

SURFACE TRANSPORTATION BOARD

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FD#33388

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UNITED STATES OF AMERICA

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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,
August 20, 1997

Washington, D.C.

The above-entitled matter came on for a
oral argument in Hearing Room 3 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 11:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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Power and Light, and Indianapolis Power and
Light:

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

(11:34 a.m.)

JUDGE LEVENTHAL: This morning's conference will come to order. This conference is in the matter of STB docket number 33388. Let me correct that. It's finance docket number 33388. At this time, we'll take appearances.

MR. BURT: Jeffrey Burt, Arnold and Porter on behalf of CSX.

MR. ALLEN: Richard Allen of Zuckert, Scoutt and Rasenberger, appearing for Norfolk Southern Corporation.

MR. BIRKHOLZ: Fred Birkholz, Jacksonville, Florida, appearing on behalf of CSX.

MR. DATZ: Chris Datz, also on behalf of CSX.

MR. GUINIVAN: James Guinivan with Harkins Cunningham on behalf of Conrail, Your Honor.

MR. MCBRIDE: Good morning again, Your Honor. Michael McBride, LeBoeuf, Lamb, Greene and MacRae for American Electric Power, Atlantic City Electric Company, Delmarva Power and Light Company,

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1 Indianapolis Power and Light Company, and the Ohio
2 Valley Tool Company.

3 With me is Brenda Durham.

4 JUDGE LEVENTHAL: All right. This is an
5 in-camera conference. Only parties who are present
6 here this morning are entitled to copies of the
7 record. Any other party who has signed the
8 confidentiality agreement is also entitled, but before
9 any other party may get the record, the reporting
10 company is required to confer with Mr. Burt to make
11 certain that counsel is entitled to a copy of the
12 record.

13 All right, the --

14 MK MCBRIDE: May I just inquire, Your
15 Honor, at that point I did talk to counsel for NYSEG.
16 You will recall Mr. Mullins, counsel for Niagara
17 Mohawk. Mr. Maser informed them that this was going
18 forward and they didn't feel a need to be here because
19 their own matters are not yet in dispute and they are
20 hoping that they not be, but they also understand that
21 however you resolve the matters for us can have a lot
22 to do with how any disputes about their documents

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1 might be resolved.

2 So what I understand it, I can just tell
3 them to call Mr. Burt and work out whether -- if
4 getting a copy of the transcript for today.

5 JUDGE LEVENTHAL: All right. If you wish
6 to do it, you can do it on the record now.

7 MR. BURT: We don't see any problem. We
8 would like to finish the hearing before. We don't see
9 any problem with him getting access.

10 JUDGE LEVENTHAL: All right. Before you
11 leave, this is my law clerk, Jennifer Schmitt. Your
12 offices have been in contact with Jennifer.

13 Off the record.

14 (Whereupon, the foregoing matter went off
15 the record at 11:36 a.m. and went back on
16 the record at 11:37 a.m.)

17 JUDGE LEVENTHAL: All right. The purpose
18 of this morning's conference is to decide whether
19 certain materials can be redacted from documents which
20 have been or are required to be furnished pursuant to
21 orders made by me or in the ordinary course of
22 discovery.

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1 Again, off the record.

2 (Whereupon, the foregoing matter went
3 briefly off the record at 11:38 a.m.)

4 JUDGE LEVENTHAL: All right. Mr. Burt,
5 you address the first portion this morning.

6 MR. BURT: Your Honor, we are here today
7 pursuant to discussions at last week's hearing where
8 Mr. Coburn of Steptoe and Johnson indicated that with
9 respect to certain documents, information was redacted
10 because of the extreme sensitivity and the fact that
11 they related directly to ongoing negotiations with Mr.
12 McBride's clients.

13 At the hearing, we indicated we would look
14 at those documents. There were 20 that were
15 identified at the time, subject of the discussion.
16 That we would look at that, see if some accommodation
17 could be reached. Following the hearing, of the 20
18 documents we looked at it and 14 were further
19 unredacted. That information was supplied to Mr.
20 McBride yesterday morning.

21 We had a conference with Mr. McBride
22 yesterday at 3:00 and were not able to resolve all the

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1 issues outstanding. There were basically four
2 categories of information that remain that open for
3 discussion.

4 As was discussed earlier, the most
5 sensitive and the one that is of considerable concern
6 relates to internal management costing systems.
7 Certain data is contained on three of the documents at
8 issue here.

9 With respect to that costing data, the CSX
10 as well as the other applicants with whom we have
11 conferred feel that this is of extreme importance,
12 high and commercial sensitivity, and disclosure of
13 that information to Mr. McBride would be very damaging
14 to competitive interests of CSX and the others.

15 There are two recent STB decision which in
16 our view directly relate to this. One was decided in
17 May of this year involving Pepco, also our clients.
18 Another was decided just a few weeks ago involving the
19 Arizona Public Service Commission.

20 We respectfully would request that if this
21 can not be resolved today, and in earlier discussions
22 it can not be resolved, that the applicants be

1 permitted to brief this issue before resolution by
2 Your Honor. We would be able to schedule, as has been
3 discussed earlier, in order to fully present arguments
4 as to why this information should continue to be
5 redacted.

6 We also have a few other categories of
7 non-cost data, in view we believe of the fact that
8 there be further briefing. We think it may make sense
9 to include this other data there as well having to do
10 with interim market research. There are some related
11 issues.

12 So basically we would like the opportunity
13 to present this further to Your Honor and brief it as
14 soon as the schedule can accommodate Mr. McBride's
15 needs.

16 JUDGE LEVENTHAL: Well, earlier this
17 morning I thought you were only discussing briefing in
18 the fourth category, those internal cost material.
19 Are you now suggesting that you brief all four
20 categories?

21 MR. BURT: Just raising it. If that is
22 not considered appropriate by Your Honor, we can

1 briefly discuss the other two categories where there
2 are some outstanding issues.

