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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,  
October 1, 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 2:00 p.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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

(2:08 a.m.)

JUDGE LEVENTHAL: All right. The discovery conference will come to order.

MR. HARKER: Your Honor, if I may, when you came in, we were discussing with Mr. McBride and Mr. Wood a possible settlement of at least one of the issues. And it looked to me like we were pretty close to resolving something. If you could give us a few more minutes?

JUDGE LEVENTHAL: Sure. Why don't we take appearances, and then I'll recess for as long as you'd like.

MR. HARKER: Very good.

JUDGE LEVENTHAL: At this time we'll take appearances. For ACE?

MR. McBRIDE: Good afternoon, Your Honor. Michael F. McBride, LeBoew, Lamb, Green and McRae, LLP, for the American Coal Sales Company, American Electric Power, Atlantic City Electric Company, Delmarva Power and Light Company, Indianapolis Power and Light Company, the Ohio Mining and Reclamation

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1 Association, and the Ohio Valley Coal Company.

2 MR. WOOD: Good afternoon, Your Honor.  
3 Frederic L. Wood appearing today on behalf of the  
4 National Industrial Transportation League.

5 JUDGE LEVENTHAL: Further appearances?

6 MR. COBURN: David Coburn, Steptoe and  
7 Johnson, for CSX, Your Honor.

8 MR. HARKER: Drew Harker, Arnold and  
9 Porter, for CSX, Your Honor.

10 MR. EDWARDS: Good afternoon, Your Honor.  
11 John Edwards with Zuckert-Scoutt appearing for Norfolk  
12 Southern.

13 JUDGE LEVENTHAL: Further appearances?

14 MR. NORTON: Yes. Gerald Norton, Harkins  
15 Cunningham, for Conrail.

16 MS. KHERA: Farhana Khera, Hogan and  
17 Hartson, for Canadian Pacific Railway parties.

18 JUDGE LEVENTHAL: Very well.

19 MS. BROWN: Sandra Brown, Troutman  
20 Sanders, for New York State Electric and Gas.

21 MR. FULLANO: Gene Fullano,  
22 Nixon-Hargrave, Rochester Gas and Electric.

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1 JUDGE LEVENTHAL: All right. Very well.  
2 Let's go off the record.

3 (Whereupon, the foregoing matter went off  
4 the record at 2:07 p.m. and went back on  
5 the record at 2:31 p.m.)

6 JUDGE LEVENTHAL: Back on the record. All  
7 right. Does anybody wish to report?

8 MR. McBRIDE: Yes. Thank you, Your Honor.  
9 I am going to start, but we're all moving fast. So  
10 they may revise or correct.

11 We have an outstanding document request  
12 for a study that apparently is in progress at Price  
13 Waterhouse but is the basis for a number that was  
14 recorded in the deposition, at least of Witness  
15 Whitehurst.

16 In order to accommodate our need for some  
17 basis background for the number and, yet, at the same  
18 time to accommodate the fact that their study is still  
19 ongoing, we have agreed that the applicants will  
20 provide to us, as I understand it, correspondence from  
21 November of 1996, June of 1997, and a subsequent  
22 document, all of which are going to be treated as they

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1 designed either highly confidential or confidential,  
2 and that we will have these documents, I assume, -- we  
3 didn't get to this -- as promptly as they can possibly  
4 be provided recognizing the schedule we're under.

5 And then we would have a continuing  
6 interest in any revisions of those numbers, not on an  
7 hourly basis, but if there comes a point at which the  
8 applicants for purposes of rebuttal have instructed  
9 Price Waterhouse.

10 If we need any revised numbers or a report  
11 or both by a certain date for the purpose of preparing  
12 their rebuttal evidence, then we would have a right at  
13 that time to see the same information. So if we  
14 needed to supplement our evidence, had an opportunity  
15 to be heard, we would have the earliest opportunity to  
16 be heard of that.

17 What we have agreed we are not asking for  
18 in that latter respect is for sort of hourly or daily  
19 reports on these updates or numbers but only if there  
20 comes a milestone, if you will, when they have  
21 instructed the accountants that they need to have the  
22 numbers finalized.

