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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 18, 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 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

APPEARANCES:

On behalf of Conrail:

GERALD P. NORTON, ESQ.  
of: Harkins Cunningham  
Suite 600  
1300 19th Street, N.W.  
Washington, D.C. 20036  
(202) 973-7605 (GPN)

On behalf of CSX:

DREW A. HARKER, ESQ.  
of: Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004  
(202) 942-5022 (DAH)

On behalf of New York State Electric and Gas:

SANDRA L. BROWN, ESQ.  
of: Troutman, Sanders, LLP  
Suite 500 East  
1300 I Street, N.W.  
Washington, D.C. 20005-3314  
(202) 274-2959 (SLB)

On behalf of Norfolk Southern Corporation  
and Norfolk Southern Railway Company:

JOHN V. EDWARDS, ESQ.  
PATRICIA E. BRUCE, ESQ.  
of: Zuckert, Scoutt & Rasenberger  
888 17th Street, N.W.  
Washington, D.C. 20006  
(202) 298-5660

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APPEARANCES (continued):

On Behalf of Canadian Pacific Parties:

ERIC VON SALZEN, ESQ.  
of: Hogan & Hartson, L.L.P.  
555 13th Street, N.W.  
Washington, D.C. 20004  
(202) 637-5718 (EVS)

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

2 (9:30 a.m.)

3 JUDGE LEVENTHAL: All right, the discovery  
4 conference will come to order. For the movant?

5 MS. BROWN: Your Honor, Sandra Brown of  
6 Troutman, Sanders for New York State Electric and Gas.

7 JUDGE LEVENTHAL: Off the record.

8 (Off the record.)

9 JUDGE LEVENTHAL: For the Respondents?

10 MR. EDWARDS: John Edwards with Zuckert,  
11 Scoutt for Norfolk Southern, Your Honor.

12 MS. BRUCE: Good morning, Your Honor,  
13 Patricia Bruce, Zuckert, Scoutt for Norfolk Southern.

14 MR. HARKER: Drew Harker with Arnold and  
15 Porter for CSX.

16 JUDGE LEVENTHAL: All right, this  
17 morning's discovery conference is a renewed motion  
18 filed by New York State Electric and Gas to compel  
19 responses by Norfolk Southern and CSX.

20 I don't know, is Conrail included, Ms.  
21 Brown?

22 MS. BROWN: No, Your Honor, not in this.

1 JUDGE LEVENTHAL: All right, to certain  
2 data requests. All right -- yes?

3 MR. HARKER: Your Honor, before, if I may?

4 JUDGE LEVENTHAL: Sure.

5 MR. HARKER: I just want to confirm that  
6 you have received NYSEG has submitted two letters  
7 dated September 15th and September 16th and I sent you  
8 a letter yesterday and given our problems yesterday  
9 with the hearing that we had where you had not  
10 received our paper, I just wanted to confirm that you  
11 had all three papers.

12 JUDGE LEVENTHAL: Yes. I believe I do.  
13 You said all three?

14 MR. HARKER: There is a letter from Mr.  
15 Mullins, Ms. Brown's colleague that is September 15th  
16 and another letter dated September 16th.

17 JUDGE LEVENTHAL: Right.

18 MR. HARKER: And then yesterday afternoon,  
19 I sent Your Honor a letter on behalf of CSX.

20 JUDGE LEVENTHAL: Yes, I have all three.

21 MR. HARKER: Very good.

22 JUDGE LEVENTHAL: All right.

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1 MS. BROWN: Thank you, Your Honor.

2 JUDGE LEVENTHAL: Let me ask this, have  
3 the parties resolved, I gathered from your letter, Ms.  
4 Brown, there was still some communications going on  
5 among the parties, have the problems been resolved?

6 MS. BROWN: There were some communications  
7 and there were some additional documents that we did  
8 look at. Unfortunately, the issues, I think, are  
9 still unresolved.

10 JUDGE LEVENTHAL: All right, so the record  
11 is complete, I have a letter dated September 15, 1997  
12 to New York State Electric and Gas and a letter dated  
13 September 16, 1997 and a letter dated September 17th  
14 from Mr. Harker, counsel for CSX.

15 All right.

16 MS. BROWN: Your Honor, as I'm sure you  
17 know, we've been here several times and one -- well,  
18 actually the main issue that NYSEG has had to  
19 continually come back here is that we're interested  
20 in finding out how NS and CSX competed against each  
21 other and that's because when the Board -- under the  
22 Board's merger authority, the Board looks at whether

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1 the transaction would have an adverse effect on  
2 competition.

3 Throughout the entire discovery process,  
4 applicants have fought every portion of discovery that  
5 deals with competition, yet they haven't fought  
6 discovery that deals with operational issues. For  
7 example, NYSEG 4 has met very little resistance. I  
8 think that NYSEG 4 which is the second set of  
9 discovery NYSEG propounded on the applicants, I think  
10 that those issues will be resolved, hopefully without  
11 involving your assistant.

12 NYSEG 3 which asks for mainly the meat,  
13 the substance of our argument and what we need to put  
14 together are opposition evidence and argument has  
15 dealt with competition and this has resulted in a wall  
16 of dispute.

17 NYSEG's first set of discovery was  
18 propounded on August 13, 1997, more than five weeks  
19 ago. Now we have less than four weeks to put our  
20 evidence together and we still have very little  
21 evidence to present to the Board.

22 NYSEG stands to be substantially harmed by

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1 this merger which is why NYSEG needs to see these  
2 documents and to understand what, if anything, will  
3 happen and maybe even determine if they won't be  
4 harmed which would lead to them just dropping out of  
5 the case, but either way they need to prove or  
6 disprove their theories.

7 This merger is more than two times as big  
8 as the merger of UP-SP which was finalized about a  
9 year ago. But interestingly, in the UP-SP merger,  
10 more than 63,000 shipper specific documents were  
11 produced in that merger, yet the shipper specific  
12 documents that we have received amount to  
13 approximately 100 pages and most of those are  
14 redacted.

15 Mr. Norton, I believe, helped in the UP-SP  
16 merger, produced most of those documents. Maybe he  
17 could verify, even maybe if I'm wrong, but I look  
18 through the index that was produced in the UP-SP  
19 merger and I counted over 63,000 pages of shipper  
20 specific information which contained no redactions.  
21 There were whole files produced so that the issue of  
22 competition could be determined.

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1           There are several arguments that  
2 applicants have raised as to why these documents  
3 shouldn't be produced. One is the protective order.  
4 And Your Honor, we respectfully believe that that  
5 issue has been resolved and another argument has been  
6 raised that certain information is irrelevant and that  
7 argument is too late.

8           The problem of the lack of discovery and  
9 the problem of extra classification of discovery has  
10 permeated every part of this case, including  
11 classification of other documents besides discovery as  
12 highly confidential that probably didn't need to be,  
13 such as transcripts and some other things. And I  
14 think that goes to show just how deep this whole issue  
15 is. It's not just these documents.

16           If another issue is that this is taking so  
17 much time and we need to -- we don't have enough  
18 people to do it, if need be, we could send a whole  
19 group of people down to Jacksonville, down to Norfolk,  
20 wherever we need to go to help get through these  
21 documents and find them, if that's necessary.

22           Specifically, the first issue that we

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1 addressed in our first letter were Requests 14 through  
2 16. If Your Honor would recall, these documents were  
3 ordered produced on August 28th and it was limited to  
4 five shippers, five coal shippers who were solely  
5 served, who received shipments by sole carriers of NS  
6 and CSX.

7 The last discovery conference that we  
8 attended on September 5th, we had made a request that  
9 all documents previously ordered be produced by  
10 September 12th.

11 On September 12th, we received no  
12 documents for these requests. We did receive a phone  
13 call requesting if we would agree to some additional  
14 redactions before these documents were produced.

