

SURFACE TRANSPORTATION BOARD 09/25/97 FD #33388 1-43

## UNITED STATES OF AMERICA

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## DISCOVERY CONFERENCE

CSX CORPORATION AND CSX  
TRANSPORTATION, INC., NORFOLK  
SOUTHERN CORPORATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY --  
CONTROL AND OPERATING LEASES/  
AGREEMENTS -- CONRAIL INC. AND  
CONSOLIDATED RAIL CORPORATION --  
TRANSFER OF RAILROAD LINE BY  
NORFOLK SOUTHERN RAILWAY COMPANY  
TO CSX TRANSPORTATION, INC.

Finance Docket  
No. 33388

Thursday,  
September 25, 1997

Washington, D.C.

The above-entitled matter came on for a  
oral argument in Hearing Room 4 of the Federal  
Energy Regulatory Commission, 888 First Street, N.E.  
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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

(9:05 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. We will take appearances at this time. Mr. McBride.

MR. McBRIDE: Good morning, Your Honor. Michael F. McBride, LeBoeuf, Lamb, Greene & MacRae, L.L.P., for the American Coal Sales Company, American Electric Power, Atlantic City Electric Company, Delmarva Power and Light Company, Indianapolis Power and Light Company, the Ohio Mining and Reclamation Association, and the Ohio Valley Coal Company.

JUDGE LEVENTHAL: All right. Further appearances?

MR. COBURN: David H. Coburn, from Steptoe & Johnson, L.L.P., on behalf of CSX Transportation.

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

MR. EDWARDS: Good morning, Your Honor. John Edwards, with Zuckert, Scoutt & Rasenberger, for Norfolk Southern.

MR. NORTON: Gerald Norton, Harkins

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1 Cunningham, for Conrail.

2 JUDGE LEVENTHAL: Further appearances?

3 MS. KHERA: Good morning. Farhana Khera,  
4 Hogan & Hartson, for Canadian Pacific Railway.

5 JUDGE LEVENTHAL: The discovery conference  
6 this morning is on behalf of the clients mentioned by  
7 Mr. McBride, and Mr. McBride has asked for this  
8 discovery conference to discuss Conrail's failure to  
9 produce data concerning several American Electric  
10 Power's plants, and the failure of CSX to produce data  
11 concerning Indianapolis Power and Light Company's  
12 Stout Plant which is served by a subsidiary of a  
13 subsidiary of CSX, the Indiana Railroad.

14 I have the letter dated September 23, 1997  
15 from Mr. McBride. I have a letter in response from  
16 Mr. Coburn on behalf of CSX, and that's all the  
17 written documents I have, is that correct?

18 All right. Do you wish to be heard, Mr.  
19 McBride?

20 MR. McBRIDE: Yes. I'll be brief, Your  
21 Honor. Mr. Coburn quite correctly cited the  
22 Commission's regulation, 49 CFR Section 1114.30 on

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1 page 3 of his letter, which refers to the obligation  
2 to produce documents "in the possession, custody or  
3 control of the party served with discovery". And  
4 there is no dispute here, as I understand it, that CSX  
5 controls the Indiana Railroad Company. In fact, if  
6 Your Honor needs to see it, I've brought along the  
7 copies of the pages from the deposition of the  
8 Chairman of CSX, Mr. Snow, who conceded the point to  
9 me and also the head of their coal marketing group  
10 Vice President Ray Sharp, who is also, as it happens,  
11 on the Board of the Indiana Railroad Company, as he so  
12 testified.

13 The case law cited by Mr. Coburn actually  
14 supports me. Let's start with the FERC case that he  
15 cited, Williams Natural Gas Company, which appears at  
16 72 FERC 61846, it's paragraph 61170. And there the  
17 issue was discovery of a subsidiary which was the  
18 litigant in the case, and they were trying to get  
19 discovery as against the parent of the subsidiary, and  
20 the Commission said that that was not appropriate  
21 because the subsidiary didn't control the parent, the  
22 parent was not the party to the case.

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1                   Interestingly,     the     Commission  
2 distinguished the case of Pacific Gas Transmission  
3 Company, which my firm handled, and which the parent  
4 was a party to the litigation and, therefore,  
5 discovery was appropriate against the parent. And  
6 that's the situation that we have here and, in fact,  
7 the other cases that Mr. Coburn cited are consistent  
8 with that.

9                   The issue is very simple -- does the  
10 litigant, the party to the case, control the entity  
11 against which you're seeking the discovery -- and CSX  
12 clearly controls Indiana Railroad Company. So, on  
13 that basis, we've been entitled to this discovery  
14 since we served it on July 3. And I should indicate  
15 to Your Honor that in the discovery that we did serve  
16 on that date, that you've been hearing about regularly  
17 ever since the July 16 conference, we defined  
18 applicants, including CSX Corporation and CSX  
19 Transportation, to include any parent, subsidiary, or  
20 affiliated corporation, the standard definition. I  
21 have that here if Your Honor needs to see it. So, on  
22 that basis, we believe that CSX should be required --

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1 it has been required for quite sometime -- to produce  
2 this.