3 JUDGE LEVENTHAL: What you were previously
4 asking to brief, was that category three and four or
5 just four?

6 MR. BURT: Just four, Your Honor.

7 JUDGE LEVENTHAL: Just four. All right.

8 MR. BURT: That's what I had understood.
9 I thought we were going to get the others resolved.

10 JUDGE LEVENTHAL: All right. That's what
11 we'll do. We'll resolve the first three categories.
12 The fourth category which deals with CSX internal cost
13 management material will be the subject of briefing.

14 In our off the record conference earlier
15 this morning, Mr. McBride protested vigorously against
16 any delay in time and protested against any briefing
17 schedule. However, in view of the fact that I
18 indicated off the record that I thought briefing would
19 be appropriate, Mr. McBride has not agreed to but has
20 stated that he could accept a briefing schedule which
21 will allow the railroads to submit a brief by close of
22 business on Monday. Off the record.

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1 (Whereupon, the foregoing matter went
2 briefly off the record at 11:43 a.m.)

3 JUDGE LEVENTHAL: By Monday, August 25,
4 and Mr. McBride will have until Thursday, August 28,
5 close of business to file a reply brief. I will rule
6 on it as promptly as I can after receipt of the
7 briefs.

8 MR. MCBRIDE: May I just ask at that
9 point, Your Honor, that I be -- that you direct that
10 I get a copy via fax or messenger at the same -- no
11 later than the time you get it. And that it be no
12 later than 5:00 on Monday?

13 MR. BURT: Yes. Of course.

14 JUDGE LEVENTHAL: All right. In this
15 morning's conference, Mr. McBride indicated that it
16 might be necessary to recall a witness that is
17 scheduled for deposition on Thursday, August 28,
18 because of the need to reply, to file a reply brief.
19 Mr. Birkholz indicated that they would arrange, if
20 such a recall is necessary, they would arrange a
21 mutually convenient date.

22 MR. MCBRIDE: Yes, sir.

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1 JUDGE LEVENTHAL: All right. Now we'll
2 hear argument. All right. Mr. Burt.

3 MR. BURT: With respect to two of the
4 categories that we discussed this morning, I would
5 like to address that at this point, Your Honor.

6 The first category related to an offer
7 that CSX received from a broker to provide alternative
8 service to Delmarva, the inpart barge. This was an
9 offer that made and not in fact implemented. The CSX
10 people have produced the document, but have redacted
11 certain price and quantity information that was
12 contained in the offer by the broker who presented
13 this information on a confidential basis.

14 There are two such documents of the 20
15 that are being discussed today. It is our position,
16 Your Honor, that this information in terms of offers
17 made confidentially to provide alternative service
18 contains very sensitive information, is not relevant
19 to the exercise that we think Mr. McBride is engaged
20 in, and that that information was appropriately
21 redacted under the circumstances.

22 JUDGE LEVENTHAL: This was an offer of

1 service which never materialized in a contract for
2 service. Is that correct?

3 MR. BURT: That is correct.

4 JUDGE LEVENTHAL: And no service was ever
5 performed under this offer?

6 MR. BURT: That's correct. We have
7 produced the offer, but in terms of the price that the
8 broker offered to provide this alternative service, we
9 don't think it's relevant. By disclosing it to Mr.
10 McBride and his consultant, we are concerned that that
11 would reveal information that is relevant to ongoing
12 negotiations, because it informs the shipper of
13 certain price and quantity information that a broker
14 was prepared to offer and related to how CSX evaluated
15 appropriate pricing.

16 JUDGE LEVENTHAL: All right. Mr. McBride?

17 MR. MCBRIDE: Yes. I have the document
18 here, if counsel will collaborate that what we're
19 talking about is CSX 28 HC 000123 through 25.

20 MR. BURT: 00123 to 25. Let me just check
21 our numbers. Yes. 123 and 125.

22 MR. MCBRIDE: If I may approach, Your

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1 Honor.

2 JUDGE LEVENTHAL: Yes.

3 MR. MCBRIDE: I have this in front of you.
4 The process of going through the negotiations of last
5 week to try to lift these redactions didn't produce
6 anything in relay of their withdrawing their desire to
7 withhold the redacted information.

8 You just heard Mr. Burt say this had to do
9 with ongoing negotiations. But the document is dated
10 June 29, 1995. I don't understand that, but in any
11 event, he just argued how extremely sensitive it was
12 to them because it shows how they set the rates, which
13 is precisely what our discovery is seeking to inquire
14 about. It shows what they deleted is the most
15 important information. Rates per ton and expiration
16 date of the offer and what the rates would be in
17 different sizes of trains. We're trying to determine
18 how they set their rates for purposes of developing
19 our testimony on this one lump theory.

20 JUDGE LEVENTHAL: You want to see this
21 document, Mr. --

22 MR. BURT: Yes. I know the document.

1 Just to give a further, Mr. Coburn had promised that
2 is an unredacted version just so you can see. We
3 reveal specific information that has been redacted, so
4 we focus on the sensitive information.

5 The price that the broker had offered and
6 that in fact was rejected, is part of the
7 considerations that CSX incorporated in its own
8 decision making in terms of ongoing negotiations.
9 This tells us that in 1995, there was an offer to
10 provide alternative service at a different price at
11 certain volumes. That kind of information we are
12 concerned about because it does indicate what the
13 pricing range was, what was out of bounds, what was
14 within range, what some alternatives are that CSX has.

15 Frankly, we just don't see the relevance
16 of this. It is part of this market research hearing
17 that we had that I'll address in a moment.

18 JUDGE LEVENTHAL: But are you saying that
19 an offer to perform a transportation service which
20 never materialized in any movement and was made in
21 1995, and actually this document is dated June 29,
22 1995, is still confidential? What difference would it

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1 make if everybody knows whatever the price rate per
2 ton that the offer contained? How would that affect
3 anybody?

