UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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

Wendesday,
May 7, 1997

Washington, D.C.

The above-entitled matter came on for a oral argument in Hearing Room 6 of the Federal Energy Regulatory Commission, 888 First Street, N.E. at 1:30 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

(10:00 a.m.)

JUDGE LEVENTHAL: The oral argument will come to order.

This is an oral argument in the matter of 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, Surface Transportation Board Finance Docket No. 33388. I will take appearances at this time.

For the Movant?

MR. OSBORN: Good morning, Your Honor. I am L. John Osborn, of the firm Sonnenschein, Nath and Rosenthal, appearing on behalf of Canadian National Railway Company.

JUDGE LEVENTHAL: Very well. Respondent?

MR. NORTON: Gerald Norton, with Harkins Cunningham, and Paul Cunningham, for Conrail.

JUDGE LEVENTHAL: Very well. Intervenors?

MR. ALLEN: Your Honor, Richard Allen of the firm of Zuckert, Scoutt and Rasenberger, here with

my colleague John Edwards, representing Norfolk Southern Corporation and Norfolk Southern Railway.

JUDGE LEVENTHAL: Very well. Further appearances?

MR. EDELMAN: Your Honor, Richard Edelman, for Allied Rail Unions, a number of labor unions that are participating in this proceeding.

JUDGE LEVENTHAL: Very well. Any other appearances?

MR. HARKER: Drew Harker, of the firm of Arnold & Porter, and I have with me Jodi Danis and Christopher Datz from Arnold and Porter, representing CSX Corporation.

MR. STEEL: Adrian Steel, from the firm Mayer, Brown and Platt, representing Burlington Northern and Santa Fe Railway Company?

JUDGE LEVENTHAL: Very well.

MR. LISTGARTEN: Michael Listgarten, Covington and Burling, representing Union Pacific.

JUDGE LEVENTHAL: Further appearances?

(No response.)

All right. We have before us this morning

the motion of Canadian National Railway Company's motion to compel discovery responses by Conrail. As we did the last time you were before me, I urged the parties to see if they could reach an amicable disposition. I assume you've already tried to do that?

MR. OSBORN: We've been trying that from the outset, Your Honor, and we're still willing to try, but there has been no responsiveness yet from Conrail.

JUDGE LEVENTHAL: Do you have any position?

MR. NORTON: Your Honor, we don't think there's any appropriate discovery at this point. There hasn't been any suggestion of any ground that was anything close to what we think is appropriate.

JUDGE LEVENTHAL: Let me suggest a new ground. I assume you have some information that they are seeking which is readily available. For instance, system maps.

MR. NORTON: Which they can get from the STB. There is that one category I would grant is

readily available.

JUDGE LEVENTHAL: That's the only one I recognize from your reply. Isn't there anything else that's readily available?

MR. NORTON: Not in that sense, Your Honor. Everything else kind of falls -- and we got into this in dealing with the request that NS had made previously where everything was decided to be readily available in the motion, and when we got into looking at what we could do on a voluntary basis, everything was in the nature of a request, and the other in the nature of the records and availability, and the other obligations that the people involved had. So, it's not in that category of readily available, and we ultimately ended up not having, in that negotiation, identified anything that we could resolve by producing it.

JUDGE LEVENTHAL: You didn't produce any information at all in that --

MR. NORTON: Ultimately, that's correct.

MR. OSBORN: Your Honor, I have a great deal of difficulty with a number of things Mr. Norton

just said. To begin with, the system diagram map is a color-coded map, and we can't get the color-coded version from the Board. And Conrail has an obligation under the Board's regulations, to produce that map on request at a reasonable cost, and they haven't been willing to produce that.

As far as everything else is concerned, for him to say now that after NS and Conrail and CSX left this hearing room in January, that NS decided after they argued to you that the stuff was available, then secretly NS decided that they agreed with Conrail that, whoops, their requests were inappropriate after all, in the course of making a deal to purchase Conrail, I don't think -- I think if we're going to attach any credibility to NS' arguments, it should be to the arguments that they made to you and to the Board in January.

If Conrail's position is still that there should be no discovery -- and that's what their position has been from the outset of this -- there are a couple of points I'd like to argue on that, and maybe we can move past that aspect of it because

Conrail seems to be saying at times that there is a jurisdictional impediment here, and that is just flat out wrong.

They do quote a remark that you made on the record in January at the very beginning of that hearing, that there might be some jurisdictional doubt, and I feel that that doubt was erased in your mind by the end of that hearing but, in any event, that doubt should not exist, that the Board clearly has jurisdiction to order some discovery here, and they have fully vested that jurisdiction in you.

And I want to stress that the material that we are requesting at this point is not discovery about the internal aspects of the merger proposal they are currently putting together right now. That would be a different category of discovery, and that would present a more difficult issue that we are not confronted with here today.

What we are talking about is the basic name, rank and serial number type of information about Conrail that is relevant to any Conrail merger, and is very relevant to Canadian National for the purposes of

the requests we are probably going to need to make in this case. It would not be a burden for Conrail to produce this information. If we want to get into a discussion of the specific requests, which discussion Conrail has really avoided so far, I'd be perfectly willing to do so, but I think we should move past any argument about jurisdictional deficiency.

They cited some things in the pleading they gave you at the close of business yesterday, that should not trouble you at all. There are a couple of things in there that are really kind of last-minute smokescreens. They refer back to a 1980 decision in the UP/SP case that really had to do with a waiver petition and not a discovery request, but 1980 was back when we used to take years to decide merger cases, and there was never any question about early discovery.

There is something much more recent that I discovered last night -- may I approach, Your Honor?

JUDGE LEVENTHAL: Sure.

MR. OSBORN: This is a decision in the UP/SP case from just last year, and it came on an

appeal from a decision by Judge Nelson, and it involved an issue that is very analogous to what we're talking about here, namely, the primary applicants were seeking discovery from some responsive applicants before the responsive application had been filed. And Judge Nelson allowed some of it and postponed other aspects of it, and the primary applicants appealed and said he was wrong to postpone any of it, but the relevant point for present purposes is that he did allow some of it, and the Board stressed that Judge Nelson had total discretion here to fashion discovery guidelines and make these determinations.

So, that is the jurisdiction that you have here in this case. So there just should be no question whatsoever about the authority of the Board to order some discovery. And this nitpicking about whether we have a proceeding is kind of -- it's an argument that only a lawyer can me, that we are here in this merger case and they say there is no proceeding, and then at one point they suggest that the Board's discovery rules don't apply to railroad merger cases.

Well, clearly, we have a proceeding here, and the fact that the statute says that the Board can begin a railroad control proceeding on application, that just states that the Board doesn't do it sua sponte, it's an application proceeding. That doesn't mean that the Board lacks jurisdiction until the application is filed.

There's another suggestion under the regs where the Board describes a primary application as one that begins a proceeding. Well, that doesn't mean -- that distinguishes it from a responsive application, it doesn't mean that there's no jurisdiction until the primary application is filed.

And whether the discovery rules apply to railroad merger cases is really kind of beside the point. The practice has always been that they do apply unless and until some specific discovery guidelines are issued in a particular merger case, which then would take precedence. And at some point, you will be asked to issue some discovery guidelines in this case.

So, whether we are under the merger rules

or not -- excuse me -- the discovery rules or not is really incidental to the question of jurisdiction.

As to the appropriateness of what we seek, it's quite interesting that Conrail has -- right up until last night -- they don't want to get into it, and they stuck a footnote in there, I think, on page 18 of their reply. where they said, gee, if you really want to hear about why the specific requests are wrong, they'd like another chance to argue that later on, but they really don't want to get into that now. I would hope that Your Honor will see through that, and that they just don't have good arguments as to why this material is inappropriate or unavailable.

There are a couple of things they did put in so that they wouldn't be completely barren on this. They said as to local terminal maps, they say "This seemingly simple request calls for a variety of types of records that do not necessarily exist system-wide, and are not located in one place".

Well, what does that tell us, that they are not in one place? That doesn't really tell us much at all. Conrail just doesn't have viable

objections to the specific requests, and that's why they are trying to argue that there's a jurisdictional barrier that just doesn't exist.

The last point I'd like to make just as a preliminary response is that if there are arguments that they want to make as to the scope of some of these requests, we would be willing to discuss them. Some of this material is just kept on a system-wide basis for Conrail, and there is no convenient or logical way to separate it out.

Other material could be separated out for specific parts of the Conrail system and, if it would give them comfort to narrow some of them down in that respect, we'd be perfectly willing to discuss that, but up until now we've been getting a blanket response from Conrail to the effect that they don't want to talk to us, they don't want to give us anything, and they object to the very concept of discovery. We need to get past that before we can resolve this thing.

JUDGE LEVENTHAL: All right. Mr. Norton?

MR. NORTON: Your Honor, I think it's useful to go back and look at the context --

JUDGE LEVENTHAL: Before we start, let me say for the record, I have the Canadian National's motion to compel, and I have the reply filed by Conrail. The document that Mr. Osborn has furnished me is a decision in Finance Docket No. 32760, Decision No. 23, decided March 25, 1996. All right.

MR. NORTON: And I'll come to that shortly, Your Honor, that decision.

JUDGE LEVENTHAL: I haven't read it.

MR. NORTON: I think I'll spare you that burden.

The context in which the question arises is important to consider. We are working with NS and CSX to prepare an application to be filed in what is a different transaction than was being proposed by either CSX and Conrail or NS previously, and that in itself tells you one thing about our position.

We noted before that one of the benefits of not allowing discovery to go forward until the application is filed is that you don't get into the situation where discovery begins prematurely on a matter that never turns out to ripen into a

proceeding, and that's exactly what happened as to the notices of intent that were filed last fall by Conrail and CSX and by NS.

A different transaction is now being contemplated. We are working very hard with the other parties to put such an application together. That is occupying the time and attention of over 100 of our people, in addition to trying the railroad.

In that context, we now have a request from NS -- from CN for some discovery, and you look at what they are asking for, and why. The reason they say they want it -- and they make some reference to need for the response to the application -- but discovery to respond to the application will be governed by the schedule, and the Board's schedule, which has not yet been adopted, will provide that amount of time which is deemed adequate for discovery in responding to the schedule.

The schedule proposed has 120 days as the discovery period. CN says that's appropriate, and that's sufficient, that's been held sufficient in past proceedings, so that's the time for discovery to

respond to the application.

What they are really looking for here is assistance in what they describe as their desire to negotiate not with Conrail, but with CSX and NS, about the possible acquisition of some of Conrail's lines, if the application is approved and those two rails acquire control of Conrail.

On this issue, we're kind of in the middle. This is not a matter that we have any particular interest in, as an ongoing railroad right now.

Mr. Osborn has identified no authority for a party who wants to negotiate a possible line purchase, to get discovery in the context of a potential control proceeding to do so.

The normal course, if you want to negotiate, is to talk to the other parties you want to talk and negotiate with, and negotiate a confidentiality agreement, and you exchange whatever information you think you need to do that. But there's nothing that says that one party is entitled to impose upon a third party to assist it in such

negotiations, and it is an abuse and distortion of the discovery rules, even if they applied, to permit them to be used to that end.

But we come back to the question -- which I'm surprised to hear it referred to as a "nitpicking" objection -- the question of do the rules that allow discovery apply at this point? And that is a fundamental question of the authority of the Board or Your Honor to impose involuntary discovery burdens on a party who does not wish to undertake those at that time.

We've made, I think, a very strong and persuasive argument before. It's been s[illegible]ger, I think, now because there are some further aspects of the rules that we've noticed, discussed in our brief, about the limitations of the Board's discovery rules authorizing discovery. Not only does it have to be a proceeding that has begun, but the rules exclude automatic application to informal proceedings, and that is term of art that is defined in such a way as not to include control proceedings like this, as we explained in the brief.

In addition, unlike other kinds of proceedings where the rules say that the discovery rule of 1114.21, et cetera, will apply to this particular kind of proceeding. The control proceedings don't have a rule like that that incorporates the discovery rules.

So, the only way they can be incorporated, even assuming that there is a proceeding, is action by the Board, and there is no order by the Board thus far which invokes and applies and says that those rules apply to permit discovery at this time in connection with the anticipated application.

The Board's schedule order is something that has not been issued yet, as I said. That will provide some authority for -- some express authority, as in the past, for Your Honor to adopt discovery guidelines. That is also another first step that is necessary before parties can start going off on discovery. That hasn't happened here. So, we have no schedule, we have no guidelines, and we have no proceeding at this point, and there's no circumstances, there's simply no legal authority for

discovery to be begun by a party, and particularly for the purpose that CN has identified.

Now, the Decision No. 23 in UP/SP that Mr. Osborn gave to Your Honor was a very different context. The question there arose not prior to the filing of the application, but long afterwards. The question there was whether the applicants could proceed with discovery to the parties who were opposing the application before the time for them to file an opposition had been reached.

There is no question that there was a proceeding in which the discovery rules applied. There were guidelines that made that explicit. And it was a question, rather, of the application of that clear authority to permit discovery at that time. So, it doesn't have any bearing on the question here as to whether, at this stage, prior to any application being filed, the rules permit discovery to proceed as CN has requested.

The question about the particular request that has been made, I think that is something else that Mr. Osborn didn't request. He did not suggest

that the list of 24 items was carefully tailored to meet their particular needs in negotiations and, indeed, it's perfectly clear that what happened here -- I mean, he just took the request that NS had made for a very different purpose. NS said they wanted that discovery to help them prepare an application to acquire all of Conrail. Whether or not that was a valid purpose at that time, the requests were framed in that context and have that rationale. That basis for those requests has nothing to do with the present request that they want to acquire certain of Conrail's lines at some point.

I think what he did was to say, well, the easy way here to get some discovery is to ask for the same thing, thinking that we had already produced everything that NS had requested and, therefore, there couldn't be any objection to it. Well, as it turns out, that was wrong, but it doesn't mean that the rationale that is stated provides any basis for all of those requests. Most of them have nothing to do with a possible acquisition of the line. Indeed, many of them are for matters that are not even customarily

filed as part of the application or in a depository in a control proceeding.

So, these are not routine matters that are always going to be -- have to be produced in a control proceeding. There's a lot of it that are just things that NS people wanted at that time when they were looking to purchase all of Conrail, and there is certainly no rationale for any of them to apply to the rather different more limited, but no less invalid or unwarranted desire for discovery to aid a purchase of some line.

So, there isn't even a kind of logical rationale for the requests that are there, and we shouldn't have to be put to the imposition or the distraction of all of the people who are working overtime trying to get everything else done that they have to get done, in this particular period, because we're in a very sensitive and difficult time in trying to complete the application for filing by mid-June, which is the target date, which the Board has endorsed as an appropriate thing to try to do.

MR. OSBORN: Your Honor -- I didn't mean

to interrupt if you're not finished, Mr. Norton.

JUDGE LEVENTHAL: When do you expect to file the application? When you say mid-June, do you mean June 15?

MR. NORTON: I think the 16th is a Monday, I think that's the target date.

MR. OSBORN: Your Honor, I don't want to try your patience, but I'd like to respond briefly to some of the points he made, beginning with the 16th of June, on which they may or may not file the application because Mr. Norton has now suggested to us on the record that they may never file it, which is apparently part of his justification here for not engaging in even this limited discovery, even though CSX and NS have announced this settlement, even though they are in the process of borrowing something in the vicinity of $8 billion in the public market right now -- public and private, I should say -- and even though they are proposing to acquire the remaining Conrail stock in roughly two weeks, for a total purchase price in excess of $10 billion, he's suggesting that maybe this whole thing will just fall through.

Well, if that happens, responding to this discovery will have been the smallest expenditure of time and effort and money on the part of any of the primary applicants. I think it's pretty clear the application is going to be filed. It might not come in in the middle of June, that's in their hands. They got their waiver of the three-month prefiling notice requirement, so they can do it as quickly as the middle of June.

I'm glad he brought up the point of the reason why CN needs and requests this discovery because I meant to respond to that point earlier. Certainly, this discovery would be useful to us for purposes of any negotiations we might be able to engage in, but that's not the legal basis for the discovery.

The legal basis for the discovery is to be in a position to file a responsive application in this case, and I'm very comfortable saying that Canadian National stands right now as the principal railroad opponent of this merger in its current form. There are some very serious competitive deficiencies in what

CSX and NS are proposing to do with Conrail here, and this is our last chance in this case to get it right in the northeast part of the U.S., as far as railroad competition is concerned.

So, we intend to file to try to remedy the deficiencies in the transaction that they are proposing, and it's going to be extremely tight. They are advocating a highly accelerated schedule which is highly inappropriate in some respects. At the front end of it, they would propose that there is only 120 days after the application, the primary application, is filed before CN and any other parties could file any responsive application and all opposition evidence.

We did file comments, CN did file comments on the proposed procedural schedule, and we acquiesced in that 120-day period. It's pretty clear to us that the Board is not going to allow more than that, and that's what they provided for in the schedules earlier published. That doesn't mean that we think it's a great idea or that it's enough time, and it certainly wasn't meant to compromise this preliminary discovery

request that we've made here.