3 I will tell Your Honor, in all candor,  
4 that there was a communication, as Mr. Coburn attached  
5 and Mr. Harker called to my attention, that I had  
6 frankly forgotten about, that indicated there was a  
7 memo internally within CSX that said that Stout data  
8 wouldn't be on the CSX case. And I passed this  
9 information along to the consultant -- and that was  
10 back in August after, Your Honor will recall, all the  
11 give-and-take that led to some of your earlier  
12 rulings, and so I simply had overlooked the fact that  
13 we weren't getting the Stout data -- and Your Honor  
14 will recall last Friday on the record we actually had  
15 some confusion between me and Mr. Coburn and neither  
16 one of us was quite sure whether the Stout data was on  
17 the tapes or not. We're all moving quickly here, and  
18 that just was something that I overlooked at the time,  
19 and that's why this matter came to my attention. The  
20 conversation on the record last Friday led me to  
21 inquire, and the consultant and I got together and we  
22 realized that we didn't have it, and the consultant

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1 wasn't aware, not having been at all the conferences,  
2 that we were entitled to it. So, once we found out we  
3 were entitled to it, I called Mr. Coburn back Friday  
4 afternoon and asked him for it, and that's what led to  
5 our subsequent communication.

6 Turning to the Conrail matter briefly,  
7 Your Honor will recall that back on July 16, after the  
8 first discovery conference we had on this subject, I  
9 wrote to Your Honor. Your Honor attached my letter to  
10 your ruling, which was Decision No. 11, and the letter  
11 indicated that American Electric Power had plants that  
12 were served by Conrail in the sense that Conrail  
13 originated at Coal and then it went to barge unloading  
14 facilities in the Monongahela River-Ohio River area,  
15 and then was delivered to various AEP plants, and I  
16 raised that at that time by letter, and Your Honor  
17 indicated in your ruling that those should be treated  
18 as destinations served by Conrail for purposes of the  
19 ruling.

20 We then went around and around on some of  
21 the other aspects of this that aren't relevant this  
22 morning, redactions and what have you, but when we got

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1 summaries finally of the traffic tapes in August and  
2 had looked at it, and I saw data for one AEP plant  
3 from CSX, in fact, but not from Conrail, I raised the  
4 matter with Mr. Norton, and he looked into it, and  
5 wrote me the letter that I got I think Monday or  
6 Tuesday, that I attached to my letter to you.

7 As I understand the situation, it's this:  
8 AEP has several plants that it -- or has had at  
9 various times several plants that get coal from  
10 Conrail-served origins, that then go to barge and  
11 loading facilities and then go to those plants.

12 Mr. Norton informs me, as I understand his  
13 letter and from what we discussed, that there is a  
14 rate data available from Conrail but, for some reason  
15 that I don't fully understand, they're having  
16 difficulty disaggregating it, if you will, to just  
17 AEP.

18 It seems to me the solution, if that in  
19 fact is the situation -- even though they have to bill  
20 AEP separately from the other people whose data is  
21 apparently aggregated in there, so I'm not sure I  
22 fully understand the problem -- but even accepting the

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1 representation, as I do, it seems to me the solution  
2 is simply require that it all be provided to me  
3 because Your Honor ruled I was entitled to it. He's  
4 saying that there's some such data there, but there's  
5 more such data. They're having difficulty  
6 disaggregating it. Time is obviously running, Your  
7 Honor, and I had that conversation before, we won't  
8 have to have it again this morning. And, therefore,  
9 I think the simple solution is just give me that data.  
10 If they can't disaggregate it, we'll work with it.

11 JUDGE LEVENTHAL: All right. Who wishes  
12 to go first, Mr. Norton or Mr. Coburn?

13 MR. COBURN: I will, Your Honor. Your  
14 Honor, Mr. McBride is correct that the Indiana  
15 Railroad is under the "control" of CSX to the extent  
16 that CSX owns more than a 50-percent interest in the  
17 Indiana Railroad and, under the Board, and prior to  
18 that ICC, regulations, a company that owns more than  
19 50 percent of another company has to go to the Board  
20 and get approval for that control. I don't know if  
21 there's a similar requirement at FERC, but that is the  
22 requirement, has been for many years. That is

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1 financial control, it is control in the sense that the  
2 Board wants to know what carriers control other  
3 carriers. It doesn't mean control over documents,  
4 that's a different issue, that's a discovery issue,  
5 and there's no precedent that Mr. McBride has cited to  
6 the effect that if you control a company at the ICC or  
7 the Board, that means you control that company for  
8 purposes of discovery.