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1           Then we would get the information in final  
2 form for purposes of rebuttal at the same time and  
3 that in the spirit of that agreement, assuming that we  
4 haven't missed anything that our people need -- and I  
5 have to take this back to my consultant, and they have  
6 to take this arrangement, particularly the timing and  
7 the subsequent opportunity on our part to get the  
8 further revisions -- they have to run that by their  
9 clients.

10           Assuming that we have what we need out of  
11 this and they get the authorization that I've just  
12 described, that would accommodate us on this issue and  
13 we would not need for Your Honor to rule on it.

14           JUDGE LEVENTHAL: All right. Very well.  
15 Is that the agreement?

16           MR. HARKER: Yes, Your Honor.

17           JUDGE LEVENTHAL: All right. Now what  
18 else do we have before us today?

19           MR. McBRIDE: Then we have the other item  
20 of the Conrail data and documents. And if Your Honor  
21 please, I have a letter here from Mr. Crowley at the  
22 Peabody firm which I'd like to share with counsel and



1 Your Honor.

2 I know it's been difficult to determine  
3 what's on tapes that none of us are reading. So I  
4 wanted some way to try to pin this down.

5 Mr. Crowley is reviewing data not only for  
6 American Electric Power, which is my client, but New  
7 York State Electric and Gas, which is Ms. Brown's  
8 client, and Niagara Mowhawk, which is Mr. Wood's  
9 client. And he informs us, at least as of yesterday,  
10 that, notwithstanding what I think Mr. Norton has  
11 thought, the tapes provided to date did not include  
12 any traffic data for NYSEC or Niagara Mowhawk. I  
13 understand from Mr. Wood that there may be an update  
14 on that and maybe something is being fixed.

15 The American Electric Power situation,  
16 unfortunately, is a little more complicated. And I  
17 gather there's been no resolution of that dispute.

18 Here's the situation. On July 16th, after  
19 Your Honor ruled and I went back and checked with my  
20 client, I was under the impression, whether they  
21 misspoke or I misunderstood, -- I don't know which --  
22 that all of the coal that originates that they get

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1 from Conrail that goes to barge went to barge-loading  
2 facilities, I should say, on the Monongahela River.  
3 I put that in my letter to Your Honor, and Your Honor  
4 included that letter in the substance of his order.

5 Then we didn't get any data from Conrail  
6 for those kinds of origins. So I called that to Mr.  
7 Norton's attention off the record. That was not a  
8 dispute that we then brought to you.

9 He looked into the matter. Some time  
10 elapsed. And then he got back to me and said, "We  
11 don't have data for coal that goes to this Kyger Creek  
12 facility," which was an example that I gave to him.

13 Then Your Honor will recall I then brought  
14 the matter to you in the last discovery conference.  
15 Mr. Norton explained that apparently the coal company  
16 is the receiver and not American Electric Power.  
17 Conrail didn't know it was going to American Electric  
18 Power, he said. So he couldn't help me.

19 And I said: Well, I gather American  
20 Electric Power must be buying it at the dock FOB  
21 barge, it would be referred to, and that the rail rate  
22 is included, then, in the delivered price of the coal

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1 to the dock. That is, in fact, I have now  
2 ascertained, the circumstance.

3 And I am told by American Electric Power  
4 as late as yesterday that the two destinations we're  
5 talking about are the Alicia, A-L-I-C-I-A, Dock 58  
6 miles upstream of Pittsburgh on the Monongahela River.  
7 So in that respect, my July 16th letter was correct.  
8 The destination is Monongahela River and a second  
9 destination, 14 miles downstream from Pittsburgh on  
10 the Ohio River, wherein lies some of the confusion.  
11 And that destination is called the Mol Dock, M-O-L.

12 At the Alicia Dock, the coal company is  
13 Kansal. And I know this is a matter the applicants  
14 are familiar with because Kansal appears in various  
15 coal work papers and what have you. The coal company  
16 at the Mol Dock is I'm told primarily United Eastern.  
17 And American Electric Power buys its coal delivered to  
18 those docks from those two companies and then barges  
19 it to a variety of its plants.