4 MR. BIRKHOLZ: Well, Your Honor, first of
5 all, it's only two years old. These are very long-
6 term relationships.

7 JUDGE LEVENTHAL: But it's a relationship
8 that never started.

9 MR. BIRKHOLZ: That was our broker, but
10 with the utilities who are our customers. This is all
11 part of the mosaic I spoke of earlier. It's not just
12 one little item. Everything fits together. If you
13 learn how we look at our cost, you learn how we look
14 at our rates, and you learn what kinds of volumes we
15 think about and in return for rate levels at certain
16 volumes.

17 If you connect term with volume and rates
18 and rate adjustment, it all fits together as part of
19 the mosaic. It's impossible to separate and say well,
20 you can have this but you can't have this. It's a
21 slippery slope, Your Honor. Once you start down that
22 slope, everything goes. That is the reason that was

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1 redacted, because it shows how we think. Two years is
2 not a long time, Your Honor. We are constantly off
3 and on negotiating and discussing with our utility
4 customers rates coming up. Contracts are expiring
5 every day. I worked on one only two and a half years
6 ago, and already it's going to expire at the end of
7 this year and we're thinking about negotiating.

8 The fact that we offered that to that
9 broker only two years ago would be highly relevant for
10 a customer with which we're negotiating to know how we
11 were thinking at that time.

12 JUDGE LEVENTHAL: Wait. Before we
13 proceed. How could we identify this document for the
14 record? Date and the party?

15 MR. BIRKHOLZ: If I may, Your Honor.

16 JUDGE LEVENTHAL: Yes.

17 MR. BIRKHOLZ: There's a Bates number.
18 Obviously this is the unredacted version. Oh, this
19 doesn't have a Bates number. It's unredacted.

20 JUDGE LEVENTHAL: Why don't you look at
21 the redacted number and tell me how we can identify
22 this for the record so that we can know what the

1 document is.

2 MR. BURT: It would be the unredacted.
3 We're talking about the unredacted version of the
4 document that is Bates stamped number CSX 28HC 000123.

5 That's the page that Your Honor was
6 looking at, which has been --

7 JUDGE LEVENTHAL: Let me see the redacted
8 copy too. I have before me the redacted copy and the
9 unredacted copy. Off the record.

10 (Whereupon, the foregoing matter went off
11 the record at 11:51 a.m. and went back on
12 the record at 11:52 a.m.)

13 JUDGE LEVENTHAL: This document is a
14 letter from Patricia K. Murphy, sales manager utility
15 call of CSX to Mr. Russ Stewart dated June 29, 1995.

16 MR. MCBRIDE: And if Your Honor, please.
17 The record should reflect that the document is a
18 three-paged document. The numbers are the numbers
19 that I previously stated, beginning with the number
20 that Your Honor has before you.

21 JUDGE LEVENTHAL: Yes. And the material
22 redacted from this document is the rate per ton and

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1 other rate information.

2 Do you wish to make argument?

3 MR. MCBRIDE: I just wanted to say that I
4 think Mr. Birkholz has made my argument for me because
5 he conceded how relevant this is to the rate making
6 process that CSX is going through. I understand that
7 this is sensitive to CSX. I don't dispute that. That
8 is why they have been complaining so hard about the
9 last six weeks.

10 But that is what our case is about,
11 ratemaking and how they set their rates and make their
12 bids. This concerns Delmarva. It's right at the
13 heart of what Your Honor ordered them to produce.

14 I am already entitled to this information.
15 They did not ask you for permission to redact
16 information. They didn't raise it. You ordered them
17 to produce it, and now we're rearguing something that
18 you already told them to produce, which goes right to
19 the heart of what I told you from the very beginning
20 in this process, is what we were trying to do here, to
21 get evidence about how they set rates to determine
22 whether that evidence conforms to the board's theory

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1 or not. This could not be more central to that.

2 JUDGE LEVENTHAL: And you say this is
3 central for you to test whether or not the one lump
4 theory applies in this particular case?

5 MR. MCBRIDE: Absolutely. Delmarva is the
6 quintessential one lump theory utility. Ms. Durham at
7 my direction took the time, notwithstanding our
8 position that we're already entitled to this
9 information, checked with Mr. Crowley, one of our
10 witnesses, to determine whether he did have to have
11 this and confirmed that it was absolutely essential to
12 the analysis that he was trying to do.

13 That is in fact why they don't want him to
14 have it, because it is relevant.

15 JUDGE LEVENTHAL: Any further argument?

16 MR. BURT: If I might, frankly we fail to
17 see how it relates, why it's essential. We would like
18 if Mr. McBride would care to, to give us just a little
19 more substance because simply saying it's essential
20 doesn't say anything to us.

21 What is the connection between specific
22 offer that in fact was not implemented that has

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1 certain rate information and what Mr. Crowley and you
2 are going to determine? We think some causality or at
3 least some connection is appropriate. Again, because
4 we are dealing with an area where Mr. Crowley, once he
5 has marketing information, can not simply block it out
6 of any future involvement in other matters on ongoing
7 negotiations.

8 MR. MCBRIDE: I thought I did it, but I'll
9 do it again. CSX is one of the origin carriers for
10 Delmarva Power and Light, which is served at
11 destination by Conrail. What that document Your Honor
12 has before you specifically relates to is the ongoing
13 process at CSX of how it determines to set its prices
14 as an origin carrier to Delmarva Power and Light.

15 Now yes, they say, and I don't dispute,
16 that this didn't get accepted. But it goes right to
17 the heart of how they set their rates and try to get
18 that business at Delmarva Power and Light. It tests
19 a number of things.

20 It tests whether the response that I
21 showed Your Honor to the interrogatory about how
22 there's no minimum level of contribution, and whether

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1 that applies to Delmarva Power and Light.