We need some of this basic information right now to acquire fundamental knowledge about the Conrail system, so that we'll be in a position hopefully to get the rest of the discovery on the run, after the primary application is filed, and put things together within that 120-day period. So, that's the basis for our need.

As for as the applicability of the discovery rules, again, and the jurisdictional issue, the short answer is that the Board has the jurisdiction and you make the rules. You can order this discovery now. Whether the discovery rules apply or don't apply, it really is not an issue of concern.

As to Decision 23 in the UP/SP case, I think Mr. Norton may have misspoken, or maybe put it a little confusingly, because he said that the discovery there came up after the application had been filed. Well, it was after the primary application had been filed, but the primary applicants were seeking discovery from perspective responsive applicants before the responsive applications had been filed.

And they were seeking discovery of a much broader nature than what we are seeking here, and Judge Nelson allowed part of it. So, that again just demonstrates the authority that the Board has and the Judge has to decide these discovery issues.

The existence or filing of a primary application is not a jurisdictional sine qua non to allowing some discovery here.

He tried to distinguish the earlier NS request from the CN request. We certainly did copy the earlier NS request because they were requesting only basic readily available information about the Conrail system, and we did not want to put any additional burden on Conrail.

He says our purposes are different. NS was proposing to acquire all of Conrail. CN will be proposing to acquire access over part of Conrail. The purposes are not so different at all, and we need this information for essentially the same reason.

And when Mr. Norton says that none of the earlier NS discovery requests were responded to, I think we have to decipher his meaning in that careful

statement because he's not saying that NS doesn't have any information about Conrail, he's just saying that -- apparently he's saying that they decided that the information that they were exchanging would be deemed not to be discovery responses.

Is he telling us that today no one at NS has a density chart on the Conrail system? I don't think he's saying that. I think NS has had this information for as long time, and they were able to put aside their discovery disputes because they were buying the company. It's just not responsive to the CN request or the CN needs.

And, lastly, as to this burden argument that Mr. Norton makes, and the sensitive time we're in, the crunch time when they're trying to prepare the application. We requested this information back in February, and the issue was drawn in December and January when the matter was before you. They are the ones who have put this off.

There is not a great deal of burden in what we're asking for, they just have to pull this information and give it to us. We're willing to talk

about whether it needs to be tailored in some respects. They have enough manpower and horsepower in a field this size, to address these requests now.

JUDGE LEVENTHAL: Let's go off the record. Do you wish to be heard?

MR. EDELMAN: I'd like to be heard, Your Honor, either before or after you go off.

JUDGE LEVENTHAL: Sure.

MR. EDELMAN: Your Honor, I'm Richard Edelman, I represent a number of the rail unions, and I want to say that rail labor is not taking a position here on the merits of the CN request or their position in the transaction or anything, what I want to address is just the potential threshold question regarding whether or not discovery is permissible at this point or in the near-term, and that's what concerns us because we may have issues we may want to address in the near-term and seek discovery.

First off, with respect to the issue of whether or not three is a proceeding. I think that the position advocated by Conrail is just plain silly. There has been a voting trust that has been given

preliminary approval by people at the Commission. Now, that's some kind of decision being made. The stock is going to be put in a voting trust. If they end up not acquiring this, the trustee is going to end up holding the stock, all of the stock of Conrail, and then they're going to have to sort out what happens after, as far as this filing and stock.

There has been a petition for waiver for the prefiling application time period filed in this finance docket by CSX and NS. There has been a petition for establishment of a schedule. And now there's been petitions for waivers of proceedings relating to construction of connecting lines by both NS and CSX, where they want approval in this finance docket to construct lines prior to -- and have to add them on -- prior to them getting approval for the acquisition or control of Conrail in the first place.

So, there's a lot going on in this case, and to sit there and say that there's no proceeding, there's no ability to get discovery about things that relate to the upcoming merger because there is no proceeding has no substance and I think is just wrong.

Second, I would concur with Mr. Osborn, there has to be some concern, given the fact that the rules set out in the CFR for formal discovery are basically keyed to a statutory scheme that involve, what, a 15 of 16-month process for approval of a merger.

The applicants proposed a 255-day schedule here, and they are looking at a 120-day period for people to file comments and request for conditions and responsive applications, and so we're going to end up with something that doesn't look like a statutory scheme by waiver, pursuant to the request of the applicants, then it seems inappropriate for the applicants to be standing on a regulatory system that's keyed to a statutory scheme that they're asking the Commission to waive, or the Board to waive.

And I would also say that perhaps CN, whatever its reasoning, didn't object to a 120-day schedule because, after all, they're a railroad, one day they may want this fast-track schedule just as all the other railroads do. But waiver shippers, other public bodies, they are all concerned with the

schedule. We all have to deal with this. We often are not represented by large law firms that can supply hundreds of lawyers on this stuff. And we have to deal with the ability to get information in a ridiculous period -- and I can say for the record, and I've said before -- that 120 days is ridiculous and prejudicial, and that needs to be recognized and, if CN can't say it, I will.

So, I think that that needs to be addressed.

JUDGE LEVENTHAL: Isn't the 120-day period usual?

MR. EDELMAN: No, absolutely not. It was done in UP/SP and it was done in BN/SF, but it's not in the statute. And the point is -- and what happened the last time, I would say, is that when they set the 120-day schedule, they certainly thought it was going to be easy, and it was in fact a mess, and everybody who was involved in trying to conduct the discovery on the ground knew it was a mess, knew it was difficult, knew it was burdensome, and it took the Commission's effort, one, to tell people in Congress that it can do

stuff fast, and applicants concerned that they want things done quickly and not have the messiness of having other people actually conduct discovery and submit complete comments.

So, I would say that you can't say it's usual, it was done in the BN/SF and UP/SP scenario, but --

JUDGE LEVENTHAL: Aren't those the last three merger cases?

MR. EDELMAN: Last two, I know it was done in UP. I'll say, we filed comments, we think it's a mess, we think it's prejudicial, we think it's wrong, and it's clearly wrong in this case where two carriers are seeking to divide up a third system, and we're going to get a transcontinental railroad after the fact. We said that before.

The fact is -- but let's assume, Your Honor, okay, this may be likely to be forthcoming under the schedule, all the more point not to preclude discovery prior to the beginning date for this 120-day countoff.

Again, they are saying that you shouldn't

have preapplication discovery of anything relating to the application, based on regulations that are tied to a statutory schedule of 16 months, but they've asked the Commission to come up with a schedule of 255 days. So, there's a discontinuity in their position vis-a-vis how fast the application gets approved and what period of time ought to be available for parties to obtain discovery.

Lastly, I would say that I think -- I have not seen Conrail's filing of yesterday, so I don't know what's in it, but it seems to me that there are general discovery rules, and that you would then need an explicit exclusion of those general discovery rules, not an explicit incorporation of the discovery rules. That's exactly what you're looking at. In other words, if they're going to say the discovery rules are inapplicable, they need to find some exclusion in it. Again, I haven't seen their paper, so I'm just going by what I hear here.

And, finally, with respect to the burdens on Conrail for the time frame, we know the time frame is set by the applicants here. They, in fact, ask the

Board to allow them less the three months prefiling time. So, if they've created a time crunch for them and the 100 people working overtime, that's been created by the applicant.

So, all that I'm asking -- again, I have no grief for the particular things that they want here, all I'm asking is that Your Honor not accept the broad notion that no discovery is permissible related to this case prior to the filing of the application.

MR. OSBORN: Your Honor, I know we're getting to the end of argument, but I just want to say, so that it will be clear in your mind, that the discovery we're seeking is not discovery about the transaction that they are going to propose in the primary application, that would be a different issue -- it would be a more difficult issue -- but that's not what we're seeking. We're seeking just basic information about the Conrail system.

JUDGE LEVENTHAL: Let's go off the record.

(Discussion off the record.)

JUDGE LEVENTHAL: We're back on the record. In our off-the-record discussion, I urged the

parties to see if they could reach some amicable agreement of the dispute with regard to discovery. I indicated that I was not going to be available for the next roughly two weeks after Thursday, which is May 8. I therefore indicated I wouldn't be able to make a ruling on the discovery dispute until sometime after May 21st.

The parties have agreed that they would try to resolve or attempt to discuss their dispute in the recess that's going to follow.

If the parties wish to add anything that we have said off-the-record, you are welcome to do so. Mr. Osborn?

MR. OSBORN: Thank you, Your Honor. I would just add that while we were off the record, I think we both agreed that we would try to have an informal discussion right now, but I suggested that if we were not able to reach a prompt agreement, that we would like to argue the merits of the individual request, and we would like to get an oral ruling from you today or tomorrow, before you do go on vacation.

JUDGE LEVENTHAL: Well, I'll hear your

argument. I can't promise you a ruling, but --

MR. OSBORN: I understand, Your Honor.

JUDGE LEVENTHAL: All right. Does anybody wish to add anything else?

(No response.)

All right. Off the record.

(Discussion off the record.)

JUDGE LEVENTHAL: Back on the record. We will stand in recess until the parties advise me you are ready to resume.

(Whereupon, the proceedings stood in recess from 11:00 a.m. until 1:00 p.m.)

JUDGE LEVENTHAL: Back on the record.

Mr. Osborn, you wish to report what has transpired during the recess?

MR. OSBORN: Thank you, Your Honor. We've had a discussion of these requests off-the-record, and we want to continue that discussion this afternoon, Your Honor, and tomorrow morning, if necessary, and would like to be able to come back before you tomorrow afternoon, at which point we either will have succeeded in resolving the dispute as to the

discovery, or we would want to be in a position to argue the specifics of the motion to the extent required tomorrow and, absent a settlement, CN would ask for an oral ruling tomorrow, if necessary.

So, that's where we are. We're going to continue to keep trying to work it out and see if we can get there between now and early tomorrow afternoon.

JUDGE LEVENTHAL: All right. In that case then, we'll stand in recess until tomorrow afternoon at 1:30.

(Whereupon, at 1:05 p.m., the proceedings in the above-entitled matter were adjourned, to reconvene Thursday, May 8, 1997, at 1:30 p.m.)

CERTIFICATE

This is to certify that the foregoing transcript in the matter of: Oral Argument:
Finance Docket No. 33388

Before: Surface Transportation Board

Date: May 7, 1997

Place: Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

Phyllis Young

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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,
May 8, 1997

Washington, D.C.

The above-entitled matter came on for a oral argument in Hearing Room 6 of the Federal Energy Regulatory Commission, 888 First Street, N.E. at 1:30 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

(1:37 p.m.)

JUDGE LEVENTHAL: All right. The oral argument will come to order.

At this time, we'll take appearances.

MR. OSBORN: Good afternoon, Your Honor. L. John Osborn of Sonnenschein, Nath & Rosenthal, appearing for Canadian National Railway Company.

JUDGE LEVENTHAL: For Conrail?

MR. NORTON: Gerald Norton and Paul Cunningham, Your Honor, for Conrail.

JUDGE LEVENTHAL: Any other appearances?

MR. HARKER: Drew Harker of Arnold & Porter on behalf of CSX.

JUDGE LEVENTHAL: All right. Do the parties want to report on what has transpired?

Let me just say for the record, this is continued oral argument in the matter of Docket Number 33388.

All right. Mr. Norton?

MR. NORTON: Your Honor, when we broke yesterday, I think we had not had a chance to respond

to some further argument by Mr. Osborn on the merits of the threshold question. And it was agreed, at Your Honor's urging. to discuss -- try to resolve the matter if we could. We have had discussions, and we were unable to reach a resolution.

What I would like to do is to address briefly some further considerations about the threshold question, which we have regarded as very important. And then, if we need to move beyond that, we would be prepared to outline what we would be willing to produce in response to the request.

But in that context, since there are people here other than the immediate parties to this dispute who are not applicant parties, we would like that discussion to be either in camera or off the record, because we would -- we think it would be useful if we made a fairly specific proffer.

But we don't want to be in a position, because of concerns about having this redound to our disadvantage in other discovery requests, of having it a matter of public record at this time because this also gets into what is going on in the application

process to some extent. So that's what we would propose to do, if that's agreeable.

JUDGE LEVENTHAL: All right.

Mr. Osborn, do you wish to be heard?

MR. OSBORN: I think I probably disagree that it gets into what is going on in the application process. But apart from that, if Mr. Norton wants to reargue the jurisdictional argument, I think that would be fine. And I think that Conrail's interest in arguing that may have been an obstacle to our trying to resolve this thing up until now, Your Honor. So I think it might be useful to get to that.

JUDGE LEVENTHAL: Obviously, we have to decide the threshold issue first. You have no objection, though, to continuing if I rule in your favor on the threshold issue. Mr. Norton has suggested that we have a private session. You have no objection to that, I take it?

MR. OSBORN: No objection, Your Honor.

JUDGE LEVENTHAL: Anybody else wish to be heard?

All right. If you wish to argue further

on the threshold issue, you may proceed.

MR. NORTON: Yes, Your Honor. And I think on that issue, whether you characterize it as jurisdictional or as prudential, or as something else, it doesn't necessarily matter. The point is that this is a very significant issue for us. And if we have to -- if there is a ruling adverse, and we have that to deal with, because of the impact it has as a precedent, that is a matter that we would certainly want to appeal.

I think the prudential dimensions of it are something that have to be taken into account. We're dealing with a request that is totally unprecedented in terms of prior proceedings not sanctioned by any rule, statute, or prior case law.

Against that background, you would need an extraordinary demonstration of why it is necessary and appropriate to allow such discovery, and also a demonstration that there are not adverse consequences following therefrom. And we think that it is clear that there are problems that are created if such discovery is allowed.

It comes at a very difficult, crucial time in the process of the preparation of the application, which as we described previously is an enormous undertaking. If parties are able to intrude upon that process through discovery at this stage, it has potential for permitting efforts to slow down the process and disrupt it in various ways. I'm not saying that's what Mr. Osborn's purpose was, but that's a way that it can be used, and there are certainly parties who do wish to delay this proceeding that will follow the application, and the filing of the application.

There is clear evidence from the positions that have been stated that some people want this put off as long as possible. And to allow free application discovery would provide another weapon, whether in this proceeding or others, for that to happen. So there are some significant prudential considerations that I think support the position that we think is established by the statue, the rules, and the case law.

Further, I think the question that Mr.

Osborn has really not even attempted to answer is demonstrating that there is a real nexus here for the kind of discovery that he is seeking. And while this may be something that bears on the particular request, each one of them you will have to ask, "Well, how did this really relate to a legitimate interest of CN at this stage?"

Overall, it is clear that this is not a request that was crafted to serve that interest. It was picked up entirely from what NS had done for a very different purpose. It does not reflect the kind of careful tailoring to meet some specific legitimate objectives that CN may have had.

There were some other points made in the argument that I think I just want to briefly mention. The question of the 120 days as sufficient for discovery came up. And I just -- I could read several passages from Mr. Osborn's submission to the Board on the schedule question, but they were not grudging in saying 120 days. They fully and firmly endorsed that as sufficient and proper.

That should be the end of it as to whether

discovery prior to the application is needed to respond to the application. So that leaves only his justification that he needs it for trying to negotiate some deal down the road with CSX and NS. And that is a justification that, as we've indicated, he has no support for as a legitimate exercise of the discovery power, particularly at this stage.

Now, unless Your Honor has some further questions on the threshold question, I think that summarizes our position.

JUDGE LEVENTHAL: You see, I was hoping that the parties would get together on disposing of this for pretty much the very reason you've expressed. If you had agreed on selling the dispute, you would have no precedent set whatsoever. But it didn't work.

MR. NORTON: It didn't work. And we certainly made good faith efforts.

JUDGE LEVENTHAL: All right.

MR. NORTON: Well, Your Honor, and it didn't -- we wouldn't have the precedent, and that's correct. But we also have a consideration that has to be balanced, and it bears on our position on the

particular request, is that the reality is that we're in the middle of this application process. Our people are really run ragged and stretched thin dealing with running a railroad and gathering information that's needed for the application process.

And to impose upon that situation this additional premature burden of trying to run down things that are not readily available -- and I mean readily available in a very easy sense -- it is a very practical consideration that we have to take into account.

JUDGE LEVENTHAL: And are there requests that are readily available that you could present without too much of a burden on anyone?

MR. NORTON: Your Honor, if we -- there are some requests, and if we get to that point I can outline what we could and would be willing to do. And I think it would be a substantial response of materials that are covered by the request and that are -- whether some of them are readily available, some of them are not readily available but we'd be willing to produce them anyway, but that would be consistent with

not significantly disrupting the application process.

And that's -- we went through some discussion to that end yesterday and this morning, but it was not ultimately something that we could resolve.

JUDGE LEVENTHAL: All right.

Do you wish to respond, Mr. Osborn?

MR. OSBORN: Thank you, Your Honor. Let me say at the outset that if Conrail were willing to provide what we regard as a substantial response, we wouldn't be here right now this afternoon. But I think Conrail does want to air this initial issue.

And you recall yesterday I said that this had two facets -- whether the Board and Your Honor can order limited discovery here and whether it should and you should, even before we get to the issue of just specifically what the specific request called for. And from what Mr. Norton has just had to say, it sounds to me like he is focusing more on the should than the can. He says it is a matter of prudence. I didn't hear him say it was really a matter of jurisdiction.