20 Apparently from what Mr. Norton has told  
21 us before, -- and I have no different understanding  
22 today -- Conrail's files of data would presumably show

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1 a Kansal or United Eastern as the shipper, if you  
2 will, receiver -- I don't know what label they would  
3 put on it, but not American Electric Power.

4 I have now provided Your Honor and Mr.  
5 Norton with all of the information that I can get out  
6 of this. And we're entitled to Conrail traffic data  
7 and then any accompanying documentation under Your  
8 Honor's July 16th ruling.

9 But, as I've been candid to say, I said  
10 only the Monongahela River because that's what I  
11 thought at the time. It now turns out it includes the  
12 Ohio River.

13 What I cannot get from the client is the  
14 different understanding Mr. Norton apparently has from  
15 his client. They seem to think there's a destination  
16 on the Kanawha River that then gets this coal barged  
17 to the AEP plants.

18 The client didn't tell me that, but AEP is  
19 a big company. And I'm not going to say they're  
20 wrong. I'm simply telling Your Honor that this is a  
21 lesson in geography.

22 I was too specific. I should have just

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1 said, "to the river" -- and then we wouldn't have had  
2 this problem, I suppose -- or "to any river." But I  
3 was trying to be descriptive and helpful.

4 In any event, we would like this data.  
5 And we would like it as promptly as possible. We are  
6 working with all of the rest of the data we got as  
7 best as we can. And there's still time to incorporate  
8 this data in that analysis if we get it promptly.

9 I'm still within the discovery cutoff  
10 period, which is five days from today. I can propound  
11 a new request, and we can start the process all over  
12 again. But I think Your Honor will recall I was first  
13 out of the gate. I've been pursuing this  
14 meticulously. Sometimes small things fall between the  
15 cracks.

16 And so I would simply like this data for  
17 the coal going from Conrail origins to those two  
18 destinations. As I understand it, it's those two. If  
19 Conrail says it's three, it's three: one on the  
20 Monongahela River, one on the Ohio River, and if there  
21 is a third such destination on the Kanawha River.

22 I would like the tape and accompanying

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1 documentation. And if it's a great burden on Conrail,  
2 I'm more than happy to try to accommodate them in any  
3 way that we can do.

4 JUDGE LEVENTHAL: Mr. Norton?

5 MR. NORTON: Your Honor, part of the  
6 problem here stems back to the circumstances. There's  
7 not much we can do about it now. As you recall, this  
8 whole business about the AEP plants was added after  
9 the hearing without a chance for us to address it  
10 requesting specifically that the order, your ruling  
11 extend to facilities of AEP served with Conrail moving  
12 coal from the origin to barge locations on the  
13 Monongahela River. That was quite explicit.

14 There are several rivers in that area.  
15 You don't have to be from Pittsburgh to know that the  
16 Monongahela is not the Ohio River and the Kanawha is  
17 a different river. And my understanding is that the  
18 AEP facility on the Kanawha River is called the  
19 Kanawha River plant. So that should be something they  
20 know about.

21 We were brought before Your Honor last  
22 week on I think what was unfounded supposition about

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1 information that wasn't provided. It wasn't  
2 requested, and that's why it wasn't there.

3 It may be irrelevant, but I have to  
4 confess to some exasperation about the process in  
5 which we have done what we were supposed to do and  
6 we're being treated as if we didn't.

7 Let me just go to the facts. It is still  
8 not even clear today that there is a facility, an AEP  
9 facility, that has received coal that Conrail  
10 delivered from the mine to the Monongahela River.  
11 This is the first mention of the Alicia location.

12 And I don't know what movements, if any,  
13 Mr. McBride is suggesting may have moved by way of  
14 Alicia, this is a hypothetical or whether it's the  
15 real thing. I mean, if it's a real thing, that's one  
16 thing, but if it's only a hypothetical possibility,  
17 then there wouldn't be any data there to begin with.

18 On the documents, we have already  
19 responded to the document request. We did produce  
20 documents. We may have produced more than we had to,  
21 but I know there were documents that were produced  
22 that related to bids to AEP for facilities including

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1 at least several of those I think that were mentioned  
2 in Mr. McBride's letter.