2 If I may, Your Honor, let me refer you for
3 example, to the Western Resources case your law clerk
4 was kind enough to bring down for me. Judge Williams,
5 writing for the DC Circuit said this at page 792 of
6 the decision, which is reported at 109 Fed Third.
7 This of course may be said simply to relocate the
8 question: why did the fall and available rents hit the
9 upstream carrier (because rates had theoretically
10 already been squeezed down to cost), rather than a
11 bottleneck carrier.

12 Well, CSX is the upstream carrier. It's
13 an origin carrier. The theory is that they should
14 have already been squeezed down to cost. This kind of
15 information is going to show us whether CSX in fact as
16 an origin carrier is squeezed down to cost, which is
17 what we need to show the board that the theory doesn't
18 apply in reality.

19 As Mr. Allen said earlier from Norfolk
20 Southern, they concede that they do make profit as
21 upstream carriers. NS is the other upstream carrier
22 here for Delmarva. Conrail actually is an upstream

1 carrier too, but NS and CSX are only upstream
2 carriers, origin carriers. Conrail is the only
3 serving carrier. They concede that they make some
4 money on their portion of these movements.

5 To the extent that it's significant, if we
6 can show that through discovery, we can show the board
7 that the theory doesn't apply because the theory is
8 they should be squeezed down to cost. That is why we
9 need that information, to see how they set their
10 rates, to see if they set them in accordance with the
11 theory. That is what we are doing here.

12 MR. ALLEN: Your Honor, I think that Mr.
13 McBride is proceeding from a fundamentally flawed
14 premise with respect to the one lump theory. The one
15 lump theory states in brief that a bottleneck carrier,
16 the one who has the only route to the destination,
17 which in this case is Conrail, generally will extract
18 its maximum profits from the move, will act as the
19 monopolist.

20 How CSX and Norfolk Southern, who are not
21 the bottleneck carriers, set their rates in connection
22 with a particular move and what their costs are, and

1 how much profit they are making, and what their theory
2 is, seems to me to be quite irrelevant to Mr.
3 McBride's effort to show that the one lump theory
4 doesn't apply here.

5 What he needs to show, it seems to me, is
6 that for some systemic reason Conrail is not in a
7 particular move extracting its -- the most it can get
8 from the move, which has to do with Conrail's behavior
9 and really has to do with some systemic reason for not
10 extracting its maximum profits, but not really has to
11 do with the particular costs and revenues in
12 particular moves.

13 In other words, if Mr. McBride can show
14 that there is some extraneous reason that Conrail is
15 not extracting the maximum profits from moves to
16 Delmarva, he might make a case. But it doesn't make
17 that case by showing that Conrail's profit on a
18 particular move might be 18 percent, and Norfolk
19 Southern or CSX's profit on that move might be 13
20 percent. That would turn a merger case into a whole
21 series of rate cases, which I don't think is pertinent
22 in a merger case. I hope I have made my point.

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1 Mr. McBride is trying to turn this merger
2 case into a whole series of rate cases.

3 JUDGE LEVENTHAL: Now suppose he can show,
4 suppose from this information he can show that there
5 is no profit left for CSX? Wouldn't that help to show
6 that the one lump theory doesn't pertain in this case?

7 MR. ALLEN: Well, actually no. It would
8 confirm the one lump theory by confirming the
9 commission's or the board's view that where you have
10 a bottleneck situation, that is a Y configuration when
11 one bottleneck carrier and several competing origin
12 carriers, that the bottleneck carrier has gotten
13 everything it can out of the move, and that the two
14 competing carriers have been driven down to basically
15 their costs, and they are making little if any profit.

16 So if he could show that -- if the facts
17 show that CSX was not making much profit, that would
18 tend to confirm the one lump theory. But even if the
19 facts show that CSX was making 18 percent rather than
20 five percent or whatever particular number, I don't
21 really think that would help Mr. McBride refute the
22 one lump theory, which as the commission stated in

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1 affirming your appeal, petitioners are attempting to
2 undermine more than the one lump theory here.

3 They are challenging a basic principle of
4 economics that firms will generally attempt to
5 maximize their profits.

6 So it seems to me that Mr. McBride as the
7 board pointed out, is trying to overcome sort of a
8 truism of economics. The only way in a particular
9 case that I think he can do that is to show that there
10 is some particular extraneous reason why in a
11 particular move the bottleneck carrier, in this case
12 Conrail, is not attempting to maximize its profits.

13 JUDGE LEVENTHAL: Well, Mr. McBride, what
14 you would prove, what would you be able to prove if
15 you got this information?

16 MR. MCBRIDE: First of all, if Your Honor,
17 please, realize that CSX or NS as origin carriers are
18 the other side of the coin from Conrail in the
19 movement to Delmarva. We're all in agreement that
20 Conrail is the only serving carrier, but those are the
21 origin carriers.

22 So it doesn't answer my point to say well,

1 go talk to Conrail about how it sets its rates because
2 they are all involved in this. That is why Your Honor
3 has a document about Delmarva before you. I don't
4 know yet what this will show because I don't have the
5 information, but I will offer you the goalpost. I'll
6 offer you the boundaries of what the evidence may
7 show.

8 On the one hand, it may show that CSX has
9 already squeezed down to its cost. It made an offer
10 and it didn't get the business, and therefore, the
11 utility, it may be getting the benefit of the upstream
12 competition between CSX and NS already, which is what
13 the board says we must show. The court of appeals
14 quoted that at page 788 of the same Western Resources
15 decision.

16 First, it must show that prior to the
17 merger, the benefits of origin competition flowed
18 through to the utility and were not captured by the
19 destination monopoly carrier. In other words, that
20 Delmarva has been able to get the profit that the
21 upstream carrier might otherwise get or that Conrail
22 may get through a shrewd negotiation form of the

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1 contract, if I may say so in camera.