We argued that at length yesterday. I

think it is very, very clear that the Board has the jurisdiction to order some limited discovery here, and that they vested that jurisdiction in you.

I don't think it is totally unprecedented. You know, we do have the precedent in the Rio Grande/SP case, and we have an analogous preference -- precedent, rather, in the UP/SP case with respect to the ordering of some discovery in advance of the filing of responsive applications.

But I think we also have to keep in mind, insofar as there may not be a lot of precedent, that we used to try these railroad merger cases over a period of time that was measured in years, not months. And now we do it in a period of time that's measured in months or weeks or days. So the occasion for limited discovery prior to the filing of a primary application really wasn't presented in the past.

There used to be abundant time during the course of the proceedings. Now we're faced with what apparently will be a maximum of 120 days in order to digest the primary application and conduct discovery on the terms of the transaction, prepare a responsive

application, prepare all other opposition evidence. It is extremely tight.

In all fairness, I think that Mr. Norton is mischaracterizing the CN response on the procedural schedule, insofar as that 120-day period is concerned. We certainly did not say that it was abundant or that it in any way obviated the need for the limited discovery we are seeking right now. We were merely acquiescing in what the Board had done before in urging that it not be shortened any further from 120 days.

As far as the crucial time that Mr. Norton says we're in, again, I think that's of his own making. We put this to them some months ago, and I think any threat that might exist for abuse of the process is something that the Board and Your Honor can manage quite well.

We are seeking extremely limited information, and I am quite prepared to limit it in scope from what we had earlier filed. He says that it wasn't tailored at the time we initially proposed it to him informally, and that is true in a sense because

we were trying to impose no inconvenience whatsoever and simply request for that which they were already producing to NS.

But we are willing to tailor it now, and we've had some informal discussions along those lines, so that it is targeted to just the limited information CN needs with respect to the specific parts of the Conrail system that are relevant to CN's interest in the case. So it is not a runaway request in any sense of the word.

And finally, if we have to get into a discussion of the specific requests and Conrail's definition of readily available, we will do so. But I think that their definition of readily available is more than a phone call or an arms length away. In other words, they are taking a very, very, very restrictive position.

We are not asking for any serious work or any serious inconvenience here. These requests are highly limited and, again, don't get into the details at all of the application that is now under preparation.

JUDGE LEVENTHAL: What have you got to say to the fear expressed by counsel that they can be inundated with discovery by -- I don't know how many parties we have in this case here. I would judge at least 20 parties who have asserted an interest in this proceeding. And if each one of them served discovery requests such as yours, wouldn't that impede their progress in getting up an application and preparing for the disposition of the matter?

MR. OSBORN: Your Honor, if those requests were forthcoming and were as limited as ours will be, by the time you're asked to rule on specific requests I think the answer would be that it wouldn't be either a burden or an inconvenience, let alone an intrusion. But there is no other request at this point.

And I think it's also worth noting that, you know, the Board in ex parte 527, I believe, recently had considered with respect to revocation proceedings on exemptions -- had considered a procedure whereby discovery would start even before a petition for exemption -- for revocation, rather, had been filed.

The Board did not adopt that in response to the railroad's pointing out that discovery could go on endlessly. Here we are talking about a very limited timeframe and a very accelerated schedule. So this is going to be over very, very quickly. And again, for the very limited information that we're talking about here, the imposition is going to be minimal or nonexistent.

We're not advocating the type of discovery that could really intrude upon the application process -- discovery that would be asking them about the transaction for which they are now preparing the application. That, as I've stressed many times, would present a very, very different and much more difficult issue that you need not grapple with here.

MR. NORTON: Your Honor, because this is such an important issue, I'd like to just add a word or two.

Mr. Osborn made a distinction between should and could. We believe we are arguing both should and could. I just wanted to emphasize today the should -- that it would be a bad exercise of

whatever authority the Board may have granted, but we also argue that the Board has not authorized discovery at this stage.

Now, Mr. Osborn referred to a bit of history in the old days when control proceedings took quite a long time, and the issue of having preapplication discovery -- there was no need for that issue to arise. Well, that supports our side, I think, because it underscores that if there is a need for a change in the rules here, that is what should happen.

The Board proposed some changes in its control rules a couple of years ago when the BN/Santa Fe proceeding was ongoing, and I don't know whether CN suggested that there should be preapplication discovery at that point, but that would have been an appropriate time to do so. The Board has not adopted rules that make any changes or that purport to authorize discovery prior to an application.

The other place, again, where that could have been addressed is in the schedule in this proceeding. And that, again, was something that CN

did not suggest was necessary or appropriate, or that the Board should adopt in the schedule of this proceeding.

What they did say was -- this is at pages 2 and 3 of their submission -- there should be no controversy as to the front end of the schedule proposed by joint applicants, which is identical to the procedural schedules earlier adopted by the Board and CSX/Conrail and NS/Conrail. That's referring to the 120 days for discovery. They said the Board wisely adopted that approach, 120 days.

They end up by saying, in short, there is no controversy regarding the front end of the schedule, and the Board -- with a 120 days, and the Board should adhere to the approach followed in its earlier decision. So there can't be any question about their having expressed the view that that was an appropriate period, and that's a period that starts with the application, not before.

There may not have been any other requests to date, but, of course, the original request by NS prompted the CN request. Mr. Edelman told us

yesterday that he is going to have some requests, if you rule in favor of CN. And who knows how many others, and likely many, will appear and seek discovery once there is a green light that it's something that is permissible.

The reference to a revocation of exemption I think, if I'm familiar with what he's talking about, may support us rather than them, because I think the change in the rules there did permit some discovery at an earlier stage than would otherwise be available. That is how this kind of procedure should be done.

If there is a need for preapplication discovery, it should come by explicit decision by the Board, whether in an order or in its rule. It hasn't happened. There is no compelling case been made for it, in general or here. And we think it is a very important threshold question, and there is no case been made that Your Honor should embark on this truly unprecedented step of allowing discovery at this stage.

Thank you.

MR. OSBORN: Your Honor, just briefly if

I could, Mr. Norton keeps coming back to this CN comment on the procedural schedule and, you know, reading out of context on page 2. The point we were making when we said the Board had wisely adopted the 120 days was that the Board had put out for comment a shorter than 120-day period for the filing of evidence in response to the primary application. And everyone who commented, I believe, had said that would be an unwise thing to do.

So we were not saying that 120 days should foreclose the limited discovery we're seeking here. We were saying that the Board should not revert back to the shorter than 120-day schedule it earlier had floated for comment.

And as to the rest of what Mr. Norton said, I know Your Honor is well aware that an agency doesn't have to make a rule in advance for everything. The agency can proceed by adjudication, and that is exactly what happened in the UP/SP case with respect to that ruling that Judge Nelson made.

The Board has vested its jurisdiction in the Judge, and the Judge has the discretion to make

the rules in the form of the discovery guidelines for each individual case to make rulings in response to the circumstances presented in these cases. There is no need, jurisdictional or otherwise, for the Board to have carved out a rule in advance that addresses this specific situation.

JUDGE LEVENTHAL: Well, if I granted -- if I permitted discovery, can you explain why you need discovery now rather than when they file their application?

MR. OSBORN: Yes, I can explain it now, or I can --

JUDGE LEVENTHAL: I mean, you tell me in general you only have 120 days. What would you use the responses to your interrogatories for?

MR. OSBORN: We are using them, and we will use them to develop a proposal for a responsive application to do a lot of the preliminary work that CN needs to do in order to determine what would be the precise scope of the responsive application that they would file.

And it is very important for us to be able

to do some of that work now, because when the primary application is filed, then it is a scramble to digest all of the stacks of volumes that -- and the information that that will contain to be developing more of the specific data for responsive application, to be preparing opposition evidence in response to the primary application.

So what we're looking for now, that is really no burden or imposition on Conrail, is to get just some of the very basic information on the lines that we're interested in, so that we can do the groundwork and get some of that done before the clock starts running on the 120-day period.

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

(Whereupon, the proceedings in the foregoing matter went off the record at 2:01 p.m. and went back on the record at 2:55 p.m.)

JUDGE LEVENTHAL: Back on the record.

In our off-the-record discussion, the parties have reached a resolution of their dispute,

subject to -- have reached a resolution of their dispute. Canadian National Railway is withdrawing their motion to compel at this time, subject to its renewal. Renewal may be made by a joint letter to the Judge on or before May 27th?

MR. OSBORN: That would be fine, Your Honor, except I think maybe it could be renewed by Canadian National unilaterally, if need be.

JUDGE LEVENTHAL: All right. It's your motion. All right.

Subject to being renewed by Canadian National, and it can be by a letter to the Judge, with copies of course to Conrail. And the oral argument will then be rescheduled for May 28th. Actually, I will reschedule the oral argument for May 28th at this time. On receipt of your letter, one way or another, if you're not going to renew your motion, then you have to advise me that the dispute is terminated permanently.

MR. OSBORN: Yes, Your Honor.

MR. CUNNINGHAM: 1:30, Your Honor, on the 28th, or 10:00?

JUDGE LEVENTHAL: What is your preference? If we make it 10:00, we have all day for argument and resolution. So I think we'll resume at 10:00 on May 28th.

Let's go off the record.

(Whereupon, the proceedings in the foregoing matter went off the record at 2:57 p.m. and went back on the record at 2:58 p.m.)

JUDGE LEVENTHAL: Back on the record.

The parties, off the record, have agreed to a revision of my last statement. In lieu of a motion to resume the argument, I am going to recess this oral argument to May 28th at 10:00 a.m.

If Canadian National Railway is satisfied with the results of our settlement today, they will notify me by mail so that I receive it on or before May 27th. It is not necessary to notify me if we are going to proceed with the argument.

All right. Is that agreeable to all parties?

MR. NORTON: Yes, Your Honor.

MR. OSBORN: Yes, Your Honor.

JUDGE LEVENTHAL: All right. Do we have anything else before us?

MR. OSBORN: No, sir.

MR. NORTON: No, Your Honor.

JUDGE LEVENTHAL: All right. The oral argument stands in recess, and I want to thank you for your cooperation. I think everybody did a good afternoon's work.

(Whereupon, at 2:59 p.m., the proceedings in the foregoing matter went off the record.)

Before the

UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

+ + + +

FINANCE DOCKET NUMBER 33388

+ + + +

CSX CORPORATION and CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION, and
NORFOLK SOUTHERN RAILWAY COMPANY

--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONTRAIL, INC. and CONSOLIDATED RAIL CORPORATION

+ + + +

APPLICANTS' MOTION FOR DISCOVERY CONFERENCE
AND
ADOPTION OF DISCOVERY GUIDELINES

Tuesday, June 17, 1997

Hearing Room 4, Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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APPEARANCES (Continued):

ALSO PRESENT (Continued):

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

(10:05 a.m.)

JUDGE LEVENTHAL: This is a prehearing conference in the matter of Surface Transportation Board Finance Docket Number 33388. We'll take appearances at this time.

MR. McBRIDE: Good morning, Your Honor. My name is Michael F. McBride with LeBoeuf, Lamb, Greene and MacRae for American Electric Power Service Corporation, Atlantic City Electric Company, Delmarva Power and Light Company, Indianapolis Power and Light Company, and The Ohio Valley Coal Company.

MR. WOOD: Good morning, Your Honor. My name is Frederic Wood appearing today on behalf of the National Industrial Transportation League.

MR. MASER: Good morning, Your Honor. My name is John Maser with Donelan, Cleary, Wood and Maser, P.C. I'm appearing this morning on behalf of the Institute of Scrap Recycling Industries and a group called the B&O Coal Fuel Producers, which is Anker Energy Corporation, Buffalo Coal Company, Evergreen Mining Company, Maryland Coal Association,

Mattiki Coal Company, PBS Coals, Inc., Tri-State Coal Association, Venture Coal Sales, and West Virginia Coals, Inc.

JUDGE LEVENTHAL: Very well. Further appearances?

MR. BERCOVICI: Your Honor, good morning. Martin Bercovici. I'm here today with the law firm of Keller and Heckman. I'm here today for Eighty Four Mining Company and for The Society of the Plastics Industry.

MR. OSBORN: Good morning. Jack Osborn with Sonnenschein, Nath and Rosenthal appearing for Canadian National Railway Company. And with me is my associate, Amber C. Haskett.

JUDGE LEVENTHAL: Very well. Further appearances?

MS. WYNNS: Good morning. I'm Pat Wynns with Highsaw, Mahoney and Clarke. And I'm appearing on behalf of the Allied Rail Unions.

MR. DOWD: Good morning, Your Honor. Kelvin Dowd, Slover and Loftus, appearing on behalf of Consumer's Energy Company and Centerior Corporation.

JUDGE LEVENTHAL: All right. Further appearances?

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

MR. CANTER: Your Honor, Doug Canter on behalf of the town of Haymarket, Virginia

MR. HARKER: Your Honor, Drew Harker from Arnold and Porter and with me my associate Christopher Datz, representing CSX.

MR. ALLEN: Richard Allen with the law firm of Zuckert, Scoutt and Rasenberger representing Norfolk Southern Railway. I'm here with my colleagues Patricia Bruce and Ellen Goldstein. Ms. Bruce will be addressing the discovery guidelines this morning.

JUDGE LEVENTHAL: Very well. Further appearances?

MR. VON SALZEN: Eric Von Salzen, Hogan and Hartson, representing the Canadian Pacific Railway.

MR. PLUMMER: Good morning, Your Honor. My name is Pat Plummer. I'm with the law firm of Guerriali, Edmond & Clayman, on behalf of the

International Association of Machinists and United Transportation Union.

JUDGE LEVENTHAL: Further appearances?

MR. WELSH: Hugh H. Welsh, Your Honor, representing the Port Authority of New York and New Jersey.

MR. DONOVAN: Paul Donovan, Your Honor, the law firm of LaRoe, Winn, Moerman and Donovan, also representing the Port Authority of New York and New Jersey.

MR. SHIRE: Good morning, Your Honor. Robert A. Shire, Deputy Attorney General, State of New Jersey, on behalf of the State of New Jersey and the Jersey Department of Transportation, New Jersey Transit Corporation.

MR. HARMONIS: Good morning, Your Honor. My name is Michael Harmonis. I'm here on behalf of the United States Department of Justice.

MR. STEEL: Good morning, Your Honor. My name is Adrian Steel, Mayer, Brown and Platt, here on behalf of the Burlington Northern and Santa Fe Railway Company.

MR. SPINA: Good morning, Your Honor. My name is Stephen Spina, representing C.U.R.E. Coalition.

MS. SERFATY: Good morning, Your Honor. Alicia Serfaty, the law firm of Hopkins and Sutter, representing the New York City Economic Development Corporation and Philadelphia.

JUDGE LEVENTHAL: Very well.

MR. SHEYS: Good morning. Kevin Sheys representing Virginia Railway Express.

JUDGE LEVENTHAL: Any further appearances?

MR. COBURN: Good morning, Your Honor. David Coburn with Steptoe and Johnson, also for CSX.

MR. McBRIDE: And, if Your Honor please, I neglected to introduce my associate, Brenda Durham.

JUDGE LEVENTHAL: Very well. Further appearances?

(No response.)

JUDGE LEVENTHAL: Will somebody get the rear door, please? All right. The purpose of this conference is to establish the discovery guidelines. And also we have an open motion to compel.

Mr. Osborn, have the parties resolved their difficulties in the motion to compel?

MR. OSBORN: Yes, Your Honor. After many discussions with Mr. Norton, I feel that we formally are at a point where I can withdraw that motion to compel. And I do so right now.

JUDGE LEVENTHAL: All right. The motion to compel is, then, withdrawn. Very well. All right.

Discovery guidelines?

MR. McBRIDE: Your Honor, it's their motion, but I wanted to inform you that a number of parties seated on our side of the table here met last week, not in any purpose to be territorial but to be constructive, in order to try to frame a position that we thought might lend itself to a quick resolution of the applicants' proposal today.

And I'm pleased to report to you that, although I'm not really representing all of these parties, I'm at least initially speaking on their behalf. And I think in large measure, if not totally so, we agree on a series of proposed we hope constructive changes to the applicants' proposed

guidelines. We have some substitute language.

I'm prepared to discuss each of those proposed changes right now. If those changes were made, I think most of the non-applicants in the room, if not all of them, would endorse the modified discovery guidelines.

Obviously they'll each have to speak for themselves if we get to the end of that process. If you'd like me to, I could begin to go down our alternate proposal right now. It does work off of their document. And we think we can in the vast number of passages live with the language that the applicants have proposed, probably more than 80 percent of their language.

For example, we have nothing I believe to propose in the way of changes on the first three pages.

JUDGE LEVENTHAL: All right. Do you want to do this on the record or do you want to confer off the record to see if you can reach an agreement? Off the record.

(Whereupon, the foregoing matter went off

the record at 10:12 a.m. and went back on the record at 10:14 a.m.)

JUDGE LEVENTHAL: The parties have advised that they would prefer to confer off the record to see if they can reach an agreement. Accordingly, we'll stand in recess until parties notify me they're ready to proceed. All right. We'll recess.