3 They weren't successful bids, at least in  
4 several major instances. So no coal moved. So the  
5 fact that there may have been some commercial dealings  
6 between the two companies does not mean that there is  
7 underlying movement of coal that would have been the  
8 basis for any data that would be even arguably  
9 responsive to these requests. So we still don't know  
10 whether we're searching after something that is real  
11 or merely a hypothetical possibility here.

12 JUDGE LEVENTHAL: But wait. Mr. McBride  
13 mentioned three specific points now.

14 MR. NORTON: Right.

15 JUDGE LEVENTHAL: Now, can't you trace,  
16 for instance, shipments he said to Kansal either as  
17 shipper or receiver? That's on the Monongahela River.

18 MR. McBRIDE: Yes, at the Alicia Dock.

19 JUDGE LEVENTHAL: At the Alicia.

20 MR. McBRIDE: And I was told that directly  
21 by AEP yesterday that that's where they get coal.

22 MR. NORTON: Yes. But I'm quite sure that

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1 they are not the only utility that gets coal from  
2 Kansal through that location.

3 MR. McBRIDE: That's a different issue.

4 MR. NORTON: So we go back to a separate  
5 question here, which is the data that we have, the  
6 traffic data, reflects the origin and destination of  
7 the rail movement.

8 That rail movement would show movement to  
9 that barge location. It wouldn't indicate whether it  
10 was moving thereafter to AEP or to anyone else. So  
11 there's no way we can subdivide that traffic data to  
12 say, "This part of it went to AEP." We're not in a  
13 position with the database that we're working with to  
14 do that. That's what we explained last week.

15 JUDGE LEVENTHAL: Let's stay with that one  
16 point of receipt. Can't you identify the specific  
17 shipments you think came from Conrail?

18 MR. McBRIDE: Well, this is the first I've  
19 been asked for that. I think we probably could, but  
20 God knows whether that can be done meaningfully in the  
21 next 20 days. My point last week was our shipments  
22 are included in the shipments to that.

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1 I dare say that it is likely that AEP is  
2 the largest shipper, perhaps one of the only shippers  
3 at that time. And the most expeditious and convenient  
4 thing to do would be simply to give us the data to  
5 that dock, whether it's AEP or not, for Kansal because  
6 I have made a representation directly from the client  
7 that the receiver is Kansal. And he mentioned, Mr.  
8 Norton mentioned, last week Kansal as one of the  
9 possible such companies.

10 And so it turns out he hit the nail on the  
11 head. If there's another coal company getting coal  
12 there, then I'm not asking for that. If there are ten  
13 others getting coal there, I'm not asking for that.  
14 I'm asking for the data in Conrail's files pertaining  
15 to Kansal. And then we'll have to sort it out if we  
16 need to to determine what's AEP and what's not.

17 JUDGE LEVENTHAL: What's the problem with  
18 doing that?

19 MR. NORTON: This raises another issue.  
20 There's a confidentiality issue. We're now talking  
21 about data relating to Conrail movements for a third  
22 party, Kansal, for example, which is not here and is

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1 not requesting this information. And that it seems to  
2 me should be protected by the statute. So we're not  
3 free to disclose that.

4 The other situations where the tape data  
5 was requested, this wasn't a problem because it was  
6 the shipper or the consignee who was requesting the  
7 information. So there was a waiver for the statutory  
8 protection as to disclosure.

9 JUDGE LEVENTHAL: Well, let's find out.  
10 Can you get a waiver from Kansal?

11 MR. McBRIDE: I don't know, but there's  
12 not a statutory issue in the first place because the  
13 statute doesn't protect or prevent them from giving to  
14 shippers this information since, as I reported to Your  
15 Honor before, the applicants invoked that very  
16 statute. They asked the Board to issue Decision  
17 Number 1, which they did and then modified it in  
18 Decision Number 4 to allow them to exchange  
19 shipper-specific information.

20 As Your Honor knows -- I've said this to  
21 you before, and I apologize to saying it to you again,  
22 but that's why when you asked me on July 16th did I

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1 think your Grainland ruling was going to be upheld and  
2 I said no because in this case, the law of this case,  
3 is the statute does not bar shipper-specific  
4 information from being disclosed under the terms of  
5 the protective order. That's the law of the case.