2 I think these -- I can say to these
3 counsel and Conrail well knows, and I think the other
4 two carriers know too because they have to make
5 proportional rate bids with this, Delmarva has a very
6 unique contract. There's a contract, a proportional
7 rate agreement it's called, which gives it rates just
8 on the Conrail, which most shippers don't have. Then
9 it gets separate rates from the origin carriers. It
10 is able to use that competition to its advantage.

11 That is what is going on under the form of
12 that agreement and that's how it has been able to
13 capture the benefits of the upstream competition.

14 Conversely, the other goal post, other
15 boundary of what this evidence may show if I ever get
16 to see it and Mr. Crowley ever gets to see it, is that
17 in fact, CSX is not passing through to the client, to
18 my client all of the benefits of the upstream
19 competition, that it does have a minimum level of
20 contribution that it demands from these things, as Mr.
21 Allen seemed to say at least for NS this morning.
22 Obviously it does, and he seemed to say it about CSX

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1 as well.

2 If that is true, then the one lump theory
3 is not applying here and I need to be able to show the
4 board through evidence, as he has admitted I have to
5 do, and the board said, you know, I am challenging an
6 economic principle. Well, that's right.

7 I am not challenging the principle so much
8 I'm trying to show that it doesn't apply. We have
9 been through this before for hours before Your Honor.
10 I need the evidence to do it. The evidence may show
11 that contrary to CSX's general response to my
12 interrogatory, that it has no minimum level of
13 contribution and that it does.

14 All of this evidence will test whether the
15 theory applies or not, whether my client is getting
16 the benefit of the upstream competition or not, which
17 is what this is all about. Of course it's sensitive,
18 but we got into this knowing this was sensitive.

19 So that is the best I can do not having
20 the actual evidence here, not having the actual
21 information. I don't know whether there is any profit
22 left here or not, but the information that Your Honor

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1 has before you will allow Mr. Crowley to make that
2 determination. That is why we need it.

3 JUDGE LEVENTHAL: Last chance. Any
4 further argument? I am going to grant Mr. McBride's
5 motion that this category of information be furnished
6 to him unredacted. Again, as I noted in making my
7 ruling earlier with discovery dispute, we're in
8 discovery now. All Mr. McBride has to show in
9 discovery is that it's possible that this material may
10 lead to evidence that is admissible before the board.
11 I don't have to find that it itself is admissible at
12 this time.

13 I am aware of the board's ruling that the
14 economic theory can not be challenged, but I am
15 impressed with Mr. McBride's argument that he is
16 trying to show that the economic theory does not apply
17 in this case.

18 All right.

19 MR. BIRKHOLZ: Your Honor, may I confer
20 with counsel?

21 JUDGE LEVENTHAL: Sure.

22 (Whereupon, the foregoing matter went off

1 the record at 12:08 p.m. and went back on
2 the record at 12:16 p.m.)

3 JUDGE LEVENTHAL: Mr. Burt?

4 MR. BURT: Your Honor, the second category
5 of documents which we would like to discuss involves
6 what we have Bates stamped as CSX 23HC 101, where
7 certain information is redacted. I am presenting to
8 Your Honor.

9 MR. MCBRIDE: Excuse me. I think you
10 misspoke. I think you said 23 and you meant 28.

11 MR. BURT: Twenty eight, I'm sorry. I
12 have it right in front of me.

13 I would also like to --

14 JUDGE LEVENTHAL: Is this 28? It looks
15 like 23.

16 MR. BURT: Poor printing.

17 MR. MCBRIDE: I suspect this is the same
18 document.

19 MR. DATZ: Your Honor, when we produced
20 the unredacted version, we gave a new Bates number to
21 it with the U next to it. It's just a typo on that.
22 It is supposed to be 28.

1 JUDGE LEVENTHAL: Twenty eight. Okay.

2 MR. BURT: And I would like to present you
3 so we can focus on it, a specific redacted to tell you
4 what that is.

5 JUDGE LEVENTHAL: Let me interrupt you for
6 a minute. Do you have copies of this so we can mark
7 it?

8 MR. BURT: Yes. I have four copies over
9 here.

10 JUDGE LEVENTHAL: Why don't we mark them
11 and then we'll -- do you have copies of the first
12 document?

13 MR. BURT: Yes, I do, Your Honor. If you
14 take a moment, I'll get them right here.

15 JUDGE LEVENTHAL: Off the record.

16 (Whereupon, the foregoing matter went
17 briefly off the record at 12:18 p.m.)

18 MR. BURT: With respect to the document
19 that was discussed prior to our brief recess, let me
20 give another copy. This was with Bates stamps 123 at
21 the end.

22 MR. MCBRIDE: Do you have all three pages

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1 of it? Can we make an exhibit of that or is it only
2 that page?

3 MR. BURT: It's only that page that we
4 discussed. That was the only page that had
5 redactions.

6 I think it's sufficient.

7 MS. DURHAM: 125, we talked about
8 yesterday during the -- but that's an issue too.

9 JUDGE LEVENTHAL: Why don't we mark it for
10 the record.

11 MR. BURT: Yes.

12 JUDGE LEVENTHAL: Do you have a copy for
13 me too?

14 MR. BURT: Yes.

15 MR. MCBRIDE: Wait a minute, no. There is
16 a redaction on 125, which is part of the same document
17 I believe.

18 MR. DATZ: Those were the documents that
19 you just identified. That's yesterday. We haven't
20 had a chance to go through them.

21 MR. MCBRIDE: But at least if it's all the
22 same document, it ought to go in as one document.

1 MR. BURT: I don't have copies.

2 MR. MCBRIDE: I have that page. Do we
3 have another one back at the office? We could give up
4 ours and they could send us another copy.

5 JUDGE LEVENTHAL: What we'll do is --

6 MR. DATZ: It's fine. We can get you
7 another page.

8 We just should note for the record though
9 that with the understanding that that page 125, we
10 have not discussed with our client yet. Whatever
11 redactions are on 125 don't apply here.