9 If I may, Your Honor, I have copies of the  
10 charts that were submitted as part of the application,  
11 showing all of the companies -- and it's several pages  
12 long, I'll supply a copy to Mr. McBride -- showing all  
13 of the companies that are under the control, in some  
14 sense, of CSX, and as we see -- I haven't actually  
15 counted them, but it's something on the order of 50 or  
16 60 companies that are under the control. And if you  
17 turn to Chart No. D, you'll see -- over on the right-  
18 hand side of the page, you'll see Indiana Railroad,  
19 under the holding company Midland United. You'll see  
20 it among many other companies that are within the  
21 financial control, or ownership control, whatever term  
22 you'd like to use, of CSX, but CSX certainly does not

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1 control the day-to-day management of each of these  
2 companies, it does not have access to their documents.

3 Their documents are segregated. They are  
4 kept under the management of those companies and,  
5 therefore, the test set out in the Williams case, of  
6 the right to use or dispose of the documents is not  
7 met, and I think that test is very clear and it's  
8 consistent with the test that the Federal Courts have  
9 applied. These companies are managed separately.

10 As our letter points out, CSX had no  
11 involvement in the Stout plant transportation, that  
12 was an Indiana Railroad matter. We know nothing of  
13 their traffic tapes. We know nothing of how they keep  
14 their documents. We don't have their documents. We  
15 have, nonetheless, offered to, as the last paragraph  
16 in my letter indicates, to call them and to see if  
17 they will cooperate. I don't have a response yet. I  
18 checked my voice mail at 8:30 this morning. Hopefully  
19 we will get a response today. But in terms of our  
20 obligation to produce documents, we are no more  
21 obligated to produce documents for the Indiana  
22 Railroad than we are for any of these 60 companies

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1 when we're served with a discovery request.

2 JUDGE LEVENTHAL: But suppose Indiana  
3 Railroad refuses in response to your inquiry to  
4 produce the documents, can't you obtain them from  
5 Indiana in any event?

6 MR. COBURN: I don't know the answer to  
7 that, Your Honor. They are a separately run company.  
8 I suppose we an request and I think it's more likely  
9 than not that they will cooperate. I can't speak for  
10 them, I'm not authorized to speak for them. But that  
11 is a matter of their choosing to cooperate, and I  
12 think on that basis we can probably resolve this  
13 matter. But on the basis that we are under some  
14 obligation as a result of the discovery request served  
15 on CSX to produce their documents, that's where we  
16 have a disagreement.

17 Certainly, Mr. McBride can always serve a  
18 discovery request on Indiana Railroad.

19 MR. McBRIDE: You know, they're getting  
20 all kinds of discovery now late in the proceeding.  
21 That's not late in terms of the deadline for  
22 discovery, but it's coming along in the latter part of

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1 the discovery period, and I was first out of the  
2 blocks on July 3. I served this request then. And I  
3 think perhaps the simple solution here, because Mr.  
4 Coburn has quite candidly demonstrated that I think  
5 Indiana Railroad is as much a part of this case as CSX  
6 is, and all these subsidiaries are, they are part of  
7 the corporate chart and part of the corporate  
8 presentation, and the Board would certainly be  
9 entitled to inquire if there were some issue  
10 concerning any one of these 60 companies. And so I  
11 think Your Honor could just order Indiana Railroad  
12 Company to provide the data, and Mr. Coburn could  
13 communicate that order to them.

14 MR. COBURN: Your Honor, when we are  
15 served with discovery on any issue, it has not been  
16 our practice -- and I know it has not been the  
17 practice on prior merger cases -- to go down the  
18 corporate chart and send out a letter to all 60, 70,  
19 however many, affiliates the companies might have,  
20 saying, do you have documents that might be  
21 responsive. We did not do that here. We didn't do it  
22 in response to Mr. McBride's discovery. We didn't do

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1 in response to any discovery request. It was not our  
2 obligation to do so. And I think it would be setting  
3 a new precedent, I think inconsistent with the  
4 Williams case, to order us to produce documents that  
5 are not under our -- or that we do not have the right  
6 to use or see or even know about.

7 JUDGE LEVENTHAL: But the Williams case  
8 ran the other way. It was a subsidiary seeking to get  
9 -- the party requesting discovery wanted discovery of  
10 the parent company from the subsidiary --

11 MR. COBURN: And affiliated companies.

12 JUDGE LEVENTHAL: -- and this is the  
13 reverse, this is the parent company controlling the  
14 subsidiary.

15 MR. COBURN: I appreciate that difference.  
16 That didn't -- that point does not seem to bear on the  
17 analysis of the Commission in the case. Their  
18 analysis was whether the company that was served with  
19 the discovery request has the right to use and dispose  
20 of the documents. In this case, we don't have the  
21 right to use or dispose of the Indiana Railroad  
22 documents. They are their documents.