(Whereupon, a recess was taken at 10:15 a.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:04 p.m.)

JUDGE LEVENTHAL: All right. The prehearing conference will come back to order. Anybody wish to report where we are?

MS. BRUCE: Yes, Your Honor. We have met, and we have come to agreement on most of the proposed discovery guidelines. There are a few matters that are outstanding, the first one being Paragraph 10 of the proposed guidelines, which deals with a discovery request.

And the applicants have proposed that there be two rounds of discovery requests, each being no more than 50 written requests. And a counter proposal was submitted in which it was suggested that, instead of having these two rounds of discovery request limitations, that, instead, there be no limitation put on any discovery and that 30 days after filing of the primary application, that Your Honor would hold a further discovery hearing to consider whether specific limitations would be needed to prevent the use of discovery in the case.

After consulting back and forth with various counsel on the other side, the applicants propose that we meld together those two and that we initially adapt our proposal to 2 rounds of discovery, no more than 50 written requests each, each party may propose those on each of the applicants, and that, in addition, on the 30th day following the filing of the primary application, that a discovery conference hearing be held to consider whether or not those limitations on the requests should be modified in any way.

We have not been able to come to an agreement on that. The applicants believe that the imposition of limitations is appropriate in the case and it will in no way inhibit the other interested parties from propounding necessary discovery requests. In addition, they would have depositions, et cetera, to be able to do that.

We do believe there should be some limitation on the discovery. And it was adopted in the NSF also. And we do believe that the proposal of putting the initial discovery limitation on the

requests and that, if necessary, to modify it is a reasonable compromise.

JUDGE LEVENTHAL: Now, in your compromise, are you talking about 2 rounds with 50 questions in each round --

MS. BRUCE: Correct.

JUDGE LEVENTHAL: -- prior to your filing of your application?

MS. BRUCE: No. We're talking about overall. And if that needs to be limited, then it can be brought before Your Honor if that needs to be modified.

JUDGE LEVENTHAL: I want to understand where we stand now. You are proposing that prior to the filing of the application, what is a discovery limitation.

MS. BRUCE: Well, prior to the filing of the application, there is no discovery. But once we file, once the application is filed, and the initial discovery begins, the discovery for the case would be 2 rounds of 50 to be propounded by each party against another party.

And part of our discussions was based on the fact that the application has not been filed yet. So there's no basis of knowing what's the necessary discovery.

And as a compromise position, we would adopt the suggestion that 30 days after the filing, if necessary, we'd come before you if those limitations were found not to be working or there's a need to change them.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Thank you, Your Honor. Our concern is several-fold. First of all, as I think Your Honor may be aware, the application so far as we know has not yet been filed. And we have not been able to find out when it will be filed nor certainly to find out how large it is, how many witness statements there are, what matters may be involved.

Just to give you some indication of the complexity that we may be facing here, there's an indication and an article in the papers this morning that there are 13,000 pages of agreements between and among these applications.

Now, whether or not that's true -- and I don't know whether that's true. I'll simply represent to Your Honor that we're being asked to buy a pig in a poke here today. We have no idea how complicated this case is, nor do the Board's rules impose any limitations on the amount of discovery that we can take.

And certainly none of us are aware of any precedent, whether you go to the local rules in the federal court, the STB, or what have you, for limiting document requests or, God forbid, requests for admission, their proposed limitation would keep us from narrowing this case through what I think most judges and agencies think is an obviously useful technique of getting requests for admission, getting affirmative responses if you can, and narrowing the issues of the case.

So our concern is we're being asked to accept constraints here without knowing what we're even dealing with. And our proposal in response, not knowing what we're dealing with, was to see how this goes for 30 days.

Their concern was burdensomeness, which is, of course, hypothetical. They don't know what we're going to do. They were assuming I was going to give them hundreds of interrogatories. I represented for one party I have 15 sitting on my desk, which I haven't served yet. I'm waiting for the application.

But among the perversities in their proposal is that if I only get 2 rounds, 50 per round, I might as well propound 50, even though at the moment I don't see the need for it because I'm going to be losing those 35.

So we see all kinds of problems with what they're trying to propose. And our counter simply was we see how this goes for 30 days. Most of us can't create too much mischief in 30 days. It will take us two weeks to read this thing probably and propound one round of discovery.

If they say it's burdensome and they want to come in here and say, "Look what McBride did" or "Look what" somebody else "did," they'll be able to do it.

And our proposal was to come in and see

you in 30 days without any constraints under discovery. And if they then feel the need for such constraints and they can show Your Honor that it's burdensome, that there is a problem, I'm sure Your Honor will give them some kind of limitation. If, on the other hand, things are going swimmingly, you'll probably be glad you never imposed any limitations.

So our feeling simply is that we would leave it in the good hands of Your Honor without limitation for 30 days and see where we are.

JUDGE LEVENTHAL: Mr. Osborn?

MR. OSBORN: Your Honor, may I be heard? Let me suggest that Your Honor get a copy of the draft language that has been proposed by the non-primary applicants.

Basically, as Mr. McBride said, the issue here is whether we're going to try to impose some type of numerical limitation before we even get the application, before we get a look at the document depository that the primary applicants are set up. We just feel that that would be wrong to do.

There is no hint of abuse at this point.

We haven't even started. So our suggestion is that you wait 30 days. And then if there is some abuse or hint of abuse, they can come in and explain the circumstances and explain the need for some type of limitation if there is one at that time.

The most recent case was the UP-SP case. And there was no numerical limitation imposed there. And that did not present a problem. There certainly was a lot of discovery, but I don't think there was abuse of discovery in that case.

So we don't know at this point that we need a numerical limitation. What they suggest as a compromise is we'll impose it and then we have to come back and try to argue that it should be rescinded. And we just think that's the wrong way to go at this point.

JUDGE LEVENTHAL: Why do you think it's wrong, though? Suppose we have a limitation of 50 rounds prior to the filing of the application and you come back 30 days after. You don't think I'd be reasonable?

MR. OSBORN: I think you may have misspoke

and said 50 rounds there when you meant 50 requests.

JUDGE LEVENTHAL: Two rounds and 50 requests.

MR. OSBORN: Right.

JUDGE LEVENTHAL: I think you would be satisfied with 50 rounds.

(Laughter.)

MR. OSBORN: You may have said before we're talking about with the filing of the application, which we expect sometime in the near future, although we don't have a specific day yet.

It doesn't make sense to us to try to put everyone in a straitjacket before there's any abuse. They're working on a presumption that there needs to be a limitation. That's why they want you to impose one now.

But the most recent case was conducted without a numerical limitation. And we did not have discovery abuse. So --

JUDGE LEVENTHAL: Didn't they have limitation in the last CSX-Conrail merger application that was withdrawn?

MR. OSBORN: I don't believe. I don't believe there were any discovery guidelines adopted.

MR. WOOD: There were never any discovery guidelines because all we got was procedural schedule. And then those were withdrawn. So we never got to the point of --

JUDGE LEVENTHAL: There were no --

MR. WOOD: -- considering discovery guidelines in those proceedings.

JUDGE LEVENTHAL: Which case did you say you had guidelines?

MS. BRUCE: Your Honor, BNSF adopted guidelines. BNSF adopted discovery guidelines and limitations on the amount of discovery.

And, to respond to Mr. McBride and Mr. Osborn, we're not seeking to put anyone in a straightjacket. If they would like to come back in 30 days and say the discovery limitations do not accommodate their needs, then we'll bring it before you that way. But without a limitation, we could be subject to numerous, numerous, numerous requests and with nothing to fall back on as a limitation. And we

don't think that this is at all unreasonable.

And just as they're saying we can come back to you, we can all come back if they don't work. We have to see if they work first. And they do understand that no application has been filed. So they have no point of reference.

However, we're willing to say that whenever, within the 30 days or before the 30 days or whenever necessary, we need to revisit the limitation, so be it. We're not opposing any revisiting of it. We just think as an initial matter, the guidelines need to set out some discovery limitation.

And, again, I emphasize that the limitation is per party, per party. So if one party wants to fire away, seeking matters against each applicant, then they're giving that opportunity. But we don't want the limits to be so unreasonable that they're entirely unworkable.

MR. OSBORN: Your Honor, I just want to say that I'm willing to state right now that the limitation that they're imposing is restrictive on what we would expect to do.

We haven't seen the application yet. So it's difficult to be precise, but they're talking about a limitation, 50, and they want to count subparts as a request. And the way you write discovery requests, you try to put things together in a logical way so that there are subparts. But you would use them up very quickly if the restrictions that they suggest were imposed here. I think it's an artificial restriction. And we just don't have a need for it at the outset.

MR. McBRIDE: I'd just like to make a few last points, if I may, Your Honor. One is that the analogy to the Burlington Northern Santa Fe case I think is not an apt analogy. If there is a good analogy, it's better for the Union Pacific-Southern Pacific.

The reason simply was that in Burlington Northern Santa Fe there was relatively little overlap. It was largely end to end. And there weren't many litigating parties. It was a lot easier to put limitations on it. The case was on a much faster schedule.

The Union Pacific-Southern Pacific, we had far more problems, far more controversy, substantive and whatever. Conrail has a proceeding in which we're heading into uncharted waters, carving a major railroad into two parts and giving pieces off to their competitors.

A lot of us are having to wait for the application until we can advise specific clients on what is even going on here. So a lot of this is for people who aren't even here yet and who I'm sure are going to be in this case.

And I think you need to be mindful about that, that some of these limitations may be imposed on people who haven't even had an opportunity to be heard yet.

MR. WOOD: Your Honor, if I may make one additional point? I think it's also important for Your Honor to keep in mind the change in attitude at the STB about discovery and the opportunity for parties to utilize discovery.

Historically the ICC, the STB's predecessor, had not allowed unrestricted use of

depositions and requests for production of documents. And in the amendments to their rules practice, which they adopted the end of last year, they removed those restrictions, which I think should indicate to Your Honor that there is now an attitude at the STB to allow the free use of discovery with full recognition that the rules provide for parties an opportunity to come and obtain relief from the presiding officer against any kind of abuse.

And I think what the applicants are proposing is just the reverse of what the prevailing philosophy about discovery is at the STB, which I would again indicate was fully reflected, the allowance of free discovery was fully reflected, and the guidelines were put in place in UP-SP.

And, as Mr. Osborn indicated, there was no indication of abuse. There certainly was full discovery. But I don't think anyone came before Judge Nelson and claimed that the opportunity to pursue discovery had been abused.

JUDGE LEVENTHAL: When does discovery start under your schedule, under the guidelines?

MS. BRUCE: With the filing of the application, --

JUDGE LEVENTHAL: With the filing of the application.

MS. BRUCE: -- we can pass discovery on the applicant, Your Honor.

JUDGE LEVENTHAL: How long will it take for you after the filing of the application for you to formulate your discovery requests?

MR. McBRIDE: Well, as I say, for a couple of my clients, I've taken a stab at it already because I have some reasonable idea of what's going on. But for some of the other clients, I've had to tell them I can't get started until I read the application, literally cannot. It's a waste of their time, their money, and my time to do that.

JUDGE LEVENTHAL: And after you read the application, do you have a ballpark figure of when you'll be prepared for discovery?

MR. McBRIDE: Two weeks. Two weeks probably. We're going to try to get started on some other things in about that period of time, too. We've

had some discussions with the applicants. If I may report on that, I think we're in agreement.

We've not proposing they write any language in. They're going to take a crack at a schedule of depositions in about two weeks time. And then we would be giving two weeks notice of requests for depositions. And so the depositions might begin in about a month.

But my point to you would be, Your Honor, if I don't serve much in the way of interrogatories for two weeks or a little longer, they won't even have had to respond until the F plus 30, the 30th day of filing the application. And we would propose to come back before Your Honor.

If I might add, if I do something that's burdensome and these other people do, too, whether singularly or en masse, there's nothing to prevent them from making a motion before Your Honor at any time and say, "You see we were right."

JUDGE LEVENTHAL: Mr. Osborn?

MR. OSBORN: I think he did pretty much make my point, Your Honor, that -- and that's why we

suggested you don't need to do this now. Let's wait 30 days. And by that time I think most parties will have begun the discovery process who intend to conduct discovery and will have a flavor of how it's going and a sense as to whether there is going to be any risk of abuse here.

One of the problems with this restriction is that it taps everyone. But, of course, the discovery needs of the parties may vary greatly. Some parties may conduct very limited discovery or no discovery. Other parties may have much greater needs.

On balance, I don't think we're going to have a problem with discovery abuse in this case, even without numerical limitations.

JUDGE LEVENTHAL: All right. Here's your chance for anything further you want to tell me.

MS. BRUCE: Well, there is nothing to prohibit anyone from coming before Your Honor to ask for these to be changed. We do believe that they are necessary, even though Mr. McBride has represented that it will take him two weeks to probably get some of the discovery from some of his clients.

We don't know what else we will get. I mean, people might be prepared the first day to file based on what they know or what they want to ask. And we think these discovery guidelines are reasonable and will not put anyone in a straitjacket.

And at any time if anyone would like to come before you, either at that 30-day conference or before, to voice concern over that, that can be done and accommodated.

But we do not believe that this in any way violates any of the spirit or the requirements that there be free discovery.

JUDGE LEVENTHAL: I'm sort of loathe to impose limits on discovery before an application is filed. You're really asking the other side to buy a pig in a poke. They really don't know what they're being faced with.

I would suggest that we go along with no limitation on discovery at this time. And if you feel that 30 days after the filing is too long a period to wait if there is abuse, we can set a conference for a short period.

MS. BRUCE: Okay, Your Honor. I think that we would like to reserve the right to come back as soon as possible if there is any discovery abuse if we get propounded with a number of requests that are unmatched.

JUDGE LEVENTHAL: Well, you know, you can always come back to me anytime by filing the motion. If you wish to save time, we can schedule a conference. And then if we don't meet it, you can cancel it.

MS. BRUCE: Okay.

JUDGE LEVENTHAL: You save time in this respect. It takes the broad ones three days notice for my issuing an order because of the complexities of printing an order.

So far I have had them printed the very next day, but their rules are three days. If you prefer, we can schedule it at a date certain and then cancel if we don't need the time.

And if 30 days is satisfactory, fine. We can go along with that. If not, we'll take any time you want.

MS. BRUCE: We respectfully request that we do it sooner than 30 days. Fifteen days?

JUDGE LEVENTHAL: Fifteen days? Sure.

MR. DOWD: Your Honor, if I might, the point was made briefly before, but I think it bears repetition that while Mr. McBride is speaking to a certain extent on behalf of a number of parties regarding matters of compromise, the fact remains that there are likely to be a great many interested parties in this case, some of whom do not yet know that they're interested.

And I think that it would be risky to impose temporal or scope limitations today on parties that --

JUDGE LEVENTHAL: Wait, wait. We're not imposing any limitation. All we're setting is a conference.

MR. DOWD: The notion of a conference 15 days after the application for purposes of determining whether there have been abuses of discovery presupposes that all interested parties are going to be in a position to propound discovery in advance of

that. And that may not necessarily be the case.

MS. BRUCE: Your Honor, we would accept the 30 days for the conference.

JUDGE LEVENTHAL: All right. I'll have to set that by order because you don't know when you're filing your application; correct?

MS. BRUCE: Yes, Your Honor, that's correct. We don't have a date certain.

JUDGE LEVENTHAL: So after you file your application, I'll set a date certain of 30 days, as close to 30 days of the filing --

MS. BRUCE: Okay. Thank you, Your Honor.

JUDGE LEVENTHAL: All right. Any further disputes?

MR. McBRIDE: Did you have any other --

MS. BRUCE: Well, Your Honor, there were two other points. There was one other point that Mr. McBride and his colleagues were going to address at the break. And I don't know where they stand on that.

MR. McBRIDE: Very well. Let me report on that, Your Honor. If I may, then I'll hand up because I don't think we had a disagreement about this 11 with

your additional language with the citation if we give --

MS. BRUCE: No. That wasn't it. I was talking about 13.

MR. McBRIDE: I understand. I was going to get to 13.

MS. BRUCE: No. Eleven with additional language we have agreed upon.

MR. McBRIDE: May I keep handing these sections up, Your Honor?

JUDGE LEVENTHAL: Sure.

MR. McBRIDE: This would be our substitute Paragraph 11. It's got some of my handwriting on it, which I think is legible and which is the language that we wrote down from the applicants' counsel if you'd like to take a look.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Then on to 13, if I may, Your Honor, I'd like to hand up our substitute paragraph. Let me, if I may, explain, but you may want to take a moment to read it.

JUDGE LEVENTHAL: Is 13 agreed upon?

MS. BRUCE: No, Your Honor.

MR. McBRIDE: With two changes that I want to report to, Your Honor, I believe. Maybe you'll have three, counsel. We have agreed -- and we haven't written the words in, but we can quickly agree on this modification.

The party who would request the deposition would give two weeks' notice. The two-day reference you see there would apply to anybody else who wanted to participate in the deposition.

So it would be two weeks notice provided to the witness' counsel of the deposition schedule.

MS. BRUCE: And then also a notice of withdrawal if it's appropriate.