12 MR. MCBRIDE: I understand. The ruling
13 may inform us all, the ruling on 123 may inform us
14 about the ruling on 125, but I understand and agree
15 that you apparently haven't had a chance to discuss it
16 with your client. So I'm not contending otherwise.

17 MR. BURT: With respect --

18 JUDGE LEVENTHAL: Wait a minute. What are
19 you giving me now?

20 MR. MCBRIDE: I gave you the other two
21 pages of a document.

22 JUDGE LEVENTHAL: Does it come this way?

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1 MR. MCBRIDE: Correct.

2 JUDGE LEVENTHAL: That is the whole thing?

3 MR. MCBRIDE: That is my understanding.
4 That's the order they produced it in. If we could
5 give that to the reporter, that would be great.

6 JUDGE LEVENTHAL: Anybody got a staple
7 machine with them?

8 All right. We'll mark the document we
9 discussed earlier and which I had just made a ruling
10 on, the document addressed to Mr. Russ Stewart dated
11 June 29, 1995, we are going to mark Exhibit No. 1.
12 Let's go off the record.

13 (Whereupon, the foregoing matter went off
14 the record at 12:21 p.m. and went back on
15 the record at 12:23 a.m.)

16 JUDGE LEVENTHAL: Back on the record.
17 We'll mark this exhibit for purposes of the discovery
18 conferences, DIS 1, DIS-1.

19 (Whereupon, the document was
20 marked for identification as
21 DIS Exhibit No. 1)

22 MR. MCBRIDE: And if I may suggest to Your

1 Honor, if the court reporter can advise you as you go
2 along so that you don't repeat a designation, their
3 service is able to do that. Just for example, you have
4 a hearing tomorrow. I won't be there, on labor
5 matters. It will get confusing if you started over
6 with 1 again.

7 JUDGE LEVENTHAL: All right. That is a
8 good suggestion. All right. Off the record.

9 (Whereupon, the foregoing matter went
10 briefly off the record at 12:24 p.m.)

11 JUDGE LEVENTHAL: Now the document you
12 just gave me, you have described it for the record
13 with a number. We will further describe it. It
14 appears to be a memo to HWF I guess abbreviation for
15 from, F-R, PKM. It's not dated. Is that right?
16 We'll mark this DIS-2 for purposes of the discovery
17 conference.

18 (Whereupon, the document was
19 marked for identification as
20 DIS Exhibit No. 2)

21 MR. BURT: Your Honor, the document that
22 you were just presented reflects an internal CSX

1 document that is used in connection with ongoing
2 negotiations with Mr. McBride's client. What has been
3 deleted are figures in the last three lines that
4 reflect the results of CSX market research. It tells
5 our marketing department what we think, what we
6 estimate, what we guess are the prices that NS and
7 Conrail are charging to the same shipper that the
8 plant has indicated. It reflects our market
9 intelligence.

10 These prices may or may not be correct.
11 The reason we have deleted it and the reasons we think
12 it's totally irrelevant to the exercise here is it
13 indicates whether our intelligence is good or bad. Do
14 we have right prices or don't we have the right
15 prices.

16 To reveal this to a shipper, to a
17 consultant and to Mr. McBride says absolutely nothing
18 in our view, that's at all relevant to the one lump
19 theory. What it does disclose is whether we have good
20 or bad intelligence. Frankly, we don't see why this
21 relates even remotely to any of Mr. Crowley's
22 theories. It has clearly damaging effect from our

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1 perspective because it tells the consultant and others
2 are we on point or are we way off. Are we two dollars
3 off? How good is our market intelligence.

4 I have heard nothing this morning, and I
5 have seen nothing in the board decision to suggest why
6 whether we have good or bad market intelligence when
7 we are in our internal -- thinking, trying to assess
8 things, why that is relevant to the exercise.

9 For that reason, we deleted it in this
10 document. There is one other document in the 20
11 that's similar to this, but this document illustrates
12 the principle.

13 JUDGE LEVENTHAL: Mr. Allen, do you wish
14 to be heard?

15 MR. ALLEN: Just to add to that. I think
16 the sensitivity of this kind of information is again,
17 obvious. If CSX thinks that Norfolk Southern is
18 charging 10 dollars or let's say CSX thinks Norfolk
19 Southern is charging five dollars a ton for a
20 competitive move to the junction point, when in fact
21 Norfolk Southern is charging 10, well, if the utility
22 knew that CSX thought it was five when it's actually

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1 10, then the utility would know that well, CSX will
2 probably go down to five.

3 So it is of enormous value to the utility
4 as a negotiating point. But for purposes of the value
5 as to any issue in this case, it is totally beyond us.

6 MR. MCBRIDE: The relevance is central,
7 Your Honor, because first of all if I may say so, this
8 really is in a category of which you already ordered
9 produced. This is discovery. We are going to rate
10 information, volumes and that sort of thing. What
11 reason this is central is because the one lump theory
12 assumes that Conrail can squeeze CSX down to its cost.
13 Apparently what this information may show is that in
14 fact, all that's going on is that CSX gets squeezed
15 down below what NS, what they perceive NS may be
16 charging, which would be evidence that would overcome
17 the one lump theory.

18 It would mean that CSX is not being
19 squeezed down to its cost. So it goes right to the
20 heart of what is relevant to what we are trying to
21 prove. That they don't price at the level of their
22 costs. They price in some other fashion. The issue

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1 is whether the shipper is getting the benefit of that
2 or not, and whether that will change after the merger
3 when NS is the delivering carrier.

4 JUDGE LEVENTHAL: Anything further?

5 MR. BIRKHOLZ: If I may, Your Honor. I
6 guess I don't understand Mr. McBride's argument. How
7 does this estimate of rates charge of other carriers
8 show whether CSX T is being squeezed down to its cost?