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1 JUDGE LEVENTHAL: Didn't Mr. McBride, in  
2 making his original discovery request, define that he  
3 was seeking discovery not only from CSX but from all  
4 its subsidiaries as well? Isn't that --

5 MR. COBURN: I have it right here, Your  
6 Honor.

7 JUDGE LEVENTHAL: I think Mr. Coburn is  
8 looking at it now.

9 MR. COBURN: I believe he did, Your Honor.

10 MR. McBRIDE: And I can cut through some  
11 of this. He doesn't have to go ask the other 59, or  
12 however many, companies for documents, I'm not  
13 interested in them. I'm only interested in Indiana  
14 Railroad.

15 JUDGE LEVENTHAL: Perhaps we can put a  
16 finality to this dispute. Is this the only subsidiary  
17 you're looking for information from?

18 MR. McBRIDE: That's correct.

19 JUDGE LEVENTHAL: And there will be no  
20 others?

21 MR. McBRIDE: There will be no others.

22 JUDGE LEVENTHAL: Mr. Coburn, I just got

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1 an important concession from Mr. McBride. He says  
2 just this one.

3 MR. COBURN: Your Honor, we have made  
4 informally the request to Indiana Railroad. We've  
5 alerted them as to what the documents that Mr. McBride  
6 is seeking are. We haven't heard back from them. I  
7 imagine that they will be cooperative. I imagine that  
8 he'll get his documents. He did not raise this issue,  
9 as Mr. McBride acceded. He knew that he didn't have  
10 company documents as of August 8. Here we are in late  
11 September and the issue is first --

12 JUDGE LEVENTHAL: But he specifically  
13 asked for them, particularly in a letter to me, served  
14 upon all parties.

15 MR. COBURN: On September --

16 JUDGE LEVENTHAL: -- after my original  
17 ruling including Indianapolis -- including his request  
18 information from Indianapolis Railroad.

19 MR. COBURN: And it was after that, Your  
20 Honor, that we wrote to him saying that we, CSX, do  
21 not have any such documents. It was our August 8th  
22 letter that came after your ruling extending the order

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1 to the Stout plant.

2 JUDGE LEVENTHAL: I prefer people do  
3 things voluntarily rather than under the duress of an  
4 order. However, I have to recognize Mr. McBride's  
5 concern that time is running short. And so I'm going  
6 to help you get this information from Indiana Railroad  
7 by requiring you to do so.

8 MR. COBURN: May I say, Your Honor, for  
9 the record, we respectfully disagree that we have --  
10 to the extent your ruling might suggest we have  
11 control over those documents for purposes of the  
12 discovery rules, we disagree --

13 JUDGE LEVENTHAL: No, but you have control  
14 over Indiana Railroad, do you not?

15 MR. COBURN: We have financial control  
16 over Indiana Railroad, that's correct.

17 JUDGE LEVENTHAL: What stronger control is  
18 there?

19 (Laughter.)

20 MR. COBURN: Thank you, Your Honor.

21 JUDGE LEVENTHAL: Mr. Norton?

22 MR. NORTON: Your Honor, I think we need

1 to take a step back and see what the issue is. Mr.  
2 McBride sought discovery back in July. Your Honor  
3 ruled on July 16 that he was entitled to certain  
4 discovery. AEP was sort of a late addition to the  
5 mix, and then his letter after the July 16 hearing  
6 asked that Your Honor include AEP plants where Conrail  
7 was the origin carrier carrying coal from the mine to  
8 the Monongahela River. That was what we responded to  
9 when it was a matter said then to be of great urgency.  
10 On August 1, we provided the traffic tapes that would  
11 have contained, along with the Atlantic City and  
12 Delmarva, the other matters that had been covered by  
13 the request.

14 Quite a long time later, apparently, it  
15 took -- evidently they didn't look at these tapes when  
16 they got them, or I don't know how this is only coming  
17 to light now, but they are raising a question about  
18 whether there was the requisite information provided  
19 concerning the AEP plants. And I'd like to  
20 distinguish between the Krieger Creek situation which  
21 was raised by Mr. McBride separately -- and it has  
22 some different wrinkles to it -- and the others that

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1 are addressed in the letter from Mr. Crowley that is  
2 attached to Mr. McBride's letter.

3 There are several things that have to be  
4 distinguished. One, there is a list of plants in the  
5 Crowley letter. It's not clear whether those are ones  
6 that are served via the Monongahela River or in some  
7 other manner. So, we don't know, as of the moment,  
8 whether those would have been covered by your order at  
9 all. If they were served via the Ohio Valley or some  
10 other way, they weren't covered by the order, which  
11 was specifically limited per his request to movements  
12 from mine to the Mon and then to barge to the AEP  
13 location.