15 As Your Honor is aware, that issue was in  
16 dispute at the time and we agreed to wait on that  
17 issue until Monday, the 15th, and to rediscuss that  
18 issue after we had a chance to fully read the Board's  
19 decision that came out that Friday.

20 After reading that decision, we had a  
21 telephone conference again with NS and CSX and we  
22 again stated our position, that we did not believe any

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1 redactions were proper.

2 On September 16th, we did get a few  
3 documents from NS which is approximately 50 pages and  
4 I believe it's one shipper information, but to date we  
5 have received no documents from CSX in regard to  
6 Requests 14 through 16.

7 If Your Honor would please -- if the  
8 answer to my request is that we have no documents,  
9 then I would request in addition that it's stipulated  
10 on the record that NS or CSX or both, they have no  
11 other documents which would support or disprove that  
12 CSX and NS compete against each other.

13 Thank you, Your Honor.

14 JUDGE LEVENTHAL: All right, now let's  
15 take the problems one by one. When you're talking  
16 about redactions, what information has been redacted?

17 MS. BROWN: Okay, well for 14 through 16,  
18 we have received only documents from NS and they  
19 appear to be all from one shipper. There are no  
20 redactions on those, Your Honor, and there should be  
21 no redactions on those.

22 JUDGE LEVENTHAL: So on 14 through 16,

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1 there is no problem with NS?

2 MS. BROWN: If there are no other  
3 documents. They were supposed to produce five shipper  
4 files.

5 JUDGE LEVENTHAL: All right. Let's find  
6 out.

7 How about it?

8 MS. BRUCE: Your Honor, the limitation of  
9 the five shippers of Utility Coal in which NS served  
10 solely the destinations, we searched our records and  
11 there were only -- there's only -- there's actually  
12 two named shippers in those documents, if you look at  
13 them. But that's the only responsive documents.  
14 There are no other documents that would qualify.  
15 There are no other shippers that would qualify to that  
16 request is limited and we produced everything in our  
17 redacted form.

18 JUDGE LEVENTHAL: All right. You have  
19 your stipulation now. Ms. Bruce is saying you have  
20 all the documents they have.

21 MS. BROWN: My reading of those documents  
22 show that there's only one shipper that there's

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1 another subset of that shipper in there.

2 MS. BRUCE: Right, that's correct.  
3 There's two names in there.

4 MS. BROWN: Which are one --

5 MS. BRUCE: Right --

6 MS. BROWN: One shipper.

7 JUDGE LEVENTHAL: All right, so that  
8 resolves that problem?

9 MS. BROWN: If there are no other shippers  
10 which are solely served by NS, then I guess so.

11 JUDGE LEVENTHAL: You have Ms. Bruce's  
12 statement. I don't know what else we can do. You  
13 have a concession, well, not a concession, a statement  
14 that there are no other shippers. So that resolves  
15 that then.

16 MS. BROWN: If there is only one shipper  
17 which is solely served by rail by NS.

18 MR. EDWARDS: Your Honor, shipper, the  
19 coal utility.

20 MS. BROWN: Coal utility shipper.

21 MR. EDWARDS: All the rest.

22 JUDGE LEVENTHAL: Yes, of course. That's

1        what we're talking about. All right, how about CSX,  
2        Mr. Harker?

3                    MR. HARKER: Your Honor, I think that Ms.  
4        Brown accurately, although incompletely, reflected  
5        where we stand. I think our paper that we submitted  
6        last night indicates that CSX has received from the  
7        two shippers, there are only two, that fit the  
8        requirements of the request, that is, that receive,  
9        that are coal shippers that receive their coal only  
10       from CSX. There are only two shippers. They have  
11       both written letters to CSX objecting to release of  
12       their information. We're basically talking about  
13       their contracts which are both governed by  
14       confidentiality agreements, unless their identities  
15       are redacted. This was a decision, this is an issue  
16       that you've addressed before in the context of the  
17       Grain Land case which you are very familiar with, I  
18       know, and which we have talked about from time to time  
19       in this proceeding. But the shippers' view, shared by  
20       CSX is that under Section 11904 of Title 49, CSX can  
21       provide copies of shipper specific information to  
22       NYSEG so long as the identities of the shippers are

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1       protected. That's what shippers request.

2               JUDGE LEVENTHAL: Do we have an issue on  
3       redaction? Ms. Brown says they received nothing.

4               MR. HARKER: I have gotten from CSX, in  
5       fact, I have with me a copy of the redaction -- one of  
6       the redacted contracts. I can give that to Ms. Brown  
7       after the -- I just got it this morning. I can give  
8       it to her after our proceeding.

9               I have a colleague of mine dealing with  
10       the second contract and I've asked her to come over as  
11       soon as she gets done with it, hopefully before the  
12       end of the proceeding. I can give that to her as well.

13              JUDGE LEVENTHAL: All right, do you have  
14       a problem then Ms. Brown? The proffer Mr. Harker is  
15       addressing which he included in his letter of  
16       September 17th deals with their inability to release  
17       shipper specific information. Previously in the Grain  
18       Land case, I ruled that they could redact the name of  
19       the shipper, but the documents which show the origin,  
20       destination and rate information. Wouldn't that  
21       satisfy you?

22              MS. BROWN: Your Honor, I have read the



1     Grain Land decision. I have also read paragraph 16 of  
2     the protective order which they drafted and which  
3     states that materials -- halfway through the  
4     paragraph, and use of the materials and of the data  
5     that the materials contain are deemed essential for  
6     the disposition of this in any related proceedings and  
7     will not be deemed a violation of 49 U.S.C. 11323 or  
8     11904 or of any other relevant provision of the ICC  
9     Termination Act of 1995.

10           I think the issue is addressed in the  
11     protective order which they have written, they asked  
12     for and which they got and that the production of  
13     these documents fully produced without any redactions,  
14     placed in designated and highly confidential files are  
15     covered in here. They are permitted to be produced.  
16     It's my understanding that they produce things among  
17     themselves which is the first part of the protective  
18     order in order for them to get their application  
19     together, yet it seems that they refuse to produce to  
20     us documents that are clearly needed for us to  
21     determine whether or not we have a case.

22           MR. HARKER:     Your Honor, the same

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1 arguments were made in Grain Land. They argued, in  
2 fact, they argued the protective order in this case as  
3 authority for the proposition that you have the  
4 authority to disclose or to require disclosure of  
5 unredacted material. Your opinion makes clear that  
6 you found those decisions inapposite.

7 Here, we have a situation where the two  
8 shippers involved, there are only two, and both of  
9 them have come on the record, you have the letters.  
10 They were submitted to you in camera, have come on and  
11 said we will suffer competitive harm if these  
12 contracts are released. This, it seems to me, is a  
13 clear situation where 11904 fits to a T and as I say,  
14 we think that the two cases are distinguishable. And  
15 in any event, as I say, you've already dealt with the  
16 issue in Grain Land which I will only notice is up on  
17 appeal from the STB and I don't think there's a  
18 decision yet. But you looked at our protective order  
19 when you made your ruling in Grain Land.

20 JUDGE LEVENTHAL: What was the purpose of  
21 including this paragraph in your protective order, Mr.  
22 Harker? What did you intend it to cover?

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1 MS. BROWN: That's exactly my question.

2 JUDGE LEVENTHAL: Mr. Norton, you didn't  
3 enter your appearance here.

4 MR. NORTON: I'm sorry, Your Honor.  
5 Gerald Norton, Harkins Cunningham representing Conrail  
6 and I apologize, I had a subway problem.

7 JUDGE LEVENTHAL: I just didn't want you  
8 to be anonymous.

9 MR. NORTON: Sometimes I think that's  
10 better.

11 (Laughter.)

12 I think it's necessary to take a little  
13 perspective on the protective order because the  
14 language of the order and the language of the petition  
15 and seeking it is very similar to what has been seen  
16 in all of the recent proceedings. It would be very  
17 difficult, I think, to attribute to any particular  
18 craftsman or signatory an intent on this question  
19 because this issue had really not been raised before  
20 your Grain Land decision. And no one --

21 JUDGE LEVENTHAL: I don't recall that we  
22 had the same protective order. I don't recall that

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1 provision in the protective order in Grain Land.