9 MR. MCBRIDE: Mr. Crowley can determine in
10 his own view what their costs are, and there are other
11 documents that relate. That is what they want to
12 brief, so we haven't gotten to that category documents
13 yet, what they believe their costs are.

14 So he can compare what NS is estimated to
15 be charging or what Conrail is estimated to be
16 charging to another document where CSX has estimated
17 its internal costs and find out whether CSX is being
18 squeezed down to its costs or being squeezed just
19 below what the competition is.

20 If it is the first, then that's in
21 accordance with the one lump theory, down to cost. If
22 it's the second, it overcomes the theory. It shows

1 that it does not apply. In either case, it's relevant
2 to test the theory.

3 MR. BIRKHOLZ: But --

4 JUDGE LEVENTHAL: You are ahead, Mr.
5 Birkholz. No. I am going to overrule your -- I am
6 going to deny your motion to unredact this material.
7 I don't see that this material can lead to anything
8 that's relevant. It is their guess on what's going on
9 in the market. I don't see how that would affect your
10 case one way or another.

11 MR. MCBRIDE: It shows then how they
12 respond, how they set their prices. That is what we
13 are after. It is their setting their prices in
14 response to what they believe the market to be.

15 JUDGE LEVENTHAL: No. I don't think this
16 -- I think this in a different category. I'll deny
17 your motion with respect to this document.

18 MR. BURT: Thank you, Your Honor.

19 JUDGE LEVENTHAL: Here's your unredacted
20 one. I don't want it.

21 MR. BURT: Your Honor, the remaining
22 category I think we can in fact resolve. This had to

1 do with a discussion that we had yesterday concerning
2 the division of revenue on a jointed served shipper.
3 Although it just came up yesterday afternoon, to limit
4 our discussions, I think we don't have to pursue that
5 at this hearing.

6 MR. MCBRIDE: If they mean they are going
7 to produce that information, then we don't have to
8 pursue it. If that's not what they mean, then we do.

9 JUDGE LEVENTHAL: Well, we'll find out.

10 MR. BIRKHOLZ: I don't know what we mean
11 at this point, Your Honor.

12 MR. BURT: This came up in the discussion
13 yesterday. It was not among the 20 that were
14 originally identified.

15 MR. MCBRIDE: I want a ruling.

16 JUDGE LEVENTHAL: Can't we resolve that
17 today? You want to confer? Suppose we recess for 15
18 minutes, a half hour, whatever time you want and see
19 if you can dispose of it?

20 MR. BURT: Perhaps we can consult with
21 you. I have after yesterday, I think I have the
22 document that you are discussing with me. We could

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1 just in a few minutes perhaps.

2 MR. MCBRIDE: If they want to talk, that's
3 fine.

4 JUDGE LEVENTHAL: Yes. That seems fine.
5 Before we recess, what is left now to decide? Is this
6 it?

7 MR. BURT: That's it, Your Honor.

8 MR. MCBRIDE: Other than what is to be
9 briefed.

10 JUDGE LEVENTHAL: Other than what's to be
11 briefed.

12 Now do I have on the category four that
13 you are going to brief, do I have anything that -- you
14 haven't given me anything to show the type of document
15 and what's been redacted. Are you going to do that by
16 brief or do you want to offer it as an exhibit now and
17 address it on brief?

18 MR. BURT: Our preference would be to
19 include it in the brief.

20 JUDGE LEVENTHAL: All right. I have no
21 preference. That's fine. Just so long as I see it at
22 some time.

1 All right.

2 MR. MCBRIDE: And it should be the
3 redacted version.

4 JUDGE LEVENTHAL: Redacted version.

5 MR. MCBRIDE: So that I have the same
6 document.

7 JUDGE LEVENTHAL: Yes. Absolutely. I
8 don't think that there will be any need for me to see
9 the unredacted material because you will be telling me
10 what you took out. I don't need the actual figures.

11 All right. So that will be fine. Before
12 you go, and while I remember, can you give me a copy
13 of Exhibit no. DIS-1?

14 MR. BURT: Yes.

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

16 (Whereupon, the foregoing matter went off
17 the record at 12:34 p.m. and went back on
18 the record at 12:35 p.m.)

19 JUDGE LEVENTHAL: We'll stand in recess at
20 this time. I am going to stay here.

21 (Whereupon, the foregoing matter went off
22 the record at 12:35 p.m. and went back on

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1 the record at 12:51 p.m.)

2 JUDGE LEVENTHAL: The conference will come
3 back to order. All right. Mr. Burt?

4 MR. BURT: During the recess and after
5 further discussions and review, as I indicated earlier
6 with respect to the category of documents that have
7 been discussed about in divisions of revenues, that we
8 will produce forthwith, that we had discussed
9 yesterday.

10 MR. MCBRIDE: Now I appreciate that very
11 much.

12 By the way, I wanted to raise one other
13 matter. We have apparently just been now getting some
14 redacted documents from Norfolk Southern. Apparently
15 given Mr. Allen's presence here and interest in this
16 whole issue, there must be some redactions that are
17 along the same line. Frankly, we haven't even had a
18 chance to talk about it.

19 But I am just extremely concerned about
20 trying to keep up with the schedule that their clients
21 asked the board to set. I would hope that Mr. Allen
22 might be able to commit on the record here that win or

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1 lose, we are going to try to abide by Your Honor's
2 rulings in the same categories or same respects as
3 would apply on the Norfolk Southern document so we
4 don't have to come back down here and do this again.
5 Because as I told you the last time, much as I like
6 Your Honor, I am really not looking for every
7 opportunity to come down here and argue every point
8 over and over again.

9 I would hope the applicants who asked for
10 the expedited proceeding would abide by the spirit of
11 your rulings with respect to the other redactions so
12 we don't have to fight over every single document.

13 JUDGE LEVENTHAL: I would assume that they
14 would, Mr. Allen.

15 MR. ALLEN: Yes. I will state on the
16 record that we will abide by the spirit of your
17 rulings and try to apply them as reasonably as we can
18 subject to I guess any possible appeal that may be
19 taken.