14 There is a second possibility, which is  
15 that there was just a glitch in the tape transfer --  
16 the data transfer from disk to tape which took place  
17 when we ended up producing the tapes for the  
18 depository and Mr. McBride. That is a problem we  
19 didn't know might exist until we got this letter late  
20 on Tuesday. We're looking into that. We don't know  
21 the answer yet. To the extent that's what happened,  
22 there's no way we could know it because you can't look

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1 at the tape unless you actually put it on the computer  
2 and start to analyze it but, when we produced it, we  
3 had no reason to believe it wasn't what wasn't what it  
4 was meant to be. If that's the problem, we'll rectify  
5 it and it should be a nonissue. We just don't know  
6 the answer yet.

7 Mr. McBride has referred to, in connection  
8 with my letter about Krieger Creek, to some question  
9 of disaggregation. I'm not quite sure what he's  
10 getting at here. Krieger Creek is a plant he  
11 specifically raised as to why there was no data  
12 concerning it, and he pointed out it was a 42-percent  
13 owned -- I don't know whether "subsidiary" is the  
14 right term -- but it was not an AEP facility, as such,  
15 it's one in which they have a financial interest.

16 We looked into it and what we came up is  
17 reflected in my letter to him. Obviously, there's a  
18 question whether it would have been covered by your  
19 ruling in the first place, but the problem is that  
20 when there's a move from the mine to the river, that  
21 may or may not be labeled in a way that would show it  
22 to be ultimately destined for AEP. If the mine is the

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1 shipper, basically, it would show up maybe under  
2 Consolidated Mining or some other mine, not  
3 necessarily under AEP, so that that was an apparent  
4 explanation to why this kind of information might not  
5 have shown up in the tapes, assuming it would have  
6 been covered in the first place.

7 But we're trying to find out now whether  
8 there was some kind of a glitch that would have  
9 resulted in not getting any information that he was  
10 supposed to get under Your Honor's rulings. Now, as  
11 I say, his letter raises a lot of other questions  
12 about other plants, and I don't know where they are,  
13 and maybe Mr. McBride can tell us whether they are  
14 served via the Mon and should have been covered by the  
15 production, or not.

16 Also, his letter, or the Crowley letter,  
17 refers to some limited -- that the data for the  
18 Indianapolis Power and Light was not apparently  
19 complete. It was there for some years, and not all of  
20 them. It's the same problem there. We're checking  
21 whether there was a problem with the data transmission  
22 or transferral. And it was meant to be there. If we

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1 have it, it will be produced. We just don't know the  
2 answer yet.

3 JUDGE LEVENTHAL: Mr. McBride, Mr. Norton  
4 is saying that whatever they have, that you'll get.  
5 What is the problem, where are we? Is it only the  
6 Krieger Plant we're talking about now?

7 MR. McBRIDE: Well, I think there is still  
8 a problem -- and I appreciate his representations  
9 about Stout and about the other plants. If he says  
10 there's some sort of glitch, you know, I'm sure he'll  
11 fix it, and I accept that. I don't think Your Honor  
12 has to direct him on those fronts because he's a  
13 capable fellow, and he's always been very professional  
14 with me.

15 Going back to the first point, though, and  
16 the point that he said he was somewhat confused about  
17 on the comment that I made about the disaggregation,  
18 that was based on what I had understood from a  
19 conversation he and I had, and that was when he  
20 mentioned the same thing that he then mentioned on the  
21 record, which is that coal may show that it was going  
22 to Consolidated Coal or something, in other words a

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1 producer. Ohio Valley, by the way, has nothing to do  
2 with this, so far as I understand. But there may be -  
3 -

4 MR. COBURN: Just --

5 MR. McBRIDE: I'm sorry?

6 MR. COBURN: Just to clarify, I was  
7 referring to the Ohio River Valley, not Ohio Valley  
8 Coal Company.

9 MR. McBRIDE: Okay. AEP gets coal from  
10 Ohio Valley Coal Company, but by truck. But in any  
11 event, this is coal that goes to the railroad. And I  
12 don't know how they maintain their records, and  
13 whether it's listed under Consolidated Coal or some  
14 other coal company, or under AEP. But if they've got  
15 that data, and we now know -- in other words, we've  
16 supplied the missing link here. At least some of that  
17 is our coal. A lot of that is our coal. AEP is a  
18 huge coal-burning utility, and gets a lot of coal by  
19 barge.

20 Why doesn't he just give us that data and  
21 we'll work with it, rather than arguing incessantly  
22 about how they maintain records. I don't have them.