MR. McBRIDE: Thank you for reminding me. We have also agreed that if anybody requests a deposition and then later chooses to withdraw it, that they have to make the same service obligation as they did with their initial request or notice.

But then, lastly, there's a point of disagreement. And that's the last sentence. Our concern in the last case, Union Pacific-Southern

Pacific, was that there were witnesses who sponsored verified statements, some of them reasonably short, some of them very lengthy.

It didn't really matter so much the length as it did the fact that people came forward with a verified statement. And then they were asked questions about it. And they couldn't always answer questions about it. And you asked them where they got the information. They said, "Oh, I called Joe back at the Union Pacific" or something. And Joe from the Union Pacific wasn't there. And so you were stymied.

We went before the adjudicator. As Your Honor well knows, the Board wasn't sitting there presiding over these depositions. If you were in federal court and probably over here, this statement would be stricken at that point. But that's not the way the STB proceeds.

Our concern was, therefore, that we were in a very awkward situation because Your Honor will note that at the same time in Paragraph 12, which we have not disagreed with, which I want to give you a little commentary about in a moment, the applicants

have proposed that each witness be subject to deposition on each verified statement only once.

So if we only get one crack at an important witness and he says, "I don't know. Somebody else generated the facts or information that's in his verified statement," we're in a very difficult position.

Now, their counter would be, "But you can notice Joe back at the Union Pacific and find out what happened." But it may be once you get the information from Joe that you want to ask some questions of the person that they're calling, the sponsor of the overall presentation, and you've already lost your opportunity because you only get to depose him one time.

So our feeling was if we were expected to live with the one deposition rule per verified statement, that anybody who relied on Joe back at the Union Pacific or whoever his helper was had to bring the helper with him so they could answer questions about the verified statement, not about the universe, but about the verified statement.

And that's why we're proposing that last sentence because we think an orderly deposition process cannot work unless the witness can defend his or her own verified statement.

MS. BRUCE: To which I would respond that all the witnesses who submit verified statements will be prepared to answer the questions about the subject matter in the verified statement.

What Mr. McBride and his colleagues propose is to bring other people into this deposition process and have them lined up for a reference point as the deposition is taking place.

I don't know where that idea comes from, but given the fact that we have compromised on the paragraph about the depositions to allow for just a notice of a deposition as to a party who had not prepared a verified statement and all they have to do is tell us the subject matter which they wish to examine, they have ample opportunity.

If Mr. Smith refers to Mr. Jones in his deposition, they can depose Mr. Jones through the normal deposition process, instead of having Mr. Jones

attend Mr. Smith's deposition for that purpose.

We find that that will cause confusion. It will not be a process that will easily be implemented by our clients. They will have to bring people with them willy-nilly if they made any contribution to the verified statements. And in many cases, there are many people who do make contributions to their verified statements. It goes all down the corporate chain and up the corporate ladder.

So we would have to be flying people in and out for different depositions based on their input into someone's verified statement. Instead, we ask that they focus.

Once they ask the question, if that witness cannot ask that question or refer to another, got the information from another source or another party, they're free to notice that person, give the reason why, the scope of the testimony they're looking for.

And we'll make that person available to them if that person exists and was referenced in that deposition and the verified statement giver could not

answer their relevant questions. And this other procedure would just add confusion to an already large process.

We have over 40 witnesses giving verified statements. And I would say that of those 40, we probably have input from another maybe over 150 people who have given input into those statements. It does not streamline any discovery. It will just make discovery more complicated and more unmanageable.

And, as I said, we compromised with the other paragraph in giving them the opportunity if a witness says that he cannot answer a question and that he relied on so and so to make so and so available to them upon notice and indication of what the subject matter of the testimony will be.

JUDGE LEVENTHAL: Mr. McBride's concern, it seems to me, is that suppose they bring in the other party and he makes statements and information of what he told the witness and then they have further questions to put to the witness. What can they do?

MS. BRUCE: To the witness? Well, they can try to get it through deposition testimony of

another witness because a lot of this overlap, there are the other discovery mechanisms that we put in place. There are interrogatories they can ask for, request information. If it goes to a document, they can ask for a document request. They can have the other persons that were referenced brought back in.

And, of course, ultimately if there is an ultimate dispute, they can bring it to you for adjudication on the matter.

MR. ALLEN: Can we confer, Your Honor?

JUDGE LEVENTHAL: She's won her argument.

MR. ALLEN: Okay. Fine.

MR. McBRIDE: Your Honor, I just wanted to comment on her problem, though, about going all the way down the corporate chain because I think either she misunderstands what we have proposed here or for some other reasons he's come up with it again. But that's not the problem, and that's not what we're proposing to pose on.

If the witness can answer questions about all parts of his or her verified statement, notwithstanding the fact that someone else prepared

part of it, then they don't have to bring the helpers.

We're just worried about a situation, and we've seen that happen, where the witness says he can't answer questions about his own verified statement. And in that case, then he ought to have to bring the person who drafted that portion of it.

Otherwise, we're being deprived of our right to depose on that verified statement. And it won't be workable to go back, get a helper, then go back and take another deposition of the first person. We're working under an expedited schedule here. Depositions probably won't even begin for a month.

I can assure Your Honor that during Union Pacific-Southern Pacific there were days when we were deposing four or five people on the same day. So the practicalities of this are great once you get into the problem that I've described to you.

It never happens. If every witness can answer the questions about their own verified statements, this would be a non-problem.

JUDGE LEVENTHAL: Now, when you talk about practicality, I think they have the better argument.

Their witness may have received information from three or four other parties, and you're asking to bring all of these parties to the deposition in order to make certain that they'll be available to answer your questions.

However, you have remedy. If there is an occasion where you need to ask further questions because of what the adviser to the witness has said, you can always come back before me.

You'll find -- you can ask Mr. Osborn -- I'm a very reasonable judge. Isn't that right, Mr. Osborn?

MR. OSBORN: Absolutely, Your Honor.

MR. McBRIDE: I know you are. And that's why I then might begin to fill in a little legislative history, if I may, on Paragraph 12. You already provided part of it. And I want to ask Your Honor to comment on one other part of it.

I understand we have a remedy. If we have used up our one deposition of a witness and we haven't had all of our questions answered, we may want to come back and say we need to resume. And Your Honor will

rule about that witness.

But on Paragraph 12, Part 2, after Part 2, the last sentence, "Parties shall use their best efforts to complete depositions as promptly as practicable and as possible within two days," I want to tell Your Honor the way the practice normally is is the Department of Justice goes last in these depositions.

Now, we deposed four chairmen or retired chairmen of the board in the Union Pacific-Southern Pacific case. Not one of them went over a day. I don't want Your Honor thinking up we're tieing up five people. That doesn't happen.

But there was a witness whose verified statement was 300 pages long. And he was testifying on marketing of every commodity from soup to nuts, coal and chemicals. And he was half the case. His deposition went for six days.

So it can happen that a deposition goes for more than two days. And I certainly would hope that we're all in agreement that it's not possible to complete the deposition within two days if other

lawyers have gone, even if they've been efficient, two days have gone by and the Department of Justice or me or anybody else in the room hasn't even had a chance to ask the questions.

In other words, we need to have some general understanding that they don't get to send the witness home after two days without parties even being able to ask questions.

MS. BRUCE: Your Honor, I think that goes without saying. We're not going to bring a witness up and make them available and start a clock ticking and then close the door.

I think we're all trying to be reasonable about it and allow the discovery to proceed in an organized fashion and to allow everyone an opportunity to depose the witnesses.

We just would like everyone to use their best efforts to do this within two days if at all possible. And if some delay occurs, we'll try to accommodate as best as we can.

This was not put in with the intention of putting a timer on it.

JUDGE LEVENTHAL: All right. I think it's --

MS. BRUCE: I think we came to that understanding, too, prior to being put back on the record.

JUDGE LEVENTHAL: I think the provision is reasonable. I have to tell you while we were off the record, I told you about my vast experience in this field. I find that attorneys fight at the beginning of a hearing over various basic things. But once the procedure starts going, people cooperate with one another. And they certainly do before me.

MR. McBRIDE: That's why we didn't propose any language changes to that paragraph.

Now if I may, Your Honor --

JUDGE LEVENTHAL: Let's finish with 13.

MR. McBRIDE: So 13 --

JUDGE LEVENTHAL: If we eliminate the last sentence --

MR. McBRIDE: That's what I understood to --

MS. BRUCE: Yes, Your Honor. And this

paragraph I believe needs to be, some language of it needs to be, reworked, which we haven't gotten --

JUDGE LEVENTHAL: I'm going to suggest -- well, I'm going to require you after we finish today to give me a new guideline that contains all the things that have been agreed upon --

MS. BRUCE: Yes, Your Honor.

JUDGE LEVENTHAL: -- or ordered here.

MS. BRUCE: Yes, Your Honor.

JUDGE LEVENTHAL: All right? So you'll have a chance to get all of these things down.

MS. BRUCE: Okay. Thank you.

JUDGE LEVENTHAL: And that way we know that when I issue my order, there won't be any errors made by me. If there are any errors made, it will be by you.

MS. BRUCE: Okay. Thank you, Your Honor.

MR. McBRIDE: Unless Your Honor wants, I won't hand up the substitute paragraphs that we have agreed to changes within.

JUDGE LEVENTHAL: If you've agreed upon them, you don't have to show them to me now.

MR. McBRIDE: All right. We've agreed to some changes, just so Your Honor knows and for the record, to Paragraphs --

JUDGE LEVENTHAL: Why don't you give them to me and --

MR. McBRIDE: Very quickly, I'll just hand up to you Paragraph 14, which contained a bifurcation of service obligations so as to impose facts or expeditious means of service to the requester and then by mail to the other people on the restricted service list for discovery responses so that the requester gets them quickly but the burden of expense is not great for that person.

Secondly, on Paragraph 16, we compromised. They had a desire that responses to interrogatories not have to be provided in less than 15 days. And our concern from Union Pacific-Southern Pacific was that we had this earlier period of 5 days for objections and then 15 days for responses. And what happened was you got every objection that a player can think of in 5 days and then oftentimes on the 15th day you actually got an affirmative response. So there was a

lot of litigation that was unnecessary. Our concern that you weren't going to get a response turned out to be unnecessary.

So our feeling was let's somehow figure out a compromise here between expedition and the need for 15 days to respond. And our compromise was that if you're not going to respond in any affirmative way to an interrogatory or discovery request, then you have to object within five days so that the requester can promptly bring the matter before Your Honor if there's no further progress made thereafter.

On the other hand, if you know you're going to give the party at least some affirmative response to an interrogatory document request, then you can object. At the same time, within the 15 days you get to respond to the question on the theory that most lawyers know within 5 days whether they're going to get anything or not. And if they're not, let's get the dispute before you promptly.

That's been agreed to.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Then thirdly, Your Honor,

there will be two minor wording changes to Paragraph 18. You don't have a substitute typed paragraph there, but they're to conform to the 5 days, instead of the 15 that I just described to you. The first word in Line 2 would become "Five."

The end of the first sentence, which now ends with the word "objection," you would insert a comma and these words, "if a party intends not to provide any affirmative response to the request," period.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Then, if Your Honor please, as a substitute to Paragraphs 19 and 20, we have a substitute paragraph, which is patterned and almost repeats word for word Paragraph 2 in the UP-SP discovery guidelines that Judge Nelson approved.

We added one reference to the fact that the practice that was adopted in that case would be embodied in the guidelines, namely that the process would work that a party could request a discovery hearing by 4:00 p.m. on a Monday by telephone call to Your Honor's secretary.

At least that's the way we did it with Judge Nelson -- and would communicate to the restricted service list their request for such a conference.

It would not have to be a written motion, but at least the request would identify the subject matter of the issue that we'd still have to bring before Your Honor.

Then by the end of the next business day -- that would be Tuesday afternoon -- if the opposing party so chose, they could file a written response to whatever the dispute was that was being brought to Your Honor. And then the conference would be on Wednesday morning.

JUDGE LEVENTHAL: How did Judge Nelson schedule the conferences?

MR. McBRIDE: They were scheduled automatically.

JUDGE LEVENTHAL: No. How did they do it formally, though?

MR. McBRIDE: Oh. Then what happened --

JUDGE LEVENTHAL: If you call me on a

Monday and say, "We want a conference on Wednesday" --

MR. McBRIDE: The applicants' counsel -- I'm getting to that. That's right. The applicants' counsel then because they're here every time -- that's why he put the burden on them -- sent out a fax to the restricted service list indicating whether or not there was such a discovery conference.

And they would do that, if I recall correctly, on Monday after the requests were due because, even if somebody made a request, they might have either seen it immediately and realized that they could work something out or they wanted time to negotiate a resolution.

So they would communicate that presumably to the requester and get the requester to agree that we didn't need a conference because we're going to take a week to try to resolve it and then tell Judge Nelson they didn't need it or Judge Nelson wasn't available, he was trying a case.

So under those type circumstances, Judge Nelson might inform applicants' counsel, "We're not going to have a discovery conference this week. The

request has been probed. The applicants say, 'We're working on it' or I, Judge Nelson, am not available."

So then the applicants' counsel would send out a fax to the restricted service list and say, "There is" or "There is not a discovery conference this week, Wednesday morning at 9:00 o'clock."

(Whereupon, the foregoing matter went off the record at 1:45 p.m. and went back on the record at 1:51 p.m.)

JUDGE LEVENTHAL: Back on the record. Off the record the parties agreed that we will start discovery conferences at 9:30 a.m. in accordance with the provisions in the guidelines.

All right. Does anybody wish to add anything we discussed off the record? I think everything is in here --

MR. McBRIDE: I think everything is in there.

JUDGE LEVENTHAL: -- other than --

MS. BRUCE: Beginning on July 9. That's a proposed starting point.

JUDGE LEVENTHAL: Yes. And beginning July

9th will be the date of the first conference.

MR. McBRIDE: Lastly, Your Honor, in Paragraph 21, which would now become Paragraph 20, we have proposed that the no discovery provisions be modified so that F plus 90 becomes F plus 105. And then we add the words at the end, "provided that all discoveries served during that period should be completed by F plus 120."

MS. BRUCE: I'm sorry. Could you repeat that? I don't think we discussed --

MR. McBRIDE: I thought we had. The proviso was "provided that all discoveries served during that period should be completed by F plus 120." Otherwise what good does it do to propound discovery on F plus 105 if you're not going to get your responses by the time your comments and evidence are --

MR. DOWD: One-o-four.

MR. McBRIDE: Prior to what you want to do.

MR. DOWD: You said during that. You're not going to be serving them during that period.

MR. McBRIDE: Prior to F plus 120.

MR. DOWD: Is that what you want to say? The discoveries served prior to that period must be completed.

MR. McBRIDE: By F plus 120. "Provided that all discovery" -- I'm sorry. Yes. "Provided that all discoveries served prior to that period should be completed by F plus 120." Thank you. So there would be no discoveries served during that period, but responses would have to be complete by the time our evidence is --

MS. BRUCE: Yes. That's acceptable.

MR. McBRIDE: Sorry for the confusion. I think that that completes all the matters that we need to discuss. And if we have agreement amongst the applicants consistent with their document, I would ask if they would make the changes and send them around for people to review before being submitted to Your Honor.

JUDGE LEVENTHAL: All right?

MS. BRUCE: Yes, Your Honor. I will send these, then, to Mr. McBride. Will you distribute them

out to the parties?

MR. McBRIDE: I don't even know who all of these people are.

MS. BRUCE: Well, then how are we going to have it --

MR. McBRIDE: I guess we need a sign-up sheet.

MS. BRUCE: Okay.

JUDGE LEVENTHAL: We're going to serve it on --

MS. BRUCE: The revisions will be served on the parties that appear to date.

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

(Whereupon, the foregoing matter went off the record at 1:59 p.m. and went back on the record at 2:00 p.m.)

MS. BRUCE: I'm sorry, Your Honor. We have another matter about serving it on everyone. We prefer that we serve it on the parties in the room, instead of everyone on the restricted service list.

JUDGE LEVENTHAL: You mean the guidelines?

MS. BRUCE: The proposed guidelines that we have done. And then once your order was appended to it, it would go to everyone.

JUDGE LEVENTHAL: Everybody gets it after I issue the order. I think that that's reasonable that you serve the proposed firm guidelines on parties who appear here today.

MS. BRUCE: And I would suggest that Mr. McBride and I could confer with the initial draft just to make sure that everything is in order because he had submitted the initial changes to us.

So I'll confer with him. And then if everyone could give me a card or I can get it from the court reporter.

JUDGE LEVENTHAL: No. She doesn't have it. She just has the names.

MS. BRUCE: I will take everyone's card, then, and will distribute it out.

JUDGE LEVENTHAL: All right, Mr. McBride?

MR. McBRIDE: Yes, Your Honor. I'm happy to work with her on that.

JUDGE LEVENTHAL: All right. Do you have

anything else, then, before us?

MR. McBRIDE: No.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Thank you, Your Honor.

(Whereupon, the foregoing matter was concluded at 2:01 p.m.)

