlier
12 time.

13 Well, what exactly are you looking for
14 here?

15 MR. GITOMER: Your Honor, that's part of
16 APL's problem. APL has leased a terminal area from
17 Consolidated Rail Corporation, and it is a long term
18 lease. In their rebuttal, Applicants suddenly say
19 that this is an unfair lease, that APL may be taking
20 advantage of Applicants.

21 And in fact, let me correct that. It is
22 not Applicant saying that, I believe, in the papers;

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1 it's CSX took this position. NS did not take a
2 position on this issue because the South Kearney
3 terminal facility has been allocated to CSX by
4 agreement between CSX and Norfolk Southern.

5 APL would like to know why, all of the
6 sudden, CSX is concerned. Numerous CSX witnesses in
7 deposition said we are willing to accept a great deal
8 of risk. Well, apparently this is one of the risks
9 that CSX took.

10 They were acquiring -- or they were being
11 allocated this terminal with no guarantee that they
12 would have the APL traffic. And CSX is complaining
13 that the rent for the terminal is extremely low. In
14 fact, CSX included some highly confidential
15 information in its public version when it said that
16 the rent was, I think, a dollar a year.

17 APL wants to know why, all of the sudden,
18 CSX is concerned that it may lose the APL traffic and
19 not have some income from being allocated this
20 terminal. CSX should have known this from the very
21 beginning that they were taking the risk.

22 Why now, on rebuttal, do they claim that

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1 this is such a terrible risk; and therefore, the Board
2 should ignore APL's arguments?

3 JUDGE LEVENTHAL: All right.

4 MR. HARKER: This is written discovery.
5 I know it's documents versus interrogatories, but it's
6 got the same problems that Erie Niagara and Eighty-
7 Four Mining's request had. They were both seeking
8 production of documents, which is what this is.

9 This is just as controlled, as far as I'm
10 controlled, by the January 8th ruling as the
11 interrogatories.

12 APL has noticed the deposition of Mr.
13 Rutski. They know that Mr. Rutski is the person who
14 is very interested in intermodal traffic and has been
15 involved in discussions with APL.

16 And again, Your Honor, you indicated on
17 January 8th that somebody -- that rebuttal verified
18 statement givers can be available for -- should be
19 available for deposition. They're going to take Mr.
20 Rutski's deposition, assuming that CSX's appeal is
21 denied of your earlier ruling on depositions.

22 And they can get into all of these issues

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1 with Mr. Rutski, as you indicated that Eighty-Four
2 Mining could get into these -- to different issues
3 with Mr. Fox, NS's witness; and that Mr. Wood, on
4 behalf of Erie Niagara, could explore issues with Mr.
5 Jenkins, the CSX's witness, on the CP/CSX settlement
6 agreement that was of such interest to Mr. Wood.

7 This is -- you know, this is no different.

8 If you grant this discovery to APL on some
9 kind of an exception, and the exception of which I
10 guess is, is that we made an argument in our rebuttal,
11 then that exception basically is going to swallow the
12 whole rule because we made a lot of different
13 arguments in the rebuttal.

14 And if that suddenly becomes new evidence
15 such that discovery is allowed, then we have no right
16 to close our record and everybody is entitled to
17 discovery. I mean, those are the same arguments that
18 Mr. Bercovici and Mr. Wood made.

19 And so I would submit to you that this
20 issue is controlled by the January 8th ruling. And
21 assuming that they take Mr. Rutski's deposition, I'm
22 assuming that these will be issues that they'll get

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1 into with Mr. Rutski.

2 JUDGE LEVENTHAL: All right.

3 MR. GITOMER: Your Honor, I just have a
4 couple of brief points to make in response.

5 One thing that Mr. Harker hasn't told you
6 is that Mr. Rutski is not an employee of CSX
7 Corporation. He's not an employee of CSX
8 Transportation. He's an employee of CSX Intermodal,
9 Inc., a non-applicant in this case.

10 Mr. Rutski testified for the first time on
11 rebuttal, and that's the reason that APL has noticed
12 his deposition.

13 Now Mr. Harker also seems to be holding
14 Mr. Rutski out with one hand and taking him away with
15 the other. CSX moved to cross in the deposition.

16 So, you know, obviously is CSX is willing
17 to drop that motion, voluntarily produce Mr. Rutski
18 and direct him to bring documents which relate to the
19 South Kearney terminal, APL will be more than glad to
20 withdraw its document request and its motion to
21 compel.

22 I see no reason why we can't request Mr.

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1 Rutski to bring certain documents with him for the
2 deposition, and that would resolve our problem
3 completely.

4 JUDGE LEVENTHAL: Mr. Harker.

5 MR. HARKER: Well, the deposition has been
6 noticed. As I recall, it is scheduled.

7 We've responded to your notice of
8 deposition. I don't recall whether or not it
9 instructed him to bring documents. We'll follow the
10 notice of deposition. It's contingent upon the result
11 of the appeal.

12 And that's -- you know, that's the status
13 of it and that's where things stand.

14 Whether or not he's a CSX employee or not
15 I think is sort of -- I don't -- I guess I fail to see
16 the relevance. He offered a verified statement. And
17 as I said, he will be cross examined on it assuming
18 that CSX's appeal is denied.

19 JUDGE LEVENTHAL: All right.

20 I'll reserve on both portions of the
21 motion to our conference next week.

22 Off the record.

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1 (Whereupon, the foregoing matter went off
2 the record briefly.)

3 JUDGE LEVENTHAL: Back on the record.

4 All right, I'm reserving on the motion to
5 compel until Thursday, February 5 at the conference to
6 be held on that day.

7 The parties will advise me if the
8 conference isn't necessary.

9 All right, the argument stands closed.

10 Off the record.

11 (Whereupon, the proceedings were adjourned
12 at 10:23 a.m.)

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