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1 Your Honor doesn't have them. Apparently he doesn't  
2 have them. So, we're sitting here trying to figure  
3 out how Conrail keeps records with respect to coal,  
4 some of which at least, we know is going to AEP, it's  
5 one of the biggest coal customers in America. And  
6 time is running short. They've got the data. And  
7 they were required to produce a subset of it, and  
8 we're that subset. And either we get none of it, or  
9 we get all of it, apparently, the way they maintain  
10 it. And I suggest that as to the two choices, we get  
11 all of it.

12 MR. NORTON: Your Honor, what we're  
13 talking about is the data that was collected in the  
14 100-percent traffic tapes. If that does not -- is not  
15 linkable because of the nature of the transaction to  
16 AEP, if Conrail, for example, moves coal at the  
17 request of Consol from the mine to the barge, we may  
18 or may not know who the ultimate consignee is going to  
19 be because that's a deal between the mining company  
20 and the utility. So, I don't know how he expects us  
21 to come up with information about it.

22 JUDGE LEVENTHAL: When you get the

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1 shipment from the mine, don't they indicate the  
2 ultimate destination of the coal?

3 MR. NORTON: The destination for the  
4 railroad is the barge.

5 JUDGE LEVENTHAL: And that's all you know?

6 MR. NORTON: I can't say in every case  
7 that's all we know. It may depend upon the  
8 particulars of the transaction. But that is often the  
9 case. We're just moving coal at the request of the  
10 mine to the barge.

11 JUDGE LEVENTHAL: And the barge may go  
12 anywhere?

13 MR. NORTON: It may go to AEP, it may go  
14 to any number of utilities that are served in that  
15 manner.

16 JUDGE LEVENTHAL: Mr. McBride has made the  
17 suggestion that you give him the tapes and they'll  
18 figure out which is going to AEP, do you have a  
19 problem with that?

20 MR. NORTON: One, I don't know that that  
21 is possible from the tapes because that will show you  
22 the origin and destination as the river. And if we're

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1 talking about situations which, by definition, do not  
2 show AEP as the receiver, I don't know how they're  
3 going to get there from that tape data. And that  
4 raises additional questions about providing  
5 information about other parties' transactions which  
6 are not his transactions.

7 JUDGE LEVENTHAL: Well, Mr. McBride?

8 MR. McBRIDE: Well, that was why I made  
9 the suggestion. I mean, it's their records, and it's  
10 the way they maintain them. And Your Honor ruled that  
11 I was entitled to some of this data. Now, if they  
12 choose, or if they happen in the course of business,  
13 which apparently is the case, to maintain it in a  
14 fashion that they can't conveniently break it out --  
15 and we don't even know that for sure, he conceded that  
16 point. He said, you know, there may be shipments that  
17 they know are going to AEP, or they could call up the  
18 coal company and ask them where the coal went, that  
19 would be simple, they deal with it every day.

20 JUDGE LEVENTHAL: But suppose they can't.  
21 How would you be able to determine which shipments  
22 went to AEP and which didn't?

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1 MR. McBRIDE: Because some of the AEP  
2 plants use so much coal -- there's one, for example,  
3 I know that uses 6 million tons a year. It's not  
4 necessarily a barge facility, but I've seen some of  
5 these plants, they're huge. And so the volumes are  
6 such that AEP and Mr. Crowley can probably figure out,  
7 looking at the volumes, where a lot of this coal went.  
8 Plus, they'll have records of receiving the coal by  
9 the barge, so they may be able to connect it up from  
10 their own records.

11 MR. NORTON: Your Honor, this is another  
12 point. They may be able to figure this out on their  
13 own, without the need to try to get another source of  
14 the same information from Conrail. If it's coal that  
15 was ultimately destined for AEP, they're going to have  
16 records of that. They're going to know what they  
17 paid.

18 MR. McBRIDE: That's not necessarily so.  
19 You see, here's the problem. When he says that the  
20 Conrail records may show the coal going to  
21 Consolidated Coal, there are situations in this  
22 country -- and I'm sure these gentlemen will concede

1 it -- where the coal company pays for the rail  
2 transportation, not necessarily the receiving shipper.  
3 And so we don't have a record of the rail rate. AEP  
4 may pay only the delivered price of the coal, either  
5 to the river or to the plant.

6 So we don't have the rail rates. Plus,  
7 the other two document requests, Your Honor will  
8 recall, all the way back on July 3, were not just the  
9 traffic tapes. We're not just talking about that.  
10 That was request No. 1. Now we're talking about the  
11 bid information and the accompanying documentation.  
12 And that was the information that we regard as just as  
13 critical as the traffic tapes because that's what  
14 shows how they set the rates, and that's what we're  
15 driving at with this discovery.