CERTIFICATE

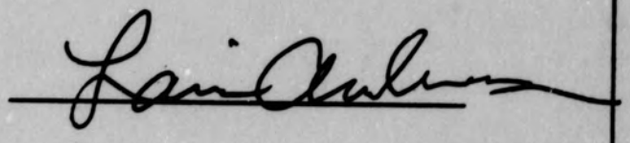
This is to certify that the foregoing transcript in the matter of: Finance Docket Number 33388

Before: Surface Transportation Board

Date: June 17, 1997

Place: Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.



UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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,
July 16, 1997

Washington, D.C.

The above-entitled matter came on for oral argument in Hearing Room 6 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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C-O-N-T-E-N-T-S

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

(9:33 a.m.)

JUDGE LEVENTHAL: All right. The oral argument will come to order.

This is an oral argument in the matter of STB Finance Docket No. 333888.

We'll take appearances at this time. For the movant?

MR. McBRIDE: Thank you, Your Honor, and good morning. My name is Michael F. McBride of LeBoeuf, Lamb, Greene & MacRae, for the moving parties, American Electric Power, Atlantic City Electric Company, Delmarva Power and Light Company, and the Ohio Valley Coal Company.

JUDGE LEVENTHAL: Very well.

MR. McBRIDE: With me are my partners, Brian O'Neill and Bruce Neely.

Also present is one of the affiants, Mr. Thomas Crowley, in case Your Honor should have any questions for him.

JUDGE LEVENTHAL: Very well. All right. Respondents?

MR. HARKER: Drew Harker with Arnold & Porter for CSX Corporation and CSX Transportation, Incorporation.

With me is Chris Datz, also from Arnold & Porter.

MR. COBURN: David Coburn with Steptoe & Johnson, also for CSX.

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

MR. ALLEN: Excuse me.

JUDGE LEVENTHAL: You're just in time.

MR. ALLEN: Thank you. Sorry.

JUDGE LEVENTHAL: Actually we're just up to you in appearance.

MR. ALLEN: Richard Allen, represent Norfolk Southern Railroad from the firm of Zuckert, Scoutt & Rasenberger.

JUDGE LEVENTHAL: Any further appearances?

MR. VON SALZEN: Eric Von Salzen of Hogan & Hartson representing Canadian Pacific.

MR. MASER: John Maser, Donelan, Cleary, Wood & Maser, representing the B&O Coal Field

Producers.

MR. EDELMAN: Richard Edelman, Highsaw, Mahoney & Clarke, for the Allied Rail Unions.

MR. DOWD: Kelvin Dowd , Slover & Loftus, for Centerior Energy, Consumers Energy Company, Dayton Power & Light, Potomac Electric Power Company, appearing in support of the moving parties.

JUDGE LEVENTHAL: Further appearances?

(No response.)

JUDGE LEVENTHAL: All right. The topic of this morning's oral argument is a motion of Atlantic City Electric Company, Delmarva Power & Light, and the Ohio Valley Coal Company to compel responses to discovery.

Have the parties explored resolution of this dispute amicably?

MR. McBRIDE: We have had some brief discussions, Your Honor. We had not heard from the applicants before their objections arrived Friday evening. I then called each of the firms. The only person I could get hold of was Mr. Norton. We discussed it briefly. There wasn't a substantive

offer of anything at that time.

They then called us an hour before our motion that had to be filed on Monday, and Mr. Neely was in the process of getting it done. We put that off until after it was filed.

We then spoke to Mr. Edwards for Norfolk Southern briefly. I indicated to them that as I understood the position they were taking, having objected under the discovery guidelines within five days, that we were not going to be provided with any affirmative response to these requests, and their papers indicate that that isn't their position, but they've not offered me anything specific in response to the request.

So I'm in a position of not having been offered anything.

JUDGE LEVENTHAL: All right. Before we go on, let me say I have the motion filed by the movants. I have a response by Norfolk Southern and a response by Conrail.

Did anybody else file a response?

MR. HARKER: Your Honor, on behalf of CSX,

yes, we filed by hand yesterday a response that I understand went directly to your chambers, but it sounds as if you haven't received that.

JUDGE LEVENTHAL: I didn't receive it. Do you have a copy?

MR. HARKER: Yes.

JUDGE LEVENTHAL: I've got two copies of Conrail's response, but I don't see how I could substitute one of them for you.

(Laughter.)

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Your Honor, I also submitted to you yesterday afternoon a letter indicating that American Electric Power joined in the discovery request and in the motion.

JUDGE LEVENTHAL: I don't believe I received that either. When was it delivered?

MR. McBRIDE: Well, yesterday afternoon, and I also faxed it to Your Honor's chambers.

JUDGE LEVENTHAL: Oh, I have this, yes. I have your fax. Yes, I'm sorry. I have your fax.

MR. McBRIDE: Thank you. We didn't want

to propound redundant discovery under the guidelines.

JUDGE LEVENTHAL: Do the parties wish to explore an amicable resolution?

MR. ALLEN: Your Honor, I'd like to say for Norfolk Southern that we just received the motion to add the other party to the movants and really haven't had time to explore it. So we would voice our objection for the record to adding them.

JUDGE LEVENTHAL: Well, do you want time now to explore it?

Let me say we have a very broad request for discovery, and we have response -- well, two responses I've read. I didn't read the response of CSX yet -- indicate there's a willingness to furnish some discovery.

If parties feel that it's worthwhile, I'm willing to recess and let you discuss this and see if you can find a meeting ground. If not, I'll entertain argument, and we can proceed rapidly.

MR. McBRIDE: I'm willing.

JUDGE LEVENTHAL: I have no preference. Whatever you desire.

MR. McBRIDE: Your Honor, I'm willing to discuss the matter with them, and I want to tell you that normally I'm the most accommodating guy in the world on this sort of thing. I think Your Honor knows we were able to work out nearly everything about the discovery guidelines.

I will just simply tell you in all candor that although these are good lawyers and we may be able to work something out, and we ought to try, I'm dealing with a very difficult problem. This is not a situation in which we're on a level playing field. It is not a situation in which the Board and the Commission and the Court of Appeals have not written before.

They have erected a very high burden for us to get over, as we read the prior decisions in the case law, and our experts, including Mr. Crowley, I consulted with before we propounded this discovery to find out what they would need. This isn't just some lawyer trying to harass these people. This is what the experts told me they would need in order to meet the evidentiary standards and overcome the

presumptions adopted by the ICC and the Board previously, and affirmed by the Court of Appeals.

So whatever we agree to, if we can agree to something, some sort of accommodation, which I'm perfectly willing to try to do, I believe we're going to require their concurrence that that will be an adequate amount of information for us to make our case and for the Board to approve that because otherwise if I compromise in the spirit of being an accommodating lawyer and then find that the Board later tells me or the Court of Appeals later tells me it wasn't good enough, then I've compromised away my litigating position.

JUDGE LEVENTHAL: I don't require lawyers to be accommodating, just civil. All right.

MR. ALLEN: Your Honor, I think as we've indicated in our pleadings we're certainly willing to consider narrowing the -- we're willing to consider a narrowed discovery request.

I do think that we have a fairly fundamental disagreement on some legal issues as to what is relevant. So I think unless that or until

that disagreement is resolved, I think discussions would probably not be fruitful.

I think basically the Applicants are willing to provide or consider providing documents that are specific to the movements involved with Mr. McBride's particular clients. Mr. McBride, however, feels, seems to feel, as his pleadings indicate, that he needs much more than documents that are relevant to movements to his clients, and with that, we fundamentally disagree.

So I think that until that disagreement is somehow resolved, if Mr. McBride would accede to our view of the matter, we'd certainly probably resolve this quite quickly, but if not, I think discussions would not be fruitful.

JUDGE LEVENTHAL: All right. Before we proceed, are there any further appearances?

MR. OSBORN: Thank you, Your Honor.

Jack Osborn for Canadian National, and with me is Beth Ferrell of our firm, Sonnenschein Nath & Rosenthal.

MR. BERCOVICI: Yes, Your Honor. Mark

Bercovici for Eighty-Four Mining Company.

JUDGE LEVENTHAL: Very well. Any further appearances?

(No response.)

JUDGE LEVENTHAL: All right. Does anybody else wish to address this?

MR. NORTON: I think --

JUDGE LEVENTHAL: I might say I think there is a basic disagreement over the scope of discovery that perhaps might have to be resolved first, but go ahead. I'll listen to you.

MR. NORTON: Well, I think we probably are pretty much in agreement that that may be necessary, but we have not -- because of the rush of things, we really haven't had a chance to see whether there is some way that we might be able to obviate the need to deal with that question today, and I think it might be useful if we did at least make some effort at discussion.

We're willing to at least explore that and see what could be done before we had to put the question to Your Honor for a ruling, and that would

also perhaps give you a chance to read the CSX papers so that you're up to speed.

JUDGE LEVENTHAL: All right. Would you like us to recess, say, for a half hour? You can have as much time as you like. My entire day is devoted to you, tomorrow, too, if need be.

Suppose we recess for a half hour. If parties want more time, you can contact me, and you can have as much time as you'd like. If not, we'll resume in a half hour. Is that --

MR. McBRIDE: That will be fine, if I may ask Your Honor to add just a couple of pages to your reading --

JUDGE LEVENTHAL: Sure.

MR. McBRIDE: -- pleasure during the period in which we're discussing things with the Applicants.

Our problem and perhaps our basic disagreement arises out of the Western Resources v. Surface Transportation Board decision that's cited extensively in the papers, 109 F.3rd, and particularly if I could direct Your Honor at pages 790, and

following, and particularly the discussion at 790 to 91.

I think that's where the basic disagreement arises.

JUDGE LEVENTHAL: All right. Do you have a copy of that? I don't have it.

MR. McBRIDE: I only have unfortunately a marked up copy.

JUDGE LEVENTHAL: Oh, no.

MR. ALLEN: My copy is also underlined, but it's an extra copy if Your Honor would like it.

JUDGE LEVENTHAL: Do you want to take a look at this, Mr. McBride?

MR. McBRIDE: I have no problem with you seeing Mr. Allen's underlinings. Just since the pagination is different on this, I'd like to take just a moment to find the place that I was referring you to in F.3rd.

Yes, it appears starting at page 9 of this copy, and it's under the heading of "Utility Specific Claims."

JUDGE LEVENTHAL: All right. Very well.

All right. Mr. Reporter, we have a phone right on the desk here. My number if 219-2539. Would you advise me if the parties -- well, let's go off the record.

(Whereupon, the foregoing matter went off the record at 9:47 a.m. and went back on the record at 10:18 a.m.)

JUDGE LEVENTHAL: All right. The oral argument will come back to order.

Mr. McBride.

MR. McBRIDE: Thank you very much, Your Honor.

JUDGE LEVENTHAL: Let me return this to Mr. Allen first.

MR. McBRIDE: I'm sorry to report to Your Honor that we haven't been able to make any progress, but we did try.

I'd like to begin by explaining to Your Honor the fundamental difference between an STB proceeding and an FERC proceeding, since I know how you spend most of your days.

JUDGE LEVENTHAL: Oh, I think I'm familiar with it, but I'll listen to you.

ORAL ARGUMENT ON BEHALF OF

ATLANTIC CITY ELECTRIC, ET AL.

MR. McBRIDE: It's a very important point, I think, Your Honor, to bear in mind that we will never have an oral hearing in this proceeding. We will never have witnesses sitting alongside an Administrative Law Judge or Board members, who then may appreciate the significance of something and then ask the witness to go get some more information.

Whatever information we get in this discovery process is the only information we will ever have to put on our case, and we only get one shot, and it's October 21st, and I suspect these counsel would admit that their clients will never agree to modify this schedule in any respect.

So October 21st is chiseled in granite, and the clock is ticking on our ability to put our case on.

Now, what we are trying to do in this case is very simple. We're trying to protect our clients from competitive harm. They leaped to an inference from my letter to Your Honor that because our concern

is the rates that my clients pay for transportation coal, or as to which applies to the coal that the Ohio Valley Coal Company sells to utilities, that for that reason, I ought to just go file a rate case.

But we're not seeking rate reductions, which is what we would be seeking if we were to file a rate case. We're trying to avoid the prospect that the carve-up of Conrail and the acquisition of it by CSX and Norfolk Southern would subject the clients to competitive harm. That's all we're seeking for purposes of this discovery.

Now, the papers of the Applicants here acknowledge that coal is either the most important or one of the most important commodities carried by each of these railroads. In fact, the electric utility industry is the largest single customer by market segment of the entire railroad industry, something on the order of $9 billion out of about $34 billion in annual revenue; so more than 25 percent of all the revenues of the railroads, and it's higher than that for CSX and Norfolk Southern.

And I will also tell Your Honor that the

electricity utility industry, which as you well know is going through a transformation, in part because of what's going on in this building, and is becoming far more concerned about its expenses and its competitiveness. Oftentimes the largest single expense in generating electricity in a coal-fired power plant is rail transportation costs, not the coal, not the labor, not the plant. Rail transportation cost is oftentimes 30 or even 50 percent, and in a few cases even as high as 70 percent of the cost of generating electricity.

So we're talking about very large sums of money here. American Electric Power, for example, pays the railroads over $300 million a year to transport coal. So these are matters of great significance to these parties.

Now, the central problem we're having in this case is this. In prior railroad mergers, the ICC, now Surface Transportation Board, has adopted something called "the one lump theory," which is borrowed from the anti-trust law.

The one lump theory essentially holds,

getting rid of the economic jargon, that a monopoly, a monopolist, in this case typically the destination carrier, Conrail in most of the cases we're talking about here, has an incentive to raise its rate to the highest level for the overall movement of the coal that it possibly can, subject only to regulatory constraints if there are any.

And on that theory, the ICC and now the Board have rebuffed shippers who have said that the merger of that destination carrier with an origin carrier may cause me harm, the shippers will come in and say, in these mergers. It will be anti-competitive.

And the ICC and the Board have said, "Oh, no, it won't because under the theory we follow around here and have for the last 15 years, you're already paying the highest price you could pay. So the merger can't harm you, and if you don't like the price you're paying today, file a complaint."

As I've already told Your Honor, it is not our purpose in this proceeding to seek to lower the rates that we're paying today. We're worrying about

the rates going up tomorrow or otherwise losing competition.

So faced with this precedent, which has now been endorsed by the D.C. Circuit on review of the Burlington Northern and Santa Fe merger, which I believe Your Honor is quite familiar with, we went out and retained the smartest people we could find to help us deal with this problem because the precedents do not say the shippers can't be heard in a merger, which is about the position I think these Applicants are taking in these papers, but rather, they say that it's a presumption. The one lump theory is simply a presumption. It's just that: a theory.

The shipper, in order to overcome the theory, has to show that it has been deriving some benefit from origin competition for coal or other commodities today, and that it would be harmed as a result of the merger.

Now, on that basis, with real evidence, the shipper will be entitled to overcome the theory and get competitive protection.

Now, Alfred Kahn -- I'm sure Your Honor is

familiar with -- his colleague, Dr. Dunbar, and Mr. Crowley here were retained by us to analyze this problem in light of the economic theory that was used in prior precedents, and I didn't just propound discovery that I thought might drive these railroads crazy and harass them a little and see how many documents I could get from them, which is about what you'd think if you read the papers.

But, in fact, I consulted extensively with my consultants, and I said, "What do you gentlemen need in order to be able to put on the testimony that we're talking about putting on?"

And they advised me that they needed these three categories of information in order to determine how these three Applicant railroads -- and let's not forget they're the Applicants; they're seeking relief here -- how these three Applicant railroads set their rates, not just as to my clients, but how do they set rates?

Because, for example, they might tell you, "Well, Delmarva can go and take a look at its file." They say that in their papers. Delmarva entered into

a contract with Conrail in 1984, and for reasons we can get into if Your Honor wishes, it has engaged in subsequent communications with Norfolk Southern and CSX, who are origin carriers, and then belatedly Conrail is an origin carrier, but to a large extent hasn't been negotiating rates from the interchange to the destination with Conrail since 1984 because it has a contract, but that contract is soon going to expire, and therefore, the effect of the merger may be to subject Delmarva Power & Light to rate increases, when Norfolk Southern takes over serving its plants, if their proposal is adopted.

So we need to know how Norfolk Southern sets coal rates not to Delmarva. It doesn't serve Delmarva, and Delmarva's file at Conrail isn't going to help because nothing has been going on at destination since that contract was executed, for the most part. There may have been some minor changes in the contract, but not fundamental negotiations of rates for all that period of time.

So Dr. Kahn took a look at this problem, and by the way, Dr. Kahn, quite candidly, I think Your

Honor may agree, made it very clear, and I think Mr. Crowley made it very clear in their affidavits. They're not challenging the economic theory that the Board applies here. They're not challenging the notion that a monopolist would try to extract the highest possible price it can charge, which is essentially what the one lump theory says, subject only to regulatory constraints.

Their advice to me is if they're setting rates that way, then your clients won't be harmed by this acquisition of Conrail. It can't charge anymore, but if they're not charging the highest price that they could charge, if that's not how they set rates, and Dr. Kahn's treatise 27 years ago described the theory and then went into numerous reasons why a monopolist might not follow that approach, I, Dr. Kahn, need to see that evidence, and then if I see that evidence, then I can conclude that your clients are at risk of rate increases or loss of origin competition, competitive harm, and then I'm prepared to sign my name to testimony that says the Surface Transportation Board ought to adopt a condition to

protect your clients.