2 MR. NORTON: It wasn't in the Grain Land  
3 order, but it was in the CSX-Conrail merger, the  
4 initial stage of all of this.

5 JUDGE LEVENTHAL: But you see in Grain  
6 Land, I wasn't faced with a clause in a protective  
7 order which specifically referred to 11904.

8 MR. NORTON: That may be true.

9 JUDGE LEVENTHAL: And even if we do, I'm  
10 interested when you use -- we lawyers use a lot of  
11 boilerplate, but still when you put boilerplate into  
12 a contract or into a stipulation or into an agreement,  
13 it has to stand for something.

14 What did you mean when you had this clause  
15 in the protective order which is ineffective in this  
16 case?

17 You know I accept the protective orders  
18 that parties agree upon, unless it has some very  
19 onerous provision that somehow affects the Board or  
20 affects the Judge, but other than that, if the parties  
21 agree on terms, I normally accept it.

22 MR. NORTON: I think it would be fair to



1 say that prior to the decision having arisen, the  
2 parties to these proceedings and submitting and  
3 working under this boilerplate type of protective  
4 order, had assumed that the ICC earlier and the Board  
5 more recently had the authority by entering such an  
6 order to permit disclosures and exchanges of  
7 information which might otherwise be covered by 11904.

8 What Your Honor ruled in Grain Land was  
9 that the statute -- well, it had a provision for Court  
10 sanction. It didn't have anything that said that the  
11 Agency or an ALJ could sanction such disclosure and  
12 that's the problem.

13 JUDGE LEVENTHAL: In 11904, the situation  
14 was a little bit different. The parties did not agree  
15 that part of the protective order which said one side  
16 will give information that might be subject to 11904.  
17 Here, we have both sides, or all sides saying this is  
18 our agreement. We will produce this information.

19 MR. NORTON: Well, it wasn't -- the part  
20 that said the parties could exchange information  
21 focused on the preparation of the application. The  
22 same protective order established a different

# **CORRECTION**

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18 our agreement. We will produce this information.

19 MR. NORTON: Well, it wasn't -- the part  
20 that said the parties could exchange information  
21 focused on the preparation of the application. The  
22 same protective order established a different

1 procedure for discovery and that's what we're dealing  
2 with here in discovery.

3 JUDGE LEVENTHAL: Well, your protective  
4 order really isn't clear on that.

5 MR. EDWARDS: Additionally, Your Honor,  
6 the protective order with regard to your observation  
7 that one party agreed that the other party couldn't  
8 reveal that information would imply that the  
9 information that sought to be revealed is that of a  
10 party to the proceeding.

11 JUDGE LEVENTHAL: It specifically mentions  
12 11904. What does that mean?

13 MR. EDWARDS: The question is is whether  
14 or not a party to the proceeding can, by entering into  
15 a protective order, sanction the release of  
16 information for a third party. I believe that some of  
17 these contracts deal with parties' shippers who are  
18 not a party to this proceeding and have not given  
19 sanction under the protective order to release of  
20 their information.

21 MR. HARKER: I think that's a key point,  
22 Your Honor. I mean this, we're focused on the

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1 protective order. The protective order binds the  
2 parties to this proceeding, so I would think that  
3 anybody who entered into -- any representative of a  
4 client who entered into this proceeding and signed the  
5 protective order would not be in a position to argue  
6 11904 as a basis for not disclosing information.

7 Here, we're talking about two utilities  
8 that are not a party to this proceeding for which this  
9 statute was passed. This statute was passed to  
10 protect their rights. I would certainly say I don't  
11 think that CSX or NS or anybody else that's a party to  
12 this proceeding is in a position to waive their  
13 statutory rights. I mean these are rights granted by  
14 statute. We, as lawyers, and we as parties, as we  
15 know, can't override by contract something that's  
16 required by statute. So I think the utilities on here  
17 to hear from, but I think they would say, Your Honor,  
18 that the statute was protected for them, was  
19 implemented for them. The protective order is  
20 designed to facilitate exchange among the parties  
21 here. If they sign -- if a party signs up to a  
22 protective order, they've essentially waived their

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1 11904 protection. They've essentially said we don't  
2 see any competitive harm which is what the statute is  
3 focused on. If our information is released to one of  
4 our competitors, but here again, we have two utilities  
5 that are not a party to this and I don't think that  
6 they're bound by anything that was entered into in a  
7 protective order. That's what they're telling us.

8 JUDGE LEVENTHAL: But you're saying that  
9 by your protective order the parties are agreeing that  
10 they will not assert 11904, yet that is exactly what  
11 you're doing, isn't it?

12 MR. HARKER: Well, we are being told --  
13 well, we are being basically told -- we're essentially  
14 here at least, in part, on behalf of the utilities,  
15 Your Honor. You have the letters. You've seen what  
16 they've said, the depth of their feeling about this  
17 and they are actually it's their ox here who is  
18 getting gored.

19 We have shared a great deal of competitive  
20 information with respect to CSX with the other parties  
21 in this proceeding. We have nothing to hide. We  
22 think this proceeding is, this transaction is pro-



1 competitive, certainly for NYSEG. They're going to go  
2 from having one shipper to having two. So we have  
3 nothing to hide on the competitive front. But as I  
4 say, we are concerned, the utilities are concerned  
5 that their information is going to be released in a  
6 proceeding to which they're not a party.

7 JUDGE LEVENTHAL: Let me ask you this, Ms.  
8 Brown, why is the identity of the shipper important to  
9 you if you have all the other information involved in  
10 the contract?

11 MS. BROWN: If I could just make a couple  
12 of points. That question, I believe, should have been  
13 raised by them after the August 28th proceeding, if  
14 they objected to producing the shipper specific  
15 information. They didn't do that. Time to appeal  
16 that has run. And the information is even broader  
17 than that as to is this systematic redaction and  
18 overclassification of documents going to continue.

19 One thing I do want to point out is that  
20 there is a term called 1 to 2. We're not going 1 to  
21 2. We're going from one rail carrier serving all of  
22 our plants, to two rail carriers splitting our volume

1 which is a different issue than going from one to two  
2 railroads serving all our plants. If they want to  
3 agree to do that, that's great. We'd be happy to have  
4 two railroads serving all of our plants.

5 Second, I think something that's really  
6 important that you are touching on is that this  
7 protective order binds all parties, not just prohibits  
8 us, not just prohibits the other parties. The  
9 applicants are free to exchange information under  
10 their protective order and not come under 11904 in  
11 order to put out their application, yet, we now are  
12 being what I would call a de facto modification just  
13 as the Board said in their September 12, 1997  
14 decision, a de facto modification of the protective  
15 order to limit the other parties' discovery. And  
16 second, I agree that if these documents, if this  
17 shipper specific information was produced to the  
18 public, it would harm the shippers, but it's not being  
19 produced to the public. It's being produced under a  
20 very stringent protective order for which only outside  
21 counsel and outside consultants will view these  
22 documents. That's covered under the protective order.

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1 It takes care of any problem as far as this sensitive  
2 information getting out into the general public.  
3 There are severe sanctions for disobeying this  
4 protective order and I believe that that issue is  
5 already addressed and that coming now and saying when  
6 it could have been argued after August 28th, if they  
7 wanted to, or at some other point or when they were  
8 drafting the protective order, they could have  
9 specifically stated this does not protect other  
10 shippers or other utilities, but it doesn't say that.  
11 It does say that 11904 is taken care of in this  
12 protective order.

13 JUDGE LEVENTHAL: All right, I'm  
14 considering your argument, but what I'm inquiring  
15 though why do you need the names of the shippers?