16 JUDGE LEVENTHAL: And that's not involved  
17 in the tapes, that's a separate item.

18 MR. McBRIDE: That's separate. Your Honor  
19 will recall all these hard copies that they then  
20 redacted, and we got into those fights about it.  
21 That's what I'm talking about. Document requests 2  
22 and 3 are those hard copies of correspondence, bid

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1 information, and the like, and we've obtained that on  
2 these other destinations, and we're working with that  
3 data. And what the consultants do is look at the  
4 traffic tapes, which was my request No. 1, look at  
5 that information, determine how the rates appear to be  
6 set, and then compare to the hard copy and  
7 correspondence and analyses and whatever, which sheds  
8 a lot of light into the numbers that you see on the  
9 tapes.

10 JUDGE LEVENTHAL: Well, how about the  
11 second item, how about these hard copies, aren't they  
12 available?

13 MR. NORTON: Well, he's talking about  
14 documents and letters and memoranda and the like. My  
15 understanding is that with respect to document  
16 requests 1 and 2, to the extent that we can identify  
17 documents that were responsive as defined by Your  
18 Honor's order, we've done that. They were produced.

19 Again, given what he has now raised, he's  
20 talking about documents relating to Conrail dealings  
21 with a mine that may have, on the face of it, no  
22 indication that it's going to involve AEP.

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1 JUDGE LEVENTHAL: Have you given them the  
2 documents that do have the identification that  
3 involves AEP?

4 MR. NORTON: That's my understanding of  
5 what we did in response to Your Honor's order.

6 JUDGE LEVENTHAL: Well, Mr. McBride, he  
7 says he gave you the documents -- he didn't give you  
8 the tapes, he gave you the documents.

9 MR. McBRIDE: Well, for one, I'm not sure  
10 I recall any, but even assuming there are some, the  
11 problem is -- we go back to the first point -- I don't  
12 doubt that if they see a document and it says American  
13 Electric Power on it and it's not privileged, they  
14 understand they have a duty to give it to me under  
15 Your Honor's ruling, and I'll accept any  
16 representation that he makes that they did. I don't  
17 recall seeing any but, if they had them, I'm sure they  
18 would.

19 It's the first problem. It's that the  
20 documents may show that they go to some coal company,  
21 Consolidated Coal Company. And that was the basis for  
22 my explanation in the letter that these are

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1 destinations served by Conrail because the coal goes  
2 to the barge. And if they have their data in such a  
3 fashion that they know some of it's going to AEP but  
4 not all of it, there's no harm in giving me this  
5 information. It's subject to the protective order.  
6 We can use it, just as we can on the waybill samples,  
7 if Your Honor please, the waybill sample tapes which  
8 we now have from the Board contain information about  
9 many, many shippers, not just my clients, and we're  
10 using that information and we're entitled to it.

11 MR. NORTON: Your Honor, this is --

12 JUDGE LEVENTHAL: Wouldn't that be an easy  
13 way to resolve this dispute?

14 MR. NORTON: No, Your Honor, because it  
15 raises very serious questions about the protection and  
16 the statutory protection and the confidentiality of  
17 the information vis-a-vis the coal company. As Your  
18 Honor knows, in the Grainland ruling is protected, and  
19 the protective order can't circumvent that -- a ruling  
20 can't circumvent that limitation.

21 MR. McBRIDE: And if Your Honor will  
22 recall, they invoked the statute to cause the

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1 Commission to issue the protective order to allow the  
2 exchange of shipper-specific information. That's why  
3 all the way back on July 16, I had the temerity to  
4 suggest to Your Honor that I didn't think the statute  
5 limited my right to get this information.

6 JUDGE LEVENTHAL: My order in Grainland,  
7 as we discussed, I believe, our last conference,  
8 required the material to be produced with the names of  
9 the shippers redacted. And as I recall, I don't  
10 remember, I think it was Mr. Coburn, wanted time to  
11 appeal, then they decided not to appeal because their  
12 shippers didn't object. Is that correct, Mr. Coburn,  
13 or Mr. Harker?

14 MR. HARKER: That is correct, Your Honor.

15 JUDGE LEVENTHAL: So, suppose you redact  
16 the name of the shipper.

17 MR. NORTON: Your Honor, I'm not even sure  
18 that we can identify the coal companies that might  
19 fall into this category. It's a universe that,  
20 because of the nature of the problem, may not define  
21 itself. In addition, I think to do that is going to  
22 be itself -- and this is, I suspect, from prior

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1 experience with document requests -- that this is  
2 going to be a large number of documents, and it's  
3 going to be a voluminous burdensome task to do this.  
4 We have to do it, the statute requires it, it would be  
5 a necessary condition of any requirement for  
6 production but, in fact, as I sat here today -- and I  
7 think it's -- and I want to take a step back -- I'm  
8 not in a position -- because this question of  
9 production of documents was not raised before today --  
10 I'm not in a position to really address it in an  
11 informed way. So, I think it's something that would  
12 be unfair to have to resolve at this point, and this  
13 is a problem with this practice of putting things on  
14 the agenda with only a day or two's notice.