6 MR. NORTON: There has not been a ruling  
7 in this proceeding on that question. The question  
8 wasn't raised when the Board --

9 JUDGE LEVENTHAL: Well, let me ask you --

10 MR. NORTON: Your Honor's own ruling is  
11 still standing in Grainland. And I don't see how Mr.  
12 McBride hasn't provided a way for us to act  
13 consistently with Grainland.

14 MR. McBRIDE: I've provided a way for him  
15 to act consistently with 4 decisions in this case or  
16 5, Decision Number 1, Decision Number 4, Decision  
17 Number 17, Decision Number 32, and Decision Number 34,  
18 all of which say the protective order will suffice.

19 JUDGE LEVENTHAL: He doesn't agree with  
20 you, Mr. McBride.

21 MR. McBRIDE: I understand.

22 MR. NORTON: And, at a minimum, Your Honor



1 --

2 JUDGE LEVENTHAL: Let me ask you a  
3 question. There's an appeal pending before the  
4 Commission on the masking issue.

5 MR. NORTON: Right.

6 JUDGE LEVENTHAL: If the Commissioner  
7 affirms my ruling, will that dispose of this issue?  
8 It's very similar. Aren't you disclosing information  
9 that would be subject to 11904?

10 MR. NORTON: It is possible that something  
11 that the Commission says in that decision will bear on  
12 the confidentiality question. That is, the statute  
13 was referred to I think by both sides.

14 MR. McBRIDE: I'm not sure if I did, but  
15 I know you did. There are two appeals pending.

16 MR. NORTON: Yes.

17 MR. McBRIDE: I think more pertinent is  
18 his appeal because I know they've made this a central  
19 part of their appeal. And it presumably would have --

20 JUDGE LEVENTHAL: Which other appeal is  
21 pending?

22 MR. McBRIDE: I appealed your denial of

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1 the masking factors for the other years.

2 JUDGE LEVENTHAL: You did?

3 MR. McBRIDE: Yes.

4 (Laughter.)

5 MR. McBRIDE: Your Honor, I told you  
6 before --

7 JUDGE LEVENTHAL: That's all right. I  
8 have no objection to his appeal.

9 MR. McBRIDE: No offense intended.

10 JUDGE LEVENTHAL: I don't take any  
11 offense. Even if you meant it, I don't take any.

12 (Laughter.)

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

14 (Whereupon, the foregoing matter went off  
15 the record at 2:50 p.m. and went back on  
16 the record at 3:14 p.m.)

17 JUDGE LEVENTHAL: In our off-the-record  
18 discussion, I attempted to see if an accommodation  
19 could be made among the parties respecting the  
20 disputes on discovery. Mr. Norton has indicated he'd  
21 like to check with his client regarding the problem  
22 with the shipments received at the Alicia Dock on the

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1 Monongahela River.

2 In a little while, we're going to recess  
3 so Mr. Norton can accomplish that. At this point,  
4 though, I would like the record to show a letter dated  
5 September 30, 1997 addressed to Mr. McBride from  
6 Thomas D. Crowley of the L. E. Peabody and Associates,  
7 Inc. These are additional items that are subject to  
8 discussion this afternoon.

9 Mr. Recorder, will you include this in the  
10 record as it was all orally read into the record?

11 (Whereupon, the above-mentioned insert was  
12 placed into the record and follows this page.)  
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1 MR. NORTON: Your Honor, if I might as  
2 well, I have a letter dated September 29th from me to  
3 Mr. McBride, which actually --

4 JUDGE LEVENTHAL: It's in response?

5 MR. NORTON: -- was delivered to him  
6 yesterday. I was out of town. And it relates to this  
7 controversy. Your Honor covered, either on or off the  
8 record, the information in that letter. For the  
9 completeness of the record.

10 JUDGE LEVENTHAL: Sure. Off the record.

11 (Whereupon, the foregoing matter went off  
12 the record at 3:15 p.m. and went back on  
13 the record at 3:16 p.m.)

14 JUDGE LEVENTHAL: Mr. Reporter, at the  
15 same time, will you include in the record the letter  
16 dated September 29 from Harkins Cunningham addressed  
17 to Mr. McBride.