But I have to see the evidence. I have to know what they do in reality. So, as Dr. Kahn said in his affidavit, there is considerable dispute among industry participants over the validity of this theory, with captive shippers believing it is not valid, while railroads assert otherwise.

Nonetheless, the ICC does not accept shipper specific evidence rebutting the theory in a merger proceeding as sufficient to reject it, citing its decision in the Burlington Northern-Santa Fe merger, and the Court of Appeals has affirmed this decision in the Western Resources v. Surface Transportation Board that we discussed earlier, at 109 F.3rd 782.

Dr. Kahn went on. "(b) At the present time, there is no empirical support of which we are aware for the theory. Specifically, it has never been validated with railroad data in a peer reviewed study.

"(c) Nonetheless, the theory does lead to hypotheses that can be tested, but only with data now in the possession of the railroads. Moreover, such an

approach to testing the theory appears to be the only way in which intervenors can satisfy their procedural burden in this matter."

So he went on to conclude that he had consulted with me, had advised me to ask for what I asked for, and that anything less than what I asked for would, in his judgment, "not meet the requirements set by the STB and the courts."

Now, I don't know how much more candid a witness can be than to say, "I'm not quarreling with the theory here, but I need to see the evidence, and only they have it," and that's essentially what Mr. Crowley said here, too, whose affidavit indicates that in his judgment -- and he has over 25 years of experience with this sort of information -- it is absolutely necessary to see comprehensive evidence of their rate making practices to test the theory.

Why? Because when the Court of Appeals got to this problem, they said that it may not take a theory to beat a theory, but it helps. This is at 109 F.3rd 790. Judge Williams went on, "The law of classic economics methodology says that a theory is to

be rejected 'if its predictions are contradicted frequently or more often than predictions from an alternative hypothesis,'" citing Milton Friedman's work, "Essays in Positive Economics."

Now, it will not do, therefore, and he went on to reject the utility specific claims in that case based on the evidence about themselves that either they adduced or got in discovery from the railroad about themselves. It doesn't do to come in and just put on utility specific evidence.

We've been through that. I wasn't counsel in the case, but they were. I can read. The Board threw out Western Resources, and the Court of Appeals affirmed what the Board did.

Now, what these counsel, these very capable counsel who've gotten the Board over the years to adopt these sorts of theories, are going to tell you when they get up is: why isn't he content with the information about his own clients?

And I've just answered that question for Your Honor in advance. The Court of Appeals has already told me it won't work. The Board doesn't buy

it.

The Board is not looking for an excuse to adopt a protective condition in favor of my clients. It would like to send us packing off to file a rate complaint. It doesn't want to have to get into all of this, but under its theory, we're entitled to get into this. Under its two-part test for overcoming that theory, we have an obligation to these clients I'm representing to attempt to adduce the evidence that is necessary to overcome the theory. It is their only shot at relief in this proceeding.

Now, we also can't wait. I think their theory would be, well, why don't we dribble out a little bit and see whether Tom Crowley can work with that, and then if that's not enough, we'll dribble out a little more and see if he can work with that, because they're not willing to extend the schedule, and you don't have to take my work for it. Ask them. Their clients aren't going to agree to move that October 21 date. So the clock is ticking on us.

So it really doesn't lie in their mouths to argue, "Well, let's, you know, take our time here

and start dribbling this stuff out."

Now they claim though that there's a burden to producing all this information, and if Your Honor please, I acknowledge that. This is a burdensome discovery request, but it is the only discovery request that we could propound to satisfy our burden of proof in the case.

And I also think it's somewhat remarkable that they say, "Gee, we might have to spend 800 man-hours going through these files," 800 man-hours. That is 100 days of a lawyer just working nine to five, and we all work harder than that. I think they do. They did a lot of work to put this application together.

They've got 50 lawyers squeezed onto the cover of this application, five law firms on the cover, several more law firms whom I've been in touch with who these railroads have retained for the purposes of these cases, for example, Eckard, Semans in Pittsburgh; Hahn, Lozier in Cleveland; another gentleman in Columbus; I believe, the Verner Lipford firm is working on this. They've got lawyers all over the Eastern United States working on this proceeding.

They've got collectively 75,000 employees with nothing more important to do than to get this transaction approved. If they take 800 man-hours, that's 100 lawyer-days divided by even ten lawyers rather than the 50 on the case down there in Jacksonville or up from Arnold & Porter, which is representing CSX, they can get this job done in two weeks working eight-hour days. That's what we're talking about here.

So they want to make this sound like it's impossible. It's not impossible, and if it can't be done in a reasonable period of time, then we're going to need an extension, but they won't agree to that. They can't have it both ways.

So I would also point out to Your Honor that we asked in interrogatories what their rate making theory or practices are. What approach do you take? Do you follow this theory, or do you do something else?

Now, if they were to tell you, "Well, we don't maximize our prices in accordance with that theory," then we might be able to dispense with a lot

of this because that's what we're trying to determine.

I had the president of a railroad and the senior vice president of another railroad, both of them Western railroads, on a panel at a Bar Association conference last month, and the gentleman from Montana Rail Link, which was the railroad, Mr. Brodsky, said he doesn't set rates at the highest price he can squeeze out of the shipper. His approach is to set a rate at a level that accommodates the shipper's business, hopefully so that it will grow, and that his railroad will, therefore, get more business.

And the other gentleman on the panel from another railroad seemed to be saying the same thing. They work with the customer, in other words. Maybe that's what these fellows are going to tell us in response to their interrogatories, an then we might not have to go through all of this.

But they didn't object to answering the interrogatories, which they did these document requests, and therefore, apparently they agree that their rate making theory and practices are relevant to

this case, and I don't know how they could contend otherwise.

Now, I will note, by the way, that Norfolk Southern objected altogether to giving us traffic tapes. CSX and Conrail did not. I think CSX and Conrail, therefore, impliedly admit these traffic tapes are relevant. I don't know how you could contend otherwise.

And I will then just close by pointing out to Your Honor that all we have asked for is traffic information and marketing information about coal, which is what my client's interests are in this proceeding, for the purpose of determining whether these clients may be subject to competitive harm in the proceeding.

And the statute provides very clearly that we're entitled to ask the Surface Transportation Board to impose a condition on this transaction that would protect my clients from competitive harm. There is no dispute about that, on the papers or otherwise. The Board clearly has the broadest possible power to condition the transaction, and we are simply trying to

adduce evidence to determine whether we might be subject to that competitive harm.

And I don't know if Your Honor has seen a situation before in which we've been so frank about what we're trying to do and in which our witnesses have said we have to have this information to overcome this theory.

Now, I don't know any other way to present it to Your Honor than that, but I'd be happy to entertain your questions if you have them.

JUDGE LEVENTHAL: Well, there are some basic objections that I think all of the Respondents made, and one of them is the time limits that you've set. They point out in their answering papers that in 1978, the industry upgraded under completely different rules.

MR. McBRIDE: I'm glad you asked.

JUDGE LEVENTHAL: So why do you need this information from 1978?

MR. McBRIDE: Well, first of all, it didn't operate under completely different rules. The D.C. Circuit said in 1982, in a wonderful phrase from

now Justice Ruth Bader-Ginsberg, that the legality of pre-Staggers Act contracts was "less than crystal clear."

So there were pre-Staggers Act contracts, but whether there were contracts or not is not really the issue. The issue is how do they and how did they set rates.

Now, with respect to the time periods, this was Mr. Crowley's advice to me, and we talked about that because I recognize 20 years is a lot of time.

Here's the problem. The last merger involving Norfolk Southern was the merger of the Southern Railway and the Norfolk & Western in 1982. The last merger involving CSX was the merger of the C&O, the B&O, the Western Maryland, and two other carriers in 1980.

And contrary to Conrail's claims they've never been involved in a merger, although technically the term is correct as it applies to them, they acquired at least the Monongahela Railway, which is so important to this case that CSX and Norfolk Southern

agreed to have joint access over it because it's where the coal is, south southwest of Pittsburgh, and they're going to have joint access over that line, which shows you the importance of coal to the proceeding.

So the reason that we wanted to go back as far as we did -- and, by the way, if this information is on tape, we're just asking for the tapes with respect to our traffic tape Request No. 3. So Mr. Crowley will do the analysis. We're not asking them to do an analysis.

What we need to see, and this was his advice to me, is how they conducted themselves before and after the last mergers in which they were involved, and we need comparable years of data for all three of them in order to make comparisons. That's the point.

As to the marketing files, they don't seem to say they got rid of them. They tell us they're in 90 file cabinets down in Jacksonville, is what I believe the CSX papers said. It sounds like they're all, you know, in one place in Jacksonville. They say

they have three other locations.

Mr. Crowley's firm has experience in going to these locations, has been to them recently, as I understand, for a rate case before the Board. So he's familiar with the records.

All you have to do is make them available, and his people will go through them. So if we're going to talk about burden here, we're talking about the possibility of competitive harm to their largest customers, most of their revenue, their profit, more lawyers than I've ever seen on a case in a ten-plus billion dollar transaction.

And that reminds me to point out to Your Honor also this. You may find this remarkable, but CSX and Norfolk Southern are paying more than $4 billion over market price for Conrail, more than $5 billion over book price for Conrail, and there is no law that provides, unlike this and other agencies, that the shippers are not subject to rate increases as a result of the payment of that acquisition premium.

That's why we're concerned here. They have paid so much for Conrail that it wouldn't take a

rocket scientist to figure out that they have an incentive to try to raise rates to cover.

Now, they have said in response to requests from concerned shippers about that that they don't intend to do that, that they're going to try to grow the rest of the business and cut costs, but that's a lot of business to grow and cut costs, and they have not ruled out rate increases to shippers. They've said that to my clients point blank, as a result of this transaction.

JUDGE LEVENTHAL: All right.

MR. McBRIDE: Thank you.

JUDGE LEVENTHAL: Mr. Allen.

ORAL ARGUMENT ON BEHALF OF

NORFOLK SOUTHERN CORP., ET AL.

MR. ALLEN: I'll go first, Your Honor, and ask my colleagues to fill in where I've left things out.

But Your Honor has observed a number of times before that all discovery is burdensome, and of course, it is, but this is simply ridiculous, we submit. It is just plain unreasonable.

It is clear from Mr. McBride's motion and from his argument this morning that the document requests that are being objected to here are sought for the purpose of relitigating basic economic propositions that have been litigated over and over and over again over the past 20 years and consistently decided by the Board and by the courts, and Mr. McBride is seeking this discovery once again to relitigate these basic propositions.

And at some point, we submit, it has to come to a stop.

I think my overall theme would be that Mr. McBride's arguments here confuse the general with the particular. As we've indicated in our motion papers, we are certainly willing to consider requests for information that are relevant to the particular circumstances of Mr. McBride's clients or any other particular party that may be in this case for purposes of determining whether or not the presumption that is embodied in the so-called one lump theory applies to that particular shipper, and that is something that the Board in its decision and the court in affirming

its decisions have indicated is perfectly appropriate for a particular shipper to raise that issue.

But it is clear from Mr. McBride's arguments that he is not satisfied with that. Instead, he wishes information for the purpose of refuting the basic theory itself and the basic presumptions that are embodied in it.

Mr. McBride wants documents relating to all of the Applicant's coal customers. In Norfolk Southern's case alone, that's more than 500 companies, and as we've stated in our motion papers, in Norfolk Southern's case alone, that would take 800 man-hours at a minimum to search all those files back to 1978 for the purpose of relitigating an issue which as I've said has been litigated over and over and over again.

And the basic proposition, with all respect, I think Mr. McBride says one thing and then says the opposite thing in his arguments. He says he doesn't question the basic theory, but, on the other hand, he wants this information to test the validity of the theory, and it's clear that that's exactly what he does want.

But the theory itself is quite straightforward. The theory is based on the simple proposition that is really unexceptionable that railroads will tend to seek maximum economic advantage from their economic circumstances. Where they're serving one location, they will tend, in general, to derive maximum economic advantage from that.

Now, the Board has said and the courts have confirmed that that presumption may not always be true. There may be instances where, with respect to a particular shipper or a particular location, that presumption doesn't apply, and it's open to shippers to demonstrate that in their particular circumstances, this presumption that a railroad will maximize its economic advantage hasn't applied.

And as to that, Mr. McBride and any other party in this case is certainly free to try to demonstrate that's the case, but Mr. McBride has made clear that that's not what he wants. He wants evidence pertaining to all of the Applicant's customers in order to establish the general proposition that, as a general matter, Norfolk

Southern, Conrail, and CSX have not striven to maximize their economic positions.

And that's sort of equivalent to trying to prove the earth is flat, and there's no reason to conscript armies of lawyers and other people to spend weeks and weeks and weeks searching through files in order to prove a proposition that that has simply been rejected over and over again, as the Court of Appeals said in the Western Resources case. The Commission relied on a broadly accepted economic proposition whose internal logic and predictive power Petitioners did not, as a general matter, contest and could not contest.

Yet Mr. McBride is in this case seeking to contest that very economic proposition, and with all of the resources that the Applicants have, that is not an excuse to, as I said, conscript large portions of their staff to this effort.

Mr. McBride and his consultants say that they don't agree with the Court of Appeals' conclusion and the Board's conclusion and want to test the validity of it, but the mere fact that Mr. McBride

doesn't agree with the Board and the courts on a proposition of economics does not entitle his clients to obtain wide ranging discovery to disprove what the courts and the Board have held. It's as simple as that.

That's basically Norfolk Southern's position. We've noted a number of other points in our reply, one of which I would point out that the relevancy of what Mr. McBride is -- the relevancy of the specific things Mr. McBride is seeking even under his own lights is highly dubious and marginal, and even if you accepted some of the premises that Mr. McBride is positing, the burdens would far outweigh any marginal relevance.

For instance, one of his clients, Atlantic City Electric, is a client that today is served by Conrail at its location at the destination, and after the merger is going to be served by both Norfolk Southern and Conrail. So it's a shipper that is going from one to two.

It is totally inconceivable to us how the one lump theory or the validity of the one lump theory

could in any way pertain to Atlantic City Electric.

Furthermore, as Your Honor has pointed out, he's seeking documents that go back to 1978, which was before the Staggers Act, and to suggest that the Staggers Act was insignificant or made no change, I think, is manifestly incorrect, but it's not only the Staggers Act. For the last 20 years, the Commission has been evolving; the Commission and now the Board has been evolving coal rate guidelines, and every two or three years comes out with a further refinement of the basic regulatory standards applicable to coal movements, and that has been going on for the last 20 years.

And what Norfolk Southern or CSX or Conrail might have bid for a particular movement in 1983 bears on anything pertaining to this merger in 1997 is totally beyond me, given the fact that what happened in 1983 is very different from what happened -- in a very different regulatory environment than what might have happened in 1995 or might happen in 1978.

That in a nutshell is Norfolk Southern's

view of the matter. The discovery requests at issue are completely unwarranted and unjustified, and we respectfully submit that they be denied.

JUDGE LEVENTHAL: I took Mr. McBride's argument to be that not necessarily that they want to test the validity of the lump --

MR. ALLEN: One lump.

JUDGE LEVENTHAL: -- one lump theory, but that he wanted to refute it as it pertains to this case. Isn't that what I understood you to say?

MR. McBRIDE: That's exactly correct. Yes, Your Honor.

JUDGE LEVENTHAL: Let me ask you this question. Is there room for compromise on time? Suppose we were to limit discovery, say, to a few years before the last merger in the case of each of the railroads and a few years after the last merger, and then the base year.

MR. ALLEN: I really don't think so, Your Honor, because he would still be asking for us and the other Applicants, but in our case to be searching files pertaining to 500 or so customers, and --

JUDGE LEVENTHAL: Well, perhaps we can limit it more. How about limiting it to the destinations involved in this transaction?

MR. ALLEN: Well --

JUDGE LEVENTHAL: Between his clients and the railroads.

MR. ALLEN: If we could limit it to the destinations involved with his clients, we would certainly consider that, and indeed, I'd have to confirm this and ratify it with my clients, but I'm fairly sure that if we could limit it to those destinations, we'd be quite amenable to complying with it.

JUDGE LEVENTHAL: Mr. McBride?

MR. McBRIDE: That, in my view, Your Honor, is a very reasonable idea that won't work for two reasons.

Number one, the Court of Appeals rejected utility specific evidence in the Western Resources case.

JUDGE LEVENTHAL: Now we're talking about the destinations, sir.

MR. McBRIDE: Yes, that's exactly what I'm talking about, exactly. You see, Western Resources put on evidence about its own destinations in the Burlington Northern-Santa Fe case, and the Board said that's not enough to overcome the theory, and the Court of Appeals affirmed that.

So that's why Dr. Kahn and Dr. Dunbar and Mr. Crowley have concluded we've got to go beyond.

And here is the other reason why it doesn't work.

JUDGE LEVENTHAL: Just a minute.

MR. McBRIDE: Sure.

JUDGE LEVENTHAL: You have four customers involved now in this motion to compel. So you don't exactly have a utility specific situation. You have a four utility specific situation.