16 MS. BROWN: Your Honor, here's an example.  
17 In I believe you should have gotten a copy of the  
18 supplemental petition which NYSEG filed --

19 JUDGE LEVENTHAL: I'm sorry, I missed what  
20 you said.

21 MS. BROWN: I'm sorry, you should have --

22 JUDGE LEVENTHAL: Should have gotten a

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1 copy of what?

2 MS. BROWN: A copy of the supplemental  
3 petition which NYSEG filed with the Board. Attached  
4 to that, I believe you should have gotten, it was not  
5 served on the general public, documents which were  
6 produced to us under request 1 through 5 which is the  
7 next issue we're going to get to. If you look at  
8 these documents --

9 JUDGE LEVENTHAL: Do you have it?

10 MS. BROWN: Sure, I brought an extra copy,  
11 if I may approach?

12 JUDGE LEVENTHAL: I received that. I have  
13 that.

14 MS. BROWN: This is the entire petition  
15 and the documents are attached.

16 Your Honor, we tried to come to an  
17 agreement and under --

18 JUDGE LEVENTHAL: Wait. Let's handle  
19 this. I'm looking at a document dated June 8, 1994  
20 and it's addressed to -- it appears to be a letter  
21 addressed to Mr. Mark Griffin, Norfolk Southern  
22 Corporation.

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1 MS. BROWN: It would be NS42HZ00012.

2 JUDGE LEVENTHAL: That's a more efficient  
3 way.

4 (Pause.)

5 MS. BROWN: Your Honor, if you could flip  
6 up actually one page, this is a better example of what  
7 we're talking about which is -- I'm sorry, two pages.  
8 And that's 42HZ00010.

9 (Pause.)

10 JUDGE LEVENTHAL: Find it for me.

11 MR. EDWARDS: Could you repeat the number?

12 MS. BROWN: Sure. It's 4200010. Your  
13 Honor, I show this as an example. I am appreciative  
14 of the fact that NS has produced documents to us in a  
15 relatively timely manner. The issue though is what do  
16 the documents give us.

17 JUDGE LEVENTHAL: That's what I'm  
18 inquiring into now. We'll take this latest document  
19 described by counsel. It seems to me you've redacted  
20 everything. You're not just talking about redacting  
21 the name of the shipper --

22 MR. EDWARDS: Your Honor --

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1 JUDGE LEVENTHAL: You're taking out  
2 everything else.

3 MR. EDWARDS: Your Honor, this document  
4 was produced by Norfolk Southern in response to our  
5 agreement with counsel for NYSEG in response to  
6 document requests 1 through 5 in which the request --  
7 in which the counsel for NYSEG agreed to the redaction  
8 of shipper and contract specific information.

9 How this can be brought before Your Honor  
10 for the proposition that we are redacting more  
11 information than shipper specific information by CSX  
12 is beyond me.

13 MS. BROWN: Your Honor, that's not the  
14 reason that it's being brought.

15 JUDGE LEVENTHAL: Wait, I can only listen  
16 to one at a time. What are you saying?

17 MS. BROWN: That's not the reason that  
18 this document is being shown. It is true that for  
19 Request 1 through 5, NYSEG and the applicant, CSX and  
20 NS, came to an agreement in order to have these  
21 documents produced in a timely manner. The decision  
22 of the Board had not been issued yet and we're running

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1 out of time. Should we reach this agreement for 1  
2 through 5? And that is true, that these were produced  
3 per that agreement. But the issue is in 14 through 16  
4 then there was a call later, and if you'd like, we can  
5 switch to the CSX documents. I probably should have  
6 done that.

7 JUDGE LEVENTHAL: Why don't we keep that  
8 -- there is no problem with this document. I'm trying  
9 to deal with specific items so I know exactly --

10 MS. BROWN: There is a problem with this  
11 document because this is what they want to do to  
12 everything else. This is how they want to produce  
13 every other document.

14 JUDGE LEVENTHAL: I am going to allow them  
15 to do whatever I rule that they may do.

16 What is the problem with this specific  
17 document dealing with 14 through 16?

18 MS. BROWN: Well, we don't have any from  
19 CSX for 14 through 16. I don't have any documents.  
20 I can't show you a document. I don't have anything.  
21 They haven't given me any documents.

22 JUDGE LEVENTHAL: Then my question to you

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1 was suppose they give you a document and they identify  
2 shipper A or shipper B or shipper C without telling  
3 you who shipper B is, but it has all the other  
4 information. Doesn't that satisfy your need?

5 MS. BROWN: That might satisfy our need,  
6 but Your Honor, I believe that need was already  
7 addressed and was not appealed.

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

9 (Off the record.)

10 JUDGE LEVENTHAL: I understand that, but  
11 Ms. Brown, if you can get a document that's useful to  
12 you and yet satisfies -- I agree with everything you  
13 said, the Board in its decision 32 said the time to  
14 object to production of documents is passed, but  
15 leaving that side for the moment, if they identify a  
16 shipper as shipper B, does it matter to you what the  
17 actual name of the shipper is when you have all the  
18 other information?

19 MS. BROWN: You want me to answer a  
20 question that I believe should already have been  
21 addressed.

22 There are circumstances where if it is

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1 identified as shipper A, shipper B, shipper C, shipper  
2 D, that that would be, that that could be just as  
3 helpful as the shipper name. Documents which CSX  
4 recently produced in regards to 1 through 5 do not  
5 have shipper A, shipper B, shipper C, so you can't  
6 tell what shipper it is. In other words, there's just  
7 a space and it says "redacted." In other words, you  
8 can't relate which ones which go with which shipper  
9 because it doesn't say shipper A, shipper B, shipper  
10 C.

11 JUDGE LEVENTHAL: But we can't argue about  
12 number 1 to 5 because you made an agreement and you  
13 accepted the documents by an agreement.

14 MS. BROWN: But we made an agreement that  
15 they would say shipper A, shipper B, shipper C, which  
16 they weren't, which is why that is another issue, I'm  
17 going to say, I'm going to address later on.

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

19 (Off the record.)

20 JUDGE LEVENTHAL: On the record.

21 MS. BROWN: Your Honor, I agree that if we  
22 can address issue by issue and the issue is closed

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1 after the ruling is entered, then we're getting  
2 somewhere. My concern is is that if today an issue is  
3 ordered, that there's an order out there that states  
4 they must -- they produce these documents and it says  
5 shipper A, shipper B, shipper C, that (1) that may not  
6 be done, that when we actually get the documents it  
7 may only be redacted space without stating which  
8 shipper. And then afterwards, we'll go back and we  
9 might get documents and then there's this  
10 reinterpretation of what you actually ordered and we  
11 have to come back again and by that time it's October  
12 21st. That's my concern and that's why I was showing  
13 these other documents was to show we came to an  
14 agreement after the documents were produced, obviously  
15 everyone had very different opinions of what that  
16 agreement was and my concern is that for 14 through  
17 16, they were ordered by Your Honor. They were not  
18 produced and now they want an additional, they want --  
19 in other words, they want an additional limitation  
20 that should have been made a long time ago. My fear  
21 is that if we leave today with an additional  
22 limitation, that's going to continue and snowball

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1 where we're going to have to come back because they  
2 want another additional --

3 JUDGE LEVENTHAL: Maybe we can dispose of  
4 that generically. Will the applicants here agree  
5 that if I make a ruling you will abide by my ruling  
6 and not ask for additional limitations after this  
7 morning?

8 Ms. Brown is right. The Board has ruled  
9 that the time for you to put limitations on whatever  
10 you wanted on material I ordered produced should have  
11 been made way back when we had our original argument.  
12 The Board said you're too late and they put you out a  
13 court order.

14 I'm willing to be a little bit more  
15 lenient because I don't think if you identify a  
16 shipper as shipper A, they really don't have to know  
17 exactly who shipper A is.