18 (Whereupon, the above-mentioned insert was  
19 placed into the record and follows this page.)  
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1 JUDGE LEVENTHAL: All right. Do you want  
2 to stand in recess now, Mr. Norton, or do you want to  
3 do this again with --

4 MR. MCBRIDE: Is he going to acquire about  
5 both the Alicia and Mol Docks, see if we can wrap  
6 these both up at the same time?

7 JUDGE LEVENTHAL: All right. If you can  
8 inquire also about the Mol Dock point of receipt. All  
9 right. We'll stand in recess ten minutes.

10 (Whereupon, the foregoing matter went off  
11 the record at 3:16 p.m. and went back on  
12 the record at 3:52 p.m.)

13 JUDGE LEVENTHAL: Back on the record. Mr.  
14 Norton, do you wish to report?

15 MR. NORTON: Your Honor, yes. My report  
16 is in the nature of a proposal. We would be willing  
17 to write a response to the request to provide the data  
18 for the movements, the Kansal movements, to Alicia and  
19 not any others with two qualifications.

20 One is that we would like to have some  
21 representation or assurance by AEP as that in a given  
22 year, there were such moves on their behalf with coal

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1 that is ultimately destined for them because otherwise  
2 we're producing data that would relate to other  
3 movements for other utilities altogether. And it  
4 would be something we shouldn't have to do.

5 I don't think I've heard enough of an  
6 assurance that for each of these years in question  
7 from Mr. McBride that there were such movements. And,  
8 second, we think it's appropriate that we advise  
9 Kansal that this information has been requested and is  
10 going to be produced lest they interpose some  
11 objection or work something out themselves with Mr.  
12 McBride.

13 JUDGE LEVENTHAL: All right. Mr. McBride?

14 MR. MCBRIDE: As to the latter items, if  
15 Mr. Norton will work with me on providing him the  
16 assurance that he needs, then I'd like him to work  
17 with me on trying to expedite the inquiry to Kansal.

18 So I'm willing to try to work with him on  
19 that, and we'll give him what assurance he needs for  
20 whatever years we're talking about here. And if it  
21 turns out there isn't such a year, then I'll go along  
22 with that part of the proposal.

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1 Now, assuming there is this data, this is  
2 what I've been entitled to from the time of Your  
3 Honor's ruling. I don't know why we're not entitled  
4 to the data on the Ohio either because, as Your Honor  
5 said earlier --

6 JUDGE LEVENTHAL: Let's finish with the  
7 Kansal movements first.

8 MR. McBRIDE: Yes. I'm willing to work  
9 with --

10 JUDGE LEVENTHAL: Are you satisfied with  
11 this proposal?

12 MR. McBRIDE: Yes as long as he's willing  
13 to commit to doing this expeditiously with me.

14 MR. NORTON: Sure.

15 JUDGE LEVENTHAL: I'm sure he'll cooperate  
16 in that respect.

17 MR. NORTON: Yes.

18 JUDGE LEVENTHAL: All right. So that's  
19 disposed of. Now, on the Ohio River, what is your  
20 position?

21 MR. NORTON: I'm sorry, Your Honor. Maybe  
22 I didn't make myself clear. We are willing to do that

1 if that is all we have to do; in other words, nothing  
2 new on the Ohio River. We'll respond with respect to  
3 the movements over the Monongahela, which is what he  
4 requested, and we'll do it in those conditions and not  
5 the new request.

6 I thought that was one of the things he  
7 was suggesting or that Your Honor was suggesting as a  
8 possible compromise. That's what we're proposing as  
9 a compromise.

10 MR. McBRIDE: That was the part of it I  
11 wasn't in agreement with because I was entitled to  
12 this other information long ago. And I explained the  
13 glitch that created this Ohio River issue. And it  
14 seemed to me that Your Honor indicated and I believe  
15 that I'm still entitled to propound such a request  
16 today and I don't know why that should be  
17 objectionable.

18 JUDGE LEVENTHAL: Well, he's making a new  
19 request now. What is your position on that? Let's  
20 leave your proposal aside for the moment.

21 MR. NORTON: Well, Your Honor, the  
22 response would be that if I understand the facts and



1 we're going to have the same problems, that we don't  
2 have the data that would identify the movements  
3 through his utilities via the Ohio River barge  
4 location.