MR. McBRIDE: That's true, but it's probably still only ten or 20 percent of their coal traffic at most, even with American Electric Power's 20 plants. They told you they had 500 customers.

So what I'm afraid of, and this is where I'm going with my next point, is that unless they will

stipulate that the data that I get, whatever it is, however Your Honor rules, however it's framed, is adequate to test the theory, and the Board approves that.

I could get sandbagged here. I could get this data, and you would think it would be enough. You're a reasonable person. You would have to believe the Court of Appeals would think it enough. We'd work with it. You know, maybe we privately without the Court of Appeals ruling or the Board's prior rulings would have thought that any rational person would say it's enough, and then we get over there and they apply the theory, and they said, "Not enough."

What am I supposed to do then? I get sandbagged by the Board. The Board, frankly -- I'll be very frank with you, and I'll put this on the record -- they've used this theory for 15 years to deny shippers relief in merger proceedings, and I've decided for the first time to challenge it, and we're going to see whether the Board is open to providing relief to shippers.

And they've used this theory as a trap

door to avoid giving shippers relief. I can't let them pull the trap door on me again. So if we're going to limit the data, we're going to have to get the Board to say that is enough of a universe of data to try this case, and we won't tell you afterwards you didn't get enough data.

MR. CUNNINGHAM: Your Honor.

JUDGE LEVENTHAL: Well, you know we can't do that, Mr. McBride.

MR. McBRIDE: Well, Your Honor, I believe you could certify to the Board a stipulation and ask the Board to approve it as adequate for these purposes, balancing the burden on the Applicants and our right and need to put on a case, and ask the Board to approve a stipulation.

MR. CUNNINGHAM: Your Honor.

JUDGE LEVENTHAL: I don't think so.

MR. CUNNINGHAM: I'm sorry to interrupt, but since Mr. McBride started it, I'm going to press it.

If I may, I'm here for Conrail.

I just wanted to note before returning the

podium back to Mr. Allen that Mr. McBride just said again that he wanted to challenge the theory, and when it comes our turn for Conrail to speak, we would like to address that concept at some length.

But he is not saying that he is challenging the application of the theory to his clients. He just said for the record that he wanted to challenge the theory, and he needed the data to do so.

MR. McBRIDE: Well, if I said that, I misspoke. Your Honor had it right earlier. My witnesses accept the theory. What we are challenging is whether these railroads follow the theory in the real world.

Your Honor had it right.

JUDGE LEVENTHAL: Let's go off the record for a moment.

(Whereupon, the foregoing matter went off the record at 10:56 a.m. and went back on the record at 11:00 a.m.)

JUDGE LEVENTHAL: In our off-the-record discussion, I made a suggestion to the parties that

perhaps they could compromise with respect to this motion by limiting the time frame of the information requested and the destinations requested.

We had quite a lengthy discussion. The parties expressed their opinions; I expressed my opinion.

Does anybody wish to add anything to what I have summarized transpired off the record?

MR. McBRIDE: No, Your Honor.

JUDGE LEVENTHAL: All right. Then we'll stand in recess until 11:30.

(Whereupon, the foregoing matter went off the record at 11:06 a.m. and went back on the record at 11:34 a.m.)

JUDGE LEVENTHAL: All right. The oral argument will come back to order.

All right, Mr. Allen. Do you want to report on what's transpired?

MR. ALLEN: Yes. We had a discussion off the record, Your Honor, as to how we might compromise this, pursuant to your suggestion, and it is generally the Applicant's position, subject to ratification,

that we would be willing to consider narrowing the document requests to documents that were relevant to movements to the destinations of the shippers who are requesting the documents, to the extent that such destinations might be affected by this merger, that is, destinations on Conrail.

We would not be willing to consider movements to some power plant in Florida that has no possible relevance or could not possibly be affected by this merger.

As I understand it, and I'll let Mr. McBride speak for himself, he is not willing to such a limitation on the documents.

In terms of time, we did not have an extended discussion on the subject. As we have stated, we think going back to 1978 is far too broad, and while we would be willing to consider, you know, something within the last few years, going back beyond that is something that we're not inclined to agree to.

MR. McBRIDE: Your Honor, the very simple point is we've asked for information about coal marketing bids and rate making practices to all of

their destinations on all three railroads, and it's not just the Conrail destinations that are at risk here.

Norfolk Southern spent $6 billion and CSX $4.2 billion, approximately in each case, for their shares of Conrail. They have to raise the money to pay for those astronomical amounts of debt. The CSX debt offering at the time was the largest corporate debt offering in history.

And so it's not just the plants that they're now going to serve that are being served today by Conrail that are at risk of rate increases. It's all of the utility coal plants that are at risk of rate increases, and that's why we need to see what their rate making practices are to those plants today.

And, therefore, if it's a CSX served or an N.S. served destination, it's at risk of a rate increase, and by the way, Conrail is also an origin carrier in some cases, and so you can have a Conrail origin and a CSX or N.S. destination. In fact, the Ohic Valley Coal Company goes to Conrail as Conrail origin and Conrail destination. After the merger it

is going to be N.S. origin and CSX destination. All of the combinations are in play here.

So we need to see that information on all three railroads to test the theory and to see whether the evidence departs from the theory in the real world. We need to see more than our own destinations.

And as for the number of years, we need to see how these railroads competed against one another before and after those mergers. We were willing to talk about data before and after those mergers for all three railroads, and we're willing to talk about more recent data, but we're going to need to seek a ruling, I suspect, from the STB at some point here whether that's adequate.

That's my problem. They won't tell me what they need to know to decide this case, and yet I've got to try the case.

JUDGE LEVENTHAL: All right. I take it then that you haven't resolved at this point.

MR. ALLEN: We have not reached an agreement, if you'd like to hear more argument on the merits of the issue, then I would like to respond.

JUDGE LEVENTHAL: I'll listen to whatever you have to say, sure.

MR. ALLEN: I've said much of it before, and of course, it's in our papers, but Mr. McBride said before we broke that he needs information that goes beyond his particular clients because the Court of Appeals in the Western Resources case indicated that shipper specific information was not enough.

That, with all respect, I think, quite mischaracterizes the issue in that case and the ruling in that case. Basically, as the Court of Appeals explained, the one lump theory is based on the proposition that a railroad monopoly will act like a rational monopolist, in general, absent unusual circumstances.

In that case, a number of shippers were unable to convince the Board and the court that the railroads involved in that case were not acting as rational monopolists, but the mere fact that parties in that case were unable to overcome the presumption doesn't mean that it is impossible to overcome the presumption or that Mr. McBride is somehow precluded

from adducing evidence that is relevant to his particular clients to do so.

But the mere fact that it may be difficult for Mr. McBride or anybody else to overcome a common sense proposition of economics doesn't mean that he's entitled to virtually unlimited discovery in order to do that, and that's basically what he's asking for.

It's quite clear, and he's, I think, said it a number of times. He is seeking the broadest possible discovery in order to test the validity of this theory, which has been applied and adopted over and over again, and it's just not reasonable.

As I say, again, we are perfectly willing to provide information that is reasonably calculated to permit Mr. McBride or anybody else to adduce evidence within the parameters of the economic theories and propositions that the Board and the courts have adopted, but beyond that, there's no warrant for the discovery request.

JUDGE LEVENTHAL: Does anybody else wish to be heard?

Mr. Osborn.

ORAL ARGUMENT ON BEHALF OF CANADIAN NATIONAL RAILWAY CO.

MR. OSBORN: Thank you, Your Honor.

For Canadian National, I'd like to be heard briefly, if I could, since it appears that Your Honor may be called upon to make a ruling here.

First, I want to make clear that we take no position on the merits of this particular discovery. We're not seeking it, and we're not the target of it. So this particular discovery is not our direct concern.

But I am concerned that if Your Honor is called upon to make a ruling, that the ruling not in any way hold or suggest that this one lump theory cannot be attacked in particular circumstances.

We have here an economic theory that, as is the case with economic theories, that has theoretical validity in particular circumstances that are hypothesized by the economists, and now the Board has applied this theory to the rail industry on a presumptive basis and in numerous cases.

The question remains whether it has

validity in particular circumstances, and that, of course, is something that everyone has acknowledged is open to inquiry.

And I would point out also that the theory by its terms, as I understand it, applies in circumstances in which there is a true monopoly, but there may be other circumstances, many circumstances, indeed, in which a particular railroad providing exclusive service to a particular point has something less than a true monopoly, and the question then remains whether a particular merger in a particular case could have anti-competitive consequences through vertical foreclosure.

So these are issues that are very complex and that we're going to be further exploring in this case, and I simply would want to caution that whatever ruling Your Honor may be called upon to make with respect to this particular discovery not close your mind or the Board's mind to the possibility that there may be negative competitive effects as a result of a vertical merger in particular circumstances.

JUDGE LEVENTHAL: All right. Very well.

ORAL ARGUMENT ON BEHALF OF

CSX CORPORATION, ET AL.

MR. COBURN: Your Honor, David Coburn for CSX.

The movants have quoted in their paper; we have quoted in our paper, and I think each of the other Applicants has quoted, as well, the two-part test that the Board has specified and that the court has affirmed as the way in which the one lump theory can be rebutted. It is a test that is utility specific.

It will be Mr. McBride's burden in this case, and he doesn't need to go to the Board to find this out; I think he knows it from reading the cases and the ample precedents; it will be his burden to show that the two-part test can be met with respect to his client.

He doesn't need, as Mr. Allen has said, and I'm simply reiterating, he doesn't need the documents of other utilities that have nothing to do with his clients to prove that the presumption can be rebutted in this particular case.

JUDGE LEVENTHAL: All right.

ORAL ARGUMENT ON BEHALF OF CONRAIL, INC.

MR. CUNNINGHAM: Your Honor, I think there are several points that go to the questionable merits of this request. I think we have to start at the fundament, which we've all addressed in some way, but I think it's worth reiterating, which is the proposition that the theory can be challenged.

And to do that, it's important to read very carefully Dr. Kahn's affidavit here because he does not say that he can contest the theory. In fact, he is not in a position to contest the theory having advocated it in numerous journals and recently on behalf of the entire electric utility industry before the FERC in the major case, rulemaking involving wholesale electric utility deregulation, resulting in Order 888.

There is really no contest in the economic literature about the theory. There is a dispute amongst industry participants because many, Mr. McBride being one of them, industry participants would like to use the pretense of a dispute about the theory

to extend their analysis beyond the particular question that Mr. Coburn put, and I think it's a question that both the Court of Appeals and the Board clearly put, to the question of the effect of rail mergers on shippers, which I think is the ultimate nexus of the questions that Mr. McBride has posed to us and the real goal of the inquiry that is being conducted here.

He could not find an economist, I don't think, of any repute, in fact, who would say there is a question about the theory. The question is whether it applies in particular instances, and the fact that there have been no studies, no peer review studies of the theory with respect to the railroad industry, or I think we could all stipulate with respect to any industry since there's never been a major empirical study that I'm aware of with respect to this theory, does not in any way denigrate the fact that the economic community is almost to a man and woman agreed upon the general applicability of this concept.

And thus, the notion that it is going to be challenged has to be suspect. Its application,

however, can be challenged. I think Mr. Coburn has given you and Mr. Allen has given you the liturgy on that, and thus, we have to come back to the question: since there is only one instance amongst his clients where the theory might have applied or might apply in this case, one instance where we are going to have one of the two carriers funneling into Conrail the exclusive serving carrier, being acquired by one of the funneling carriers -- Conrail would be acquired by one of the funneling carriers -- so that the one lump theory would come into question as to whether there would be a change in behavior, there is really no grounds for making inquiry at this point under the one lump theory into its applicability with respect to any of the circumstances that Mr. McBride suggests, much less the entire universe, except with respect to that one client, which is Delmarva Power.

And we would be delighted -- that's probably the wrong word -- but we would be satisfied, of course, to provide the information that we have that would be relevant to the inquiry with respect to Delmarva Power within a reasonable time frame.

But that is not what this inquiry is really about. It is not to test a theory which is universally endorsed and only argued about by lawyers actually here, and it is not to test its application to a particular client because Mr. McBride knows immediately whether or not rates can be raised by the Applicants here who proposed to acquire and divide Conrail.

And he has not asked for any information that would relate to whether or not they are going to have any different motivations as to whether they would raise it. So if there is a possibility of raising the rates, presumably they would do so.

The question that is relevant before the Board that is not within Mr. McBride's client's full grasp is the question of whether there is going to be anti-competitive behavior, foreclosure, and again, that issue only arises where the bottleneck carrier is going to be acquired by one of the funneling carriers, and one of the funneling carriers will then control the bottleneck.

We have only one instance under the

current circumstance, which is Delmarva, where that applies. The rest of this is, if you'll pardon me, a witch hunt unrelated to the subject nominally at hand and entirely related to another inquiry, which Mr. McBride and Mr. Crowley and many others representing the utility industry have wanted to conduct for a great deal of time, but which they know the Board would dispense of summarily without this other pretense.

Thank you very much.

MR. McBRIDE: May I inquire or would Your Honor inquire of counsel what he's referring to in that last statement? Because I'm not sure what I've just been accused and convicted of.

MR. CUNNINGHAM: Well, I'd be glad to. I think Mr. McBride has alluded in this process to the effect of mergers on rates, not the anti-competitive effect, but just the effect of mergers on rates, and that is a different line of inquiry, unrelated to the one lump theory and unrelated to this document request, and one which may be the proper subject of a rulemaking, but not one which the evidence that he or

the case here gives rise to because he has not shown any risk of anti-competitive behavior.

There is no theory that would substantiate a risk of anti-competitive behavior, except in the one instance where there could be the true two-part test that Mr. Coburn has suggested.

So the logic of the matter when ground down, and I'm sorry we only had one day and could not put on our own experts, leads us only to Delmarva as the only possible instance so far before us where the one lump theory test that Mr. Coburn accurately defined could be applied in this case.

MR. NORTON: Your Honor, if I might just supplement that, with respect to Delmarva, we have the rather odd situation that Mr. McBride has said that the files that he's asked for concerning the bid to Delmarva and Conrail wouldn't do him any good on the inquiry that he has posed because it was back in 1983 or whenever it was.

So his own concession or own argument about why that would not be helpful undercuts, it seems to me, the logic of his entire argument for the

broad requests that he's made.

JUDGE LEVENTHAL: All right.

ORAL ARGUMENT ON BEHALF OF

ALLIED RAIL UNIONS

MR. EDELMAN: Your Honor, Richard Edelman for the Allied Rail Unions.

I would like to just comment on one point here, and that is the Applicant's general response that because this theory, of which I have no view of its merits, although I generally distrust economists--

(Laughter.)

MR. EDELMAN: -- the idea that because this is somehow settled precedent over the past 15 years precludes discovery by the petitioners into this point, and I know the railroads would like to lock in forever the precedent they got in the last 12 years and say that nobody can ever do anything with respect to touching that or discovering an attempt to modify settled law, but I think that is not a correct view of the way discovery disputes ought to be handled because one of the ways people get modifications of law is through discovery in order to obtain evidence, in

order to persuade people, sometimes different decision makers who may ultimately be in the agency or may sit on the court.

So I think that the general proposition they posited is wrong and should not be followed by Your Honor.

And I feel that, you know, particularly labor has been the victim of 180 degree changes in interpretation of the law, and I can well speak that the law does change by the agency and by the courts, and that that can happen, and therefore, parties ought to be able to pursue evidence, and this, again, is broadside.

And also, as a victim of application of supposed commonly accepted notions of economics and public policy related thereto, that's happened to labor, and again, that's something that we would like to be able to challenge.

And I would note that with respect to notions of commonly accepted economic principles, when I took economics, I was told as given notions of anything that you could not have high unemployment and

inflation at the same time, and that notion was disproved within several years while I was still in college.

And I would note that the deregulation people all said that what airline deregulation was going to do, and they are all stunned to death at what happened.

So, again, I would not premise a heck of a lot on all of that. So my general point here is just to object to the broad argument that they make that you can't get discovery because something seems to be settled law at the moment.

JUDGE LEVENTHAL: All right. Any further comments?

MR. ALLEN: Your Honor.

JUDGE LEVENTHAL: Yes.

MR. ALLEN: I would like to say something very briefly about the question of the traffic tapes, which hasn't been discussed.

The third document request seeks --

JUDGE LEVENTHAL: I was going to get to the document requests specifically.

MR. ALLEN: Okay.

JUDGE LEVENTHAL: Do you want to reserve that?

MR. ALLEN: Sure.

JUDGE LEVENTHAL: Are we finished in general?

I think what we've been addressing up until now is the time frame of the requests, and you've advised me, and I clearly see, that you can't reach an agreement on it.

I would like to hear argument with respect to the document requests, and why don't we start with Request No. 1? I take that to be page 7 of the Motion to Compel. "Identify and produce all documents in the departments of Conrail responsible for marketing coal concerning bids for the carriage of coal by unit train or trainload to every destination served by Conrail in which at least 100,000 tons or more of coal was consumed for the years 1978" -- off the record.

(Whereupon, the foregoing matter went off the record at 11:56 a.m. and went back on the record at 11:57 a.m.)