18 I'm willing to be a little bit more  
19 lenient, but I think Ms. Brown makes a point. You  
20 can't keep adding forever limitations after I make a  
21 ruling. After I make a ruling you must produce the  
22 material forthwith. You know I've been reasonable and

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1 some of my rulings you ask for a stay of rulings so  
2 you could appeal to the Board and I went along with  
3 you over the objection of the other side, I might say.  
4 I, of course, require that you move extremely  
5 promptly, but the time for the movements here to move  
6 is right, it's drawing close and we can't keep  
7 dragging this out. So that if you agree that there  
8 will be no further limitations on whatever I order  
9 today, we'll see if we can't dispose of this, that  
10 might please you a little bit more.

11 MR. HARKER: Your Honor, are we on the  
12 record or off the record?

13 JUDGE LEVENTHAL: We're on the record.

14 MR. HARKER: On the record.

15 JUDGE LEVENTHAL: On the record.

16 MR. HARKER: It makes no difference to me.  
17 I have a document here which is responsive to request  
18 14 through 16. It redacted only shipper  
19 identification information, anything that would  
20 identify the shipper. It kept in rates and volumes on  
21 all the kinds of key contract terms that they're  
22 interested in. They're worried about how they're

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1 going to be treated. You're right on point when you  
2 say you don't need to know how you treated shipper A,  
3 so long as you know that he's in your position -- or  
4 who shipper A is so long as you know that he's in your  
5 position and you have the contract, you have all the  
6 terms. I'll be glad to show it to you right here. As  
7 I said, I didn't have the benefit of your order. I  
8 haven't heard your order yet, but I think based on  
9 what I'm hearing from you that the redactions in this  
10 document are consistent with where you're going and as  
11 I say, I have a colleague back at my office doing  
12 redacting out of the second contract, the same kinds  
13 of information.

14 JUDGE LEVENTHAL: So all you're redacting  
15 is the name of the shipper and you're going to  
16 identify the shipper by a letter or number?

17 MR. HARKER: Well, yes. Yes. I'd be glad  
18 to do that. But let me be clear about something.  
19 There is other information in the contract that also  
20 would identify the shipper. For instance, if a  
21 location is identified, in other words, if a plant is  
22 identified, that is identifying the shipper.

1 JUDGE LEVENTHAL: What information would  
2 you be giving the other side if you take out the point  
3 of origin or point of destination?

4 MR. HARKER: Well, point of origin is in  
5 the contract. The only thing that has been taken out  
6 is as I said is a plant, the plant name. It says that  
7 we're going to move coal from point A, from an origin  
8 to point B, without identifying point B because if you  
9 say what point B is, Your Honor, if you say we're  
10 going to move it to X plant, that identifies the  
11 shipper. That's the problem, but I'm glad to show you  
12 the contract I brought and those are the only  
13 redactions that have been.

14 Now I should say in addition because I  
15 want the record to be clear, the date of the contract  
16 has also been redacted because it's my understanding  
17 that the client, that CSX had to file with the Board  
18 a summary of the contract, along with the date and so  
19 if someone had the date in here, they would be able to  
20 derive by going to the Board who the shipper is. So  
21 the date has come out. The name of the shipper has  
22 come out. And the location of the plant has come out.

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1           That's the kind of information that has  
2           been redacted from these documents.

3           JUDGE LEVENTHAL: You're aware, I assume,  
4           that in Grain Land, all I permitted them to do is  
5           redact the name of the shipper. They had to leave the  
6           origin and destination points in and they made the  
7           same argument that you're making now. The railroad  
8           made the same argument and I guess that's the matter  
9           that's on appeal before the Board right now.

10          MR. HARKER: Well, the --

11          JUDGE LEVENTHAL: Let's see. Does that  
12          satisfy you?

13          MS. BROWN: Your Honor, if they redact  
14          where the coal is going, we don't know how far it was,  
15          so it doesn't help us with cycle times and all those  
16          other issues that we need to address that show how  
17          they compete. I mean it leaves out a whole bunch of  
18          information and that's exactly what I'm talking about.  
19          At first it was a shipper identification name and now  
20          it's the destination and it's going to be the names of  
21          the people of the shipper.

22          JUDGE LEVENTHAL: I would think that in

1 order for the document to be useful to the movant they  
2 have to know the origin and destination. Other than  
3 that, what good is it? They don't have the origin and  
4 the destination and the rate information, what value  
5 is the document to them?

6 MR. HARKER: Your Honor, as I said, they  
7 would have the rate information. They're trying to  
8 figure out if how like place utilities are now being  
9 treated by the two railroads. That is to say how a  
10 utility int he NYSEG paradigm, they're going to  
11 essentially, NS serving some other plants, CSX serving  
12 other plants, is being treated now. That's what  
13 they're trying to figure out.

14 Whether or not the coal is delivered to  
15 Dallas, Texas or Houston, Texas, doesn't seem to me to  
16 be particularly relevant. Who the shipper is isn't  
17 particularly relevant so long as they know it's the  
18 same paradigm that they're dealing with.

19 JUDGE LEVENTHAL: They're concerned about  
20 competition. Isn't competition between points? If  
21 they don't know the points, then what good is the  
22 information going to do them? I don't know what good

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1 the information would do them all together, but I mean  
2 from the purpose, from what Ms. Brown has told me and  
3 the arguments I've heard previously, that's the  
4 information they think they can build some kind of  
5 theory on.

6 MR. HARKER: Well, Your Honor, these are  
7 sole served locations so there is no competition. The  
8 problem is is the statute doesn't talk just in terms  
9 of names. The statute talks in terms of unlawful  
10 disclosure of information and it seems to me that if  
11 you tell somebody the name of the plant where the coal  
12 is going, that's just as good as identifying the name  
13 of the shipper. That's the problem.

14 JUDGE LEVENTHAL: Before we go on, I guess  
15 we should have done this at the beginning of the  
16 argument, I think we ought to have the three letters  
17 in the record, so that the record is clearly exactly  
18 what it is we're talking about. Does anybody have  
19 extra copies?

20 MS. BROWN: I would be happy to give my  
21 copies.

22 JUDGE LEVENTHAL: Let me tell you what I

1 need. I have 9/15, an extra copy of. 9/17, I don't  
2 have -- I have a copy of the 16th, but I marked it up.

3 MS. BROWN: I'd be happy -- mine is  
4 unmarked.

5 JUDGE LEVENTHAL: All right. I am going  
6 to direct the reporter to include this in the record  
7 as if they are orally read into the record.

8 COURT REPORTER: At this point?

9 JUDGE LEVENTHAL: No, you can put them in  
10 as an addendum at the close. It should have been at  
11 the beginning, but it's just as good at the close.  
12 Just so it's readily findable.

13 I am ready to rule unless parties have any  
14 further you want to tell me.

15 (Pause.)

16 MR. HARKER: No, Your Honor.

17 JUDGE LEVENTHAL: All right. I'm going to  
18 direct you to produce the information. You may redact  
19 the name of the shipper, but only the name of the  
20 shipper and you must identify the shipper by using a  
21 letter designation.

22 I'm making this ruling based upon your



1 stipulation on the record that you will following my  
2 ruling without imposing any further limitations on my  
3 ruling. The Board has already ruled that these  
4 objections should have been made when the arguments  
5 were originally made back, I guess, in July or August.

6 I'm amending the Board's ruling to give  
7 the shippers whose information is being furnished some  
8 protection. All right?

9 MS. BROWN: Thank you, Your Honor.

10 JUDGE LEVENTHAL: I think that should  
11 satisfy your need.

12 MS. BROWN: Thank you, Your Honor.

13 MR. HARKER: Your Honor, I obviously need  
14 to consult with a client who will probably want to  
15 consult with utilities. I would ask if you would stay  
16 your order to allow time for an appeal.

17 In the meantime, I will produce for Ms.  
18 Brown and NYSEG the documents that I have so that they  
19 can get started.