20 JUDGE LEVENTHAL: You always have the
21 right to appeal. Nobody forecloses an appeal.

22 MR. MCBRIDE: I'll be candid enough to

1 tell Your Honor, as you probably overheard during the
2 break, that we are probably going to appeal the ruling
3 on the second item. I certainly agree that you have
4 your right to appeal as well.

5 JUDGE LEVENTHAL: Now there is no further
6 problem with -- you raised a problem at the beginning
7 about written answers into your discovery when they
8 find they have no information available, you want a
9 written statement. Is there any problem with that
10 now?

11 In other words, Mr. McBride raised at the
12 very beginning that in some instances, he was told CSX
13 had no information from 1978 to 1982. NS had similar
14 statements. He wanted it in writing.

15 MR. ALLEN: In writing?

16 MR. MCBRIDE: Yes. I want it, or on the
17 record here. I just need a written, I need a place
18 where this is recorded for posterity, that they either
19 have responsive information or they don't.

20 MR. ALLEN: I may be wrong, but I assume
21 that our practice was whenever we had to respond to
22 your discovery requests, that we would either say in

1 writing that we had it or we didn't.

2 MR. MCBRIDE: That hasn't happened. In
3 other words, for documents. You see you have
4 responded to my interrogatories or objected and we
5 fought that out. What I am saying is we got tapes
6 from your firm, from Norfolk Southern I assume, for
7 1995, 1996 and 1997, but we didn't get any tapes or
8 documents from the period from 1980 to 1984 applicable
9 under the judge's ruling to your client.

10 So we don't have a piece of paper either
11 from you or Norfolk Southern that says there are no
12 such documents.

13 MR. ALLEN: We will do that.

14 MR. MCBRIDE: I need the same for CSX.
15 Mr. Harper has made that oral representation to me.
16 I asked him to go back and check in the 22 percent
17 rate case file to see if this stuff was there. He
18 said he would. I have not heard back. I need to know
19 whether the information exists or doesn't exist.

20 MR. BIRKHOLZ: I have no idea whether he
21 can find those files.

22 Your Honor, just to make sure the record

1 understands this. I think I understand what the
2 problem is. When we answer requests for production of
3 documents, unless there are none, the standard answer
4 is to say responsive documents will be placed in a
5 repository. That doesn't solve his need for a piece
6 of paper that says we don't have any documents for
7 this time period.

8 JUDGE LEVENTHAL: But you will accommodate
9 him with that?

10 MR. BIRKHOLZ: Yes, sir.

11 JUDGE LEVENTHAL: All right. Anything
12 else before us this morning? All right.

13 MR. MCBRIDE: May I just inquire, I do
14 have a scheduling problem now. I know we are supposed
15 to go on Thursday. But you accommodated us on
16 Wednesday this week because of tomorrow's deposition.

17 If we can't work something out that just
18 follows in the spirit of these rulings, in case for
19 example, in Norfolk Southern the damage has somehow
20 fallen into a different category, you take the
21 position that rulings really don't apply.

22 I am trying to figure out between the

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1 briefing and the possible appeal that I may file and
2 the depositions, when we all might be able to get back
3 together again. Obviously your schedule is central to
4 this. So I would just like to reserve a day next week
5 if we need to come back on the Norfolk Southern
6 documents. I don't think there is a problem with
7 Conrail, but I am not aware there have been any
8 redactions.

9 But if there is a need for a ruling on
10 Norfolk Southern, is it possible to do it Friday the
11 29th, since my reply to your briefing will be in on
12 Thursday. I don't recall that at least we have any
13 call witnesses. I have no depositions scheduled that
14 day.

15 JUDGE LEVENTHAL: Let me tell you. Next
16 week I am not available on the 25th or the 29th,
17 Monday or Friday. I can take you any other day.

18 MR. MCBRIDE: See we're in this briefing
19 period.

20 JUDGE LEVENTHAL: Well, you're in on
21 Thursday. We have our schedule, the conference unless
22 you cancel it. I am available Tuesday, Wednesday or

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1 Thursday or the following week on Monday.

2 MR. MCBRIDE: The following week Monday is
3 Labor Day.

4 JUDGE LEVENTHAL: I think we'll be closed
5 on Labor Day. I am available so far as I can remember
6 any day next week other than the holiday of course.
7 All you have to do is call my law clerk. If I am
8 available I'll be glad to accommodate you in any way
9 that I can.

10 MR. MCBRIDE: May I just ask if Mr. Allen
11 is going to be attending the Sansom deposition?

12 MR. ALLEN: No.

13 MR. MCBRIDE: Well then perhaps we could
14 ask Your Honor just to remember that Thursday, when
15 you said you would be available, and which is the
16 normal scheduled date anyway, might be a date,
17 notwithstanding the fact I'm working on my reply
18 brief, that I might need to come down in case we have
19 a dispute with Norfolk Southern.

20 MR. ALLEN: I personally have a conflict
21 on Thursday, but somebody will handle it from my
22 office.

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1 JUDGE LEVENTHAL: All right. But
2 remember, you have to advise my law clerk that you
3 want me on Thursday, you want to have a conference on
4 Thursday. If it's the day before, we can accommodate
5 you. Just clear it with my law clerk.

6 MR. MCBRIDE: Day before we'll do -- in
7 other words, under the discovery guidelines, I am
8 supposed to request it by Monday. I am juts saying
9 right now, I am going to request it unless we work it
10 out. I am hoping we work it out and we won't need it.
11 But I just wanted everybody to be aware of that. I
12 can not let a couple more weeks go by here.

13 JUDGE LEVENTHAL: All right. Everybody is
14 in agreement? There's no problem?

15 The conference stands closed.

16 (Whereupon, at 12:59 p.m. the proceedings
17 were adjourned.)
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