5 MR. McBRIDE: And that's what I was --

6 MR. NORTON: What he's getting under this  
7 proposal is something different from what he asked  
8 for. He is not getting data on movements to AEP. He  
9 is getting movements on a broader universe. They're  
10 Kansal movements to the barge.

11 That's not what he asked for. That's what  
12 he would be getting. It's different because of the  
13 circumstances that maybe neither one of us fully  
14 appreciate, although he is the one who made the  
15 request.

16 MR. McBRIDE: And now I've also --

17 JUDGE LEVENTHAL: Advantage. You're  
18 eliminating the appeal, you know, if I direct him, if  
19 by agreeing to compromise he's not going to appeal my  
20 order.

21 MR. McBRIDE: I understand, but --

22 JUDGE LEVENTHAL: And if he appeals my

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1 order, remember, the Commission may very well grant  
2 them a stay. And it might be a week or more before  
3 you get a response.

4 MR. McBRIDE: I'm willing to make him a  
5 counteroffer right here --

6 JUDGE LEVENTHAL: All right. Let's hear  
7 it.

8 MR. McBRIDE: -- that I think might  
9 resolve this. And that is that, of course, I have the  
10 other two requests as to the documentation, which I  
11 assume his offer would include, for Alicia, but I'm  
12 willing to limit the inquiry on the Mol Dock to the  
13 traffic tape data because they'd have to prepare the  
14 tape and then could put that data on readily at the  
15 same time and you would not have to give any  
16 documentation on the other two requests for the Mol  
17 Dock. So it wouldn't be any more burden to him  
18 because he would only be producing one tape.

19 MR. NORTON: We've already produced  
20 documents in response to 1 and 2.

21 MR. McBRIDE: For the Mol Dock?

22 MR. NORTON: Not for Mol Dock. They

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1 weren't covered by the request.

2 MR. McBRIDE: I understand. But I'm  
3 saying I'm now --

4 JUDGE LEVENTHAL: What he's offering now  
5 will --

6 MR. NORTON: Your Honor, that is something  
7 I did not raise. I was talking only with Conrail  
8 about the tapes. A file search, a new file search,  
9 which could have been done as part of the other one,  
10 Mol Dock, is something that is --

11 JUDGE LEVENTHAL: No. He's not asking for  
12 the --

13 MR. McBRIDE: That's correct. I said no  
14 file search for Mol Dock, just the tapes. But I said  
15 I was entitled and always have been entitled as I  
16 understand this to the documents with respect to the  
17 Alicia Dock.

18 JUDGE LEVENTHAL: You're willing to give  
19 him that, aren't you?

20 MR. NORTON: He already has them.

21 MR. McBRIDE: Okay. Well, I'm saying I  
22 didn't know if you were representing that you had

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1 produced them or not, produced the documents.

2 JUDGE LEVENTHAL: Wait, wait. You're  
3 arguing in circles now. The Alicia Dock issue is  
4 settled if your offer is accepted. Is that right? He  
5 gets everything he wanted?

6 MR. NORTON: All issues. My proposal was  
7 to settle all issues.

8 JUDGE LEVENTHAL: But let's get it down  
9 definite. We don't seem to have an understanding.

10 MR. NORTON: Okay.

11 JUDGE LEVENTHAL: Is there anything open  
12 on the Alicia Dock that he's not going to get, that  
13 Mr. McBride won't get?

14 MR. NORTON: Not to my understanding.

15 JUDGE LEVENTHAL: All right.

16 MR. McBRIDE: And is that true for all  
17 three document requests?

18 JUDGE LEVENTHAL: On the Alicia Dock?

19 MR. McBRIDE: Yes. If we have them, we  
20 have them. What I'm saying is that --

21 MR. NORTON: I know there are documents  
22 produced that referred to Alicia Dock.

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1 MR. McBRIDE: Which is baffling to me  
2 because then why didn't we ever get the information on  
3 the traffic case about it?

4 MR. NORTON: Well, let me go back a  
5 statement. We still don't have a confirmation that  
6 there are any such movements to AEP.