20 JUDGE LEVENTHAL: Ms. Brown?

21 MS. BROWN: Your Honor, we've been through  
22 this before. That was the exact argument that I was

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1 making is that you stay --

2 JUDGE LEVENTHAL: I direct him to produce  
3 it on Monday, this following Monday.

4 MS. BROWN: If they haven't had time for  
5 the Board to rule on the stay, it's lifted, Monday  
6 morning?

7 JUDGE LEVENTHAL: That's right.

8 MS. BROWN: I could agree to that.

9 JUDGE LEVENTHAL: If they wish to appeal  
10 to the Board, they may do so. They may ask the Board  
11 for a stay, for further stay, all right?

12 MS. BROWN: 8:00 a.m., Monday morning?

13 JUDGE LEVENTHAL: 8:00 a.m.

14 MR. HARKER: Close of business Monday.  
15 She's got to have the documents after the hearing.

16 JUDGE LEVENTHAL: He's going to give you  
17 what documents he has now.

18 MS. BROWN: I understand that, but every  
19 day, every weekend --

20 JUDGE LEVENTHAL: All right, we'll make it  
21 noon on Monday, all right?

22 MS. BROWN: Thank you, Your Honor.

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1 JUDGE LEVENTHAL: Monday, September 22nd.  
2 Am I right? All right, Monday, 22nd at noon.

3 MS. BROWN: Your Honor, if I could just  
4 point out that that's less than a month before our  
5 arguments are due. Just for the record.

6 JUDGE LEVENTHAL: All right. Off the  
7 record.

8 (Off the record.)

9 JUDGE LEVENTHAL: All right, back on the  
10 record. That resolves the problem with redactions,  
11 right?

12 MS. BROWN: Yes, Your Honor.

13 JUDGE LEVENTHAL: What else do we have  
14 before us?

15 MS. BROWN: Our September 16th letter  
16 addresses request 1 through 5 which as Mr. Edwards  
17 pointed out, we did come to an agreement regarding the  
18 production of documents under request 5 as they were  
19 limited in our prior discovery conferences.

20 If you recall, Your Honor, the issue had  
21 started to be addressed at the September 5th, I  
22 believe, discovery conference and the way it ended was

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1 see if you can work this out amongst yourselves.

2 We spoke --

3 JUDGE LEVENTHAL: I don't think I exactly  
4 said -- I think my ruling was why don't you see if the  
5 information at the depository serves your needs.  
6 Wasn't that what I --

7 MS. BROWN: Originally, yes. There was  
8 the Ace documents and then it was going to be limited.

9 JUDGE LEVENTHAL: I always try to rule on  
10 everything before me. I only let parties dispose of  
11 something amicably if they tell me they think they can  
12 do it.

13 MS. BROWN: Your Honor, that's correct.  
14 My understanding at the September 5th discovery  
15 conference was that the last that Mr. Mullins, my  
16 colleague, had mentioned was that Southern Company and  
17 Virginia Electric Power and one other shipper, to be  
18 a control, if we had the documents from those shipper  
19 files to show how NS and CSX competed against each  
20 other that that would be a sufficient limitation.  
21 During discussions on both Friday -- I believe -- and  
22 this, I apologize, we came to an agreement on

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1 September 8th in regard to these documents. The  
2 documents have been produced. The documents that were  
3 produced from NS were attached to the supplemental  
4 petition which I just handed Your Honor, and CSX also  
5 produced some documents.

6 I have several issues to address with  
7 that. After the documents were produced, I called the  
8 applicants, excuse me, CSX and NS, not Conrail,  
9 Conrail was not involved in this. And we discussed  
10 what I believed was a misunderstanding of the  
11 agreement. It was now my understanding that NS  
12 believes that that agreement only had to produce  
13 documents which explicitly stated that NS and CSX were  
14 competing against each other and I disagree with that  
15 further limitation in that all documents in those  
16 specific shipper files can show whether or not NS and  
17 CSX are competing against each other without  
18 mentioning the other party. A shipper can write in  
19 and say can you produce this rate for this cycle time  
20 and for this volume and not necessarily mention the  
21 other carrier that's out there and still be trying to  
22 compete against them.

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1           In addition, it seems to me that you would  
2           also have internal, in the railroad memorandums,  
3           e-mails going back and forth with what are we going to  
4           do, that type of thing. And I don't feel that that's  
5           what we got.

6           JUDGE LEVENTHAL: All right, let's hear.  
7           Mr. Edwards?

8           MR. EDWARDS: Yes, Your Honor. Actually,  
9           if I may I'd like to address each of the different  
10          points that have been brought up with regard to this  
11          production in somewhat of a systematic manner.

12          The first thing that should be pointed out  
13          is that even NYSEG agrees that there was a voluntary  
14          agreement with regard to these documents and this was  
15          not based upon any ruling by Your Honor. There was no  
16          ruling on their production with regard to 1 to 5.  
17          When we left, we had before us a suggestion by Mr.  
18          Mullins as to a potential resolution. The counsel for  
19          the applicants said this sounds very promising, let's  
20          talk. Let's see if we can come to an agreement.  
21          Let's set up a discovery conference for 2:30 on  
22          Tuesday in case we don't come to an agreement. Let's



1 see what we can do over the weekend.

2 We did discuss this over the weekend. And  
3 we believed that we came to an agreement, despite the  
4 fact that on the Friday conference you informed the  
5 counsel that were here that you had made a ruling on  
6 our request for redactions and that ruling was that we  
7 should produce documents unredacted.

8 Part of the voluntary agreement that was  
9 reached over the weekend resolved any problems that  
10 they had or with any problems we had with regard to  
11 production for actually 3 through 5 because 1 and 2  
12 had already been ruled upon, was that we would produce  
13 documents that showed either a shipper writing into  
14 the railroad and saying look, there's a problem here.  
15 We have a sole served plant on CSX, sold served plant  
16 on Norfolk Southern, we're going to have to reduce our  
17 generating power on your Norfolk Southern line and  
18 increase it on the other, unless you can give us a  
19 price break, or, our reaction to that, or, an internal  
20 memorandum saying we're shaking in our shoes or we  
21 think this is a bunch of baloney because it can or  
22 cannot do it, showing how we deal with threats of

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1 competition probably from the shipper. So in fact, by  
2 the way, if there was a memorandum that says we have  
3 a sole served on CSX, and a sole served on NS, we have  
4 to be careful about this because they can ship  
5 generating power or they can be served by truck or  
6 they can be served by barge. We will produce that.

7 Part of that agreement, by the way, was  
8 that, in fact, we would redact out shipper  
9 identification material, including plants and contract  
10 terms because the only issue, the only question was  
11 how do we view these threats. We did receive a call  
12 from Ms. Brown, later, saying I can't believe what we  
13 received. It seems to me that if there is a plant on  
14 CSX and a plant on Norfolk Southern, there's an  
15 implicit threat of competition there and so every  
16 document in your file has something to do with your  
17 response to that implicit threat. And so everything  
18 has to be produced.

19 My response, of course, was no. I mean  
20 that's not what my understanding was. In fact, why  
21 would we have agreed, the two of us, to redaction of  
22 contract terms if that, in fact, was the case. It

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1 just doesn't make sense.

2 So that was our understanding of the  
3 agreement we came to. I'm sorry they're not happy  
4 with the result of that agreement, but that was not a  
5 result of a ruling from Your Honor. That was a result  
6 of an agreement between the parties.

7 That this goes even further just to  
8 address some of the other points that she's made, Your  
9 Honor, Ms. Brown has said that we have fought, the  
10 applicants have fought everything that deals with  
11 competition and that we have not -- but not  
12 operational issues.

13 With all due respect, I don't think that's  
14 true. We have been here time and time again with  
15 basically two counsel, with regard to discovery  
16 requests. We have responded to or are in the process  
17 of responding to 1362 discovery requests. 1362. And  
18 yet, we've been obstructionists, apparently, with  
19 regard to only two which some of these others are by  
20 the way utility companies.