15 The tape issue was raised. We tried to  
16 find out is there. The question about document  
17 production was not raised, and I frankly can't answer  
18 with authority as to the nature and the extent of the  
19 problems that would be presented. And I would like --  
20 in fact, I have a duty to my client to be able to do  
21 that. And I think Your Honor has to give us that  
22 opportunity because it's unfair to submit us to the

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1 possibility of ruling without a fully informed  
2 presentation.

3 JUDGE LEVENTHAL: Well, suppose we defer  
4 this to next Wednesday. I know you don't like that,  
5 Mr. McBride, but --

6 MR. McBRIDE: I keep telling you that I'm  
7 trying to make whatever conference I'm attending my  
8 last one. The other counsel in the case think that I  
9 enjoy this, and I'm not trying to put Your Honor  
10 through it, and I'm grateful that we're going to do it  
11 in the afternoon on Wednesday instead of the morning.  
12 I can be here, if need be, but then we lose another  
13 week.

14 JUDGE LEVENTHAL: You only lose three,  
15 four days.

16 MR. McBRIDE: People are working the  
17 weekends on this, too. But in any event, perhaps Your  
18 Honor could direct the tapes at least go forward now  
19 because that information is retrievable. And I think  
20 what he's now raised is a question of difficulty of  
21 production of hard copy information, and I can imagine  
22 that that may be more difficult, but the tapes are

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1 something that he can retrieve.

2 MR. NORTON: Your Honor, no, I --

3 JUDGE LEVENTHAL: He also said that  
4 they're working on the tapes to see if they can  
5 segregate the AEP shipments, isn't that what I  
6 understood you to say?

7 MR. NORTON: That's right, and I am not in  
8 a position to give a definitive response on this  
9 question of aggregation, or whether that's feasible or  
10 not.

11 MR. McBRIDE: Could I ask Your Honor to do  
12 one other thing, please, regardless of how you rule.  
13 Could you direct Mr. Norton's client to -- whoever the  
14 person is who is working with this tape, and I presume  
15 they wouldn't have any difficulty, Mr. Norton could  
16 listen in if he wants -- contact Mr. Crowley or one of  
17 his vice presidents at his firm who are working on  
18 this, and maybe the two experts can figure out a way  
19 to communicate here so that the issues we're trying to  
20 wrestle with about these tapes may be able to be  
21 resolved.

22 JUDGE LEVENTHAL: Mr. Norton?

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1 MR. NORTON: Obviously, I have to consult  
2 with Conrail about that, but if that seems to be a  
3 sensible way to proceed, we'd be perfectly willing to  
4 explore that.

5 JUDGE LEVENTHAL: What I intend to do is  
6 to defer this argument to next Wednesday. Meanwhile,  
7 if you can reach an agreement and having the two  
8 experts consult, you may obviate the necessity of a  
9 conference next week.

10 MR. McBRIDE: Sure, because I really am  
11 not trying to put them to any burden, and I assured  
12 him of that, and this is what I'm trying to figure out  
13 a way to work out here, but could we -- could I  
14 respectfully ask -- even though I know it's Thursday,  
15 but we have two business days left this week -- that  
16 experts try to communicate this week. I don't know  
17 Mr. Crowley's schedule, he travels a lot, but he's in  
18 this week, and I hope he's still there. And so if we  
19 could try to get this communicated this week so that  
20 if I have to write Your Honor another letter, or if  
21 the shoe is on the other foot and he has to write Your  
22 Honor another letter, there will be time for that kind

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1 of communication before next Wednesday.

2 JUDGE LEVENTHAL: All right, Mr. Norton,  
3 I'm sure you'll cooperate in that respect.

4 MR. NORTON: We'll make every effort.

5 JUDGE LEVENTHAL: All right. Then I'm  
6 going to reserve ruling on the Conrail matter until  
7 next Wednesday. Is there anything else we have to  
8 discuss this morning? And as we know -- I'm not sure  
9 it's on the record -- that next Wednesday's conference  
10 will start at 2:00 o'clock.

11 Let's go off the record.

12 (Discussion off the record.)

13 JUDGE LEVENTHAL: Back on the record. All  
14 right. The conference stands closed.

15 (Whereupon, at 9:45 a.m., the discovery  
16 conference was concluded.)

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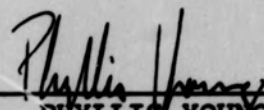
This is to certify that the foregoing transcript in the  
matter of:                   DISCOVERY CONFERENCE

Before:                   SURFACE TRANSPORTATION BOARD

Date:                   SEPTEMBER 25, 1997

Place:                   WASHINGTON, D.C.

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

  
\_\_\_\_\_  
PHYLLIS YOUNG