7 MR. McBRIDE: Then I don't know why you  
8 would have produced --

9 MR. NORTON: Your Honor?

10 JUDGE LEVENTHAL: Wait, wait, wait. Let  
11 me restate his offer. Mr. McBride, if you advise Mr.  
12 Norton that there have been movements to AEP at the  
13 Alicia Dock for specific years, he's going to give you  
14 the information that you requested; right?

15 MR. NORTON: Right.

16 JUDGE LEVENTHAL: No question about that?

17 MR. NORTON: Well, subject to --

18 JUDGE LEVENTHAL: You'll leave the second  
19 one that you're going to advise counsel?

20 MR. NORTON: Right.

21 JUDGE LEVENTHAL: Okay? Then that's  
22 resolved?

1 MR. McBRIDE: Yes, sir. That's fine.

2 MR. NORTON: Well, Your Honor, from our  
3 standpoint. And all I'm authorized to do is agree to  
4 that, and that would resolve everything, no Ohio  
5 River.

6 JUDGE LEVENTHAL: Well, with the Ohio  
7 River, now, he's made an offer that you just give him  
8 the tapes, no documentation. Is that a problem?

9 MR. NORTON: I don't have authority to do  
10 that. I raised the questions, and I came back with a  
11 proposal which was a compromise.

12 JUDGE LEVENTHAL: All right. He's not  
13 willing to go along on that. Mr. McBride, you have a  
14 good offer here because if I rule and require him to  
15 produce this material and if he appeals, then you have  
16 a stay. The Commission will give him a stay. They  
17 gave him a stay last time. I don't doubt they'll do  
18 it again. And your time evaporates.

19 MR. McBRIDE: With all due respect, Your  
20 Honor, first of all, this would be in the same kind of  
21 category as what I got before, as I understand it. So  
22 I don't know that it is likely to be stayed.

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1 And, secondly, even as to his offer, he  
2 hasn't guaranteed I'll get it because if he tells me  
3 Kansal objects, then I don't get anything.

4 JUDGE LEVENTHAL: But you would have that,  
5 no matter what I ordered. If Kansal comes in and  
6 says, "We object to that material being furnished,"  
7 I'd have to hear a new argument and make a new ruling  
8 because they would have the right on 11904 to object.

9 Now, I don't know. Maybe I'd rule in your  
10 favor, and maybe I wouldn't. I don't know either.  
11 I'd have to hear argument. So that you're eliminating  
12 that by accepting his offer.

13 MR. McBRIDE: Well, I guess part of my  
14 problem is --

15 JUDGE LEVENTHAL: You have another  
16 weakness in your position, Mr. McBride, that I don't  
17 want to bring down because it might influence the  
18 outcome of this argument that wouldn't be favorable to  
19 you.

20 MR. McBRIDE: I understand. What I'd like  
21 to do is see if Mr. Norton would be willing to allow  
22 me to be a part of the communication with Kansal so

1 that we make sure that Kansal is understanding both  
2 sides of this, who I'm speaking for, who he's speaking  
3 for, and how it's in under the protective order, and  
4 what have you.

5 I mean, if this gets miscommunicated, they  
6 may think that their data is going to go into the  
7 Washington Post.

8 JUDGE LEVENTHAL: Well, no. Everything  
9 that's being considered now is under the highly  
10 confidential.

11 MR. NORTON: Yes.

12 JUDGE LEVENTHAL: There's no question  
13 about it.

14 MR. NORTON: Your Honor, I think we can  
15 work that out.

16 JUDGE LEVENTHAL: All right.

17 MR. McBRIDE: Well, then I'll accept the  
18 offer.

19 JUDGE LEVENTHAL: I think you have a good  
20 offer.

21 All right. That's disposed of. Now what  
22 else do we have to resolve this afternoon?

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1 MR. McBRIDE: I don't think anything else.

2 JUDGE LEVENTHAL: That does everything?

3 MR. McBRIDE: Yes.

4 JUDGE LEVENTHAL: I told the reporter we  
5 would be done by 4:00 o'clock.

6 (Whereupon, the foregoing matter was  
7 concluded at 4:03 p.m.)

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Before:                   SURFACE TRANSPORTATION BOARD

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