21 Now there has been no limitation placed on  
22 discovery in this proceeding. Had there been a

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1 limitation, there would have been an effort by counsel  
2 to narrow and to be a little more precise with what  
3 they're looking for.

4 If they have a problem with where some of  
5 their discovery has led them, I'm sorry. Certain  
6 other counsel have, in fact, asked very pointing  
7 questions and they do have evidence placed before the  
8 Board on October 21 because they came to an agreement  
9 that they don't like the result of is not a reason to  
10 come before Your Honor again.

11 I guess really that's it. That's all I  
12 can say that this was a result of voluntary agreement.  
13 The redactions make sense in light of what we had  
14 agreed to. They agreed that the redactions had been  
15 agreed to. If every single piece of paper in these  
16 files were relevant, then the redactions don't make  
17 sense. That's it, Your Honor.

18 MS. BROWN: First of all, Your Honor, the  
19 agreement was voluntary in a sense and I say that  
20 because the agreement was made on September 8th which  
21 was prior to the Board's issuing their decision and  
22 NYSEG is not going to stand up here now and say that



1 we want those documents unredacted. I don't believe  
2 that we have the right to do that because we did agree  
3 to this, only those specific things that we had agreed  
4 to.

5 I just want to point out that I don't  
6 believe that was a free, voluntary agreement in the  
7 sense that we're faced with day by day the clock  
8 ticking and day by day not getting documents and we  
9 needed to do something to get the documents moving and  
10 to try to get some information that we needed.

11 I don't believe that I stated that I  
12 wanted those particular things unredacted.

13 What I do believe happened is that we came  
14 to an agreement or an understanding of which two  
15 parties had different agreements or different  
16 understandings of that agreement and where the  
17 documents were produced, they were produced under a  
18 different understanding than what NYSEG had that  
19 agreement entailed and which further limited the  
20 discovery request by taking certain things, in other  
21 words, by picking only certainly things to give to us  
22 out of the file. That's why we're here because

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1 originally the agreement that should have been worked  
2 out, if it hadn't been worked out we would have come  
3 back here just earlier and unfortunately the agreement  
4 didn't work out and that's why we're back now.

5 JUDGE LEVENTHAL: Now what is it you're  
6 looking for now, exactly?

7 MS. BROWN: Your Honor, this discovery  
8 request was limited to five shippers who are served by  
9 NS and CSX in order to show how NS and CSX compete  
10 against each other. In other words, how their plants  
11 split, I'm sorry, how their plants split, and are  
12 served solely by NS and then solely by CSX to  
13 different plants.

14 That limitation alone, limiting it to  
15 five, only five coal shippers, I believe, was a  
16 sufficient limitation. Any other limitation to me is  
17 going too far. Any document in the file, subject to  
18 the redactions, obviously, since that was part of the  
19 agreement, goes to how NS and CSX competed for that  
20 business, not just if it mentioned CSX or not just if  
21 it mentions I'm going to stop using you or something  
22 like that. Any document that a shipper and that



1 happened internally in NS or CSX is going to show how  
2 those decisions were made and those decisions were  
3 made because the plants were split which shows how  
4 they compete.

5 JUDGE LEVENTHAL: What time span are we  
6 talking about?

7 MS. BROWN: All of these discovery  
8 requests have already been limited 1995 to the  
9 present. 1995 through 1997.

10 JUDGE LEVENTHAL: All right, now we did  
11 agree upon five shippers. Isn't that right, Mr.  
12 Edwards?

13 MS. BROWN: I'm sorry, three. I'm sorry.

14 JUDGE LEVENTHAL: We'll you're speaking of  
15 both three and five --

16 MS. BROWN: I'm sorry, three.

17 JUDGE LEVENTHAL: And in your papers you  
18 speak of both. We ended up with three, isn't that  
19 right?

20 MS. BROWN: I'm sorry, that's correct.

21 MR. EDWARDS: Yes, Your Honor, which they  
22 received.

1 JUDGE LEVENTHAL: She says they haven't.  
2 You're telling me that you only picked out documents  
3 where specifically CSX and NS were competing or  
4 mentioned that they were competing?

5 MR. EDWARDS: No, Your Honor. Your Honor,  
6 they asked for three shippers and in fact, they  
7 specifically mentioned the Southern Company, ADP and  
8 Virginia Electric Power Company to us.

9 Now on the record I won't represent  
10 whether or not exactly shipper files for those  
11 shippers have been searched, but Ms. Brown does know  
12 that information and can confirm that there were guide  
13 rules produced for a shipper A, a shipper B and a  
14 shipper C. And those are identified as such in those  
15 documents.

16 Ms. Brown can also confirm that I have  
17 represented that the documents, as we understand the  
18 agreement, have been produced as we understand the  
19 agreement.

20 JUDGE LEVENTHAL: Let's go past that.  
21 Have you given her all of the documents in the file as  
22 to these three shippers as to these points?



1 That's what she says she wants.

2 MR. EDWARDS: Well, that's what she says  
3 she wants.

4 JUDGE LEVENTHAL: And that's what she says  
5 she thought the agreement was about. And you're  
6 saying no, it was about something else.

7 MR. EDWARDS: Yes, Your Honor.

8 JUDGE LEVENTHAL: But there's no way I can  
9 determine that, because I wasn't party to the  
10 agreement. I didn't listen to argument.

11 MR. EDWARDS: Absolutely, Your Honor.

12 JUDGE LEVENTHAL: So now what Ms. Brown is  
13 doing is coming back to me and saying we had a  
14 misunderstanding on our voluntary agreement. Now we  
15 want the Judge to order production of documents.

16 MR. EDWARDS: Well, Your Honor, three  
17 primary points. First, an answer to your question,  
18 specifically, was every piece of paper that was in  
19 those shipper files produced? No.

20 Second point, well, three more points.  
21 First off, she says she does not have a right to the  
22 unredacted documents, but the documents at issue have

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1       been placed before the Board in a petition filed  
2       yesterday.

3               Third, if we are now talking about whether  
4       or not she should have each of the shipper documents  
5       that she's asked for, we should in fact, be looking at  
6       the discovery requests that were propounded, which is  
7       3 through 5, where we had discussed a possible  
8       settlement and this verbal discovery request that  
9       we're now discussing.     It was only a possible  
10      settlement of a dispute over document requests 3  
11      through 5 of their discovery.   So asking you to rule  
12      on an oral discovery request that has not been  
13      propounded is not, I think, in order.

14             JUDGE LEVENTHAL: Well, wait a minute, are  
15      you saying that she didn't ask for this information in  
16      document request 3 through 5?

17             MR. EDWARDS: No, Your Honor, she did not.  
18      I will find the request.

19             MS. BROWN: Your Honor, I believe it's 1  
20      through 5 that we have always been discussing.

21             MR. EDWARDS: Your Honor, one, as we  
22      responded in our moment, document request 1 and 2 were



1 denied by Your Honor, very explicitly.

2 Document request 3 through 5 are -- can be  
3 read as follows: "Identify each shipper whose rates  
4 have been decreased by any of the applicants during  
5 the time period applicable to these requests. Each  
6 applicant may limit its response to this request to  
7 shippers transporting over \$1 million per year or its  
8 50 largest shippers."

9 During oral argument on that request,  
10 which was never ruled upon, they offered to limit that  
11 to coal shippers transporting over \$10 million per  
12 year.

13 The next request at issue was 4 which was  
14 "identify each shipper whose contract allows for an  
15 increase in rate during the time period applicable to  
16 these requests, but whose rates have not, in fact,  
17 been increased. Each applicant may limit its response  
18 to this request to shippers transporting over \$1  
19 million per year or its 50 largest shippers."

20 Finally, 5: "As to the decisions to  
21 decrease or maintain rates described in your responses  
22 to request 3 and 4, identify all communications,

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1 whether written or oral that discuss or deal with the  
2 reason or reasons the applicant railroad made the  
3 decision to decrease or maintain rates, including for  
4 each the name of the participants of the  
5 communication, the date, the substance of the matters  
6 discussed and if there are documents evidencing such  
7 communications. Produce all such documents."

8 Those are the requests at issue. This  
9 oral representation of a discovery request was not a  
10 discovery request. It was a suggested way of  
11 resolving, of getting the information that she's  
12 seeking because -- and Your Honor never ruled on  
13 these. Now if we're going to talk about discovery  
14 requests and ruling on discovery requests, with all  
15 due respect Your Honor, I think we need to deal with  
16 the discovery requests, not the settlement that was  
17 voluntarily entered into.

18 MS. BROWN: Your Honor, this would go back  
19 all the way to August 28th when we first were  
20 addressing these discovery issues. 1 and 2 were  
21 addressed and they said no way, no how, we're not  
22 giving you anything there. That was my understanding.

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1           Then we discussed 3 through 5 and their  
2           argument was that's just a subset of 1 and 2. You're  
3           still seeking this huge overly burdensome broad  
4           discovery request and so in that context we have been  
5           trying to limit our discovery requests to their  
6           satisfaction.

7           Each time we've tried to do that, yes, the  
8           discovery requests have gotten narrower and narrower  
9           and more specific, to now it's only three coal utility  
10          shippers. And Your Honor, again, I say here's the  
11          problem, 52 pages. That's it, that's all they're  
12          saying that is being produced in regard to what I view  
13          as discovery request 1 through 5 because their  
14          argument from the beginning was you're asking for too  
15          much, you're asking for too much. Let's limit it.  
16          Let's limit it. And yes, we were trying to work it  
17          out. We came to an agreement. I believe that we came  
18          to different meanings of that agreement or different  
19          understandings and we have 26 pages when in a merger  
20          that was half this size over 63,000 pages of shipper  
21          files were produced in response to discovery requests  
22          for people to try to do exactly what we're doing which

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1 is to put our case in front of the Board.

2 MR. NORTON: Your Honor, if I -- I think  
3 that was a reference again to the UP-SP merger. I  
4 think the comparison made is really a red herring.  
5 There were lots of documents produced there, just as  
6 there have been lots of documents produced here in  
7 response to a wide variety of requests covering  
8 competition, operations matters, just as they are  
9 being produced here. There were not 63,000 documents  
10 or even pages of documents produced in response to a  
11 request that was framed in terms of either 3 through  
12 5 that Mr. Edwards just read or the narrowing that  
13 emerged out of the colloquy at that discussion. It  
14 just is a total red herring.

15 JUDGE LEVENTHAL: Do you wish to address  
16 that, Mr. Edwards?

17 MR. EDWARDS: No, Your Honor.

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

19 (Off the record.)

20 JUDGE LEVENTHAL: All right, Ms. Brown?

21 MS. BROWN: Your Honor, 1 through 5 was  
22 addressed and you did say back in August to produce,

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1 to go look at the Ace documents that were produced. We  
2 did go look at them. We came back, we said that  
3 doesn't show us how NS and CSX compete against each  
4 other because there is a third carrier involved in  
5 there which is Conrail. I believe that Your Honor  
6 agreed with Mr. Mullins' diagram when he showed why  
7 the Ace documents weren't sufficient and that issue  
8 was readdressed at that point which is what started  
9 this entire sort of negotiation settlement in the  
10 first place. So 1 through 5 was addressed and the  
11 agreement that we've reached to this point is a severe  
12 limitation of discovery request 1 through 5 which is  
13 what we're trying to get. We've agreed to only three  
14 coal utility shippers. How much more narrower can it  
15 get? If you limit it more to only documents that  
16 specifically mention the other carrier, then the  
17 limitation just swallows itself.

18 JUDGE LEVENTHAL: All right.

19 MS. BROWN: I think that the limitation of  
20 three coal utility companies, and unfortunately, like  
21 I said, yes, we did agree to redact the shipper  
22 specific information and the contract information.



1 That's unfortunate. That had to do with the time in  
2 which it was made. We're not asking for that to  
3 change for this specific request only, but I will  
4 point out that after this agreement was made, that's  
5 how they tried to attack anything else that should  
6 have been ordered before was saying well, you agreed  
7 to it before, why can't we do it again? That is a  
8 problem.

9 JUDGE LEVENTHAL: But now you're willing  
10 to accept the redacted documents provided you get all  
11 the information for these three shippers?

12 MS. BROWN: Correct, all of the  
13 information in those shipper files -- yes, all of the  
14 information in the shipper files for only these three  
15 shippers.

16 JUDGE LEVENTHAL: All right, anything  
17 further?

18 MR. HARKER: One clarification on that  
19 last part. You included the word "redacted"  
20 information. And I thought your question was NYSEG  
21 willing to accept all of the documents in the file on  
22 the basis that they would be redacted in the same

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1 manner that we redacted this subset of files or this  
2 subset of documents?

3 JUDGE LEVENTHAL: I thought that's what I  
4 said, but if I didn't say it, that's what I meant.

5 MR. HARKER: I just wanted to be clear,  
6 Your Honor.

7 JUDGE LEVENTHAL: Is that correct? Did  
8 you understand me to say that?

9 MS. BROWN: I did, Your Honor.

10 JUDGE LEVENTHAL: Yes, all right.

11 MS. BROWN: And one other clarification.

12 In the documents which CSX has produced to us, it does  
13 not state shipper A, shipper B or shipper C. It  
14 doesn't clarify those documents and that would be  
15 something that --

16 JUDGE LEVENTHAL: I've ruled upon that.  
17 They have to say shipper A, B and C.

18 MS. BROWN: Thank you. I just wanted to  
19 point that out for these requests as well, so it  
20 wasn't unclear that that was only those requests.

21 JUDGE LEVENTHAL: All right, I'm going to  
22 order that all of the documents for these three

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1 shippers be produced for the time period and the  
2 redaction can be the name of the shipper may be  
3 redacted, but identified with a letter.

4 MR. EDWARDS: If I understood Ms. Brown to  
5 say that the redaction she agreed to --

6 JUDGE LEVENTHAL: We left it out. You're  
7 agreeing to accept the documents as you agree, but the  
8 redactions you agree to which are somewhat more severe  
9 than what I have ordered, except you want the shippers  
10 identified by letter.

11 MS. BROWN: Yes, Your Honor. Unless, of  
12 course, and again, I know this will be objected to,  
13 but I'm going to state it anyway for the record, we do  
14 feel that under the rulings that the Board has made,  
15 under the prior rulings that you have made, that it  
16 would be appropriate to produce these files with only  
17 the shipper identification information redacted. But  
18 because there was an agreement and I'm not going to  
19 back down on that, if that's all that they are being  
20 ordered to do, then I have to accept that. I don't  
21 agree with it. I don't like it, but I have to accept  
22 it.

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1 JUDGE LEVENTHAL: All right.

2 MR. EDWARDS: Your Honor, just --

3 JUDGE LEVENTHAL: She's taking the  
4 documents pursuant to your agreement, but the complete  
5 file for the three shippers with the one addition that  
6 you identify the shipper by letter.

7 MR. EDWARDS: Your Honor, just to -- I  
8 understand that with the same redactions and the  
9 contract terms, etcetera. With all due respect, we  
10 have no -- first off, we have no formal discovery  
11 request that this is responsive. I honestly -- I find  
12 that very -- it will be very difficult for us to be  
13 able to form an objection to a discovery request that  
14 was formed in a negotiation of a settlement. I'm not  
15 sure when we agreed to this, we agreed to a specific  
16 agreement and our clients did. What Your Honor is  
17 asking us to do, first off, is to expand that. If I  
18 understood Ms. Brown she said well, we would have  
19 taken any shippers in this -- feeding this paradigm.  
20 You choose. We chose to consider very carefully her  
21 specific requests for shippers and we responded with  
22 regard to the request that was made in the settlement,

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1 not in response to a formal request. And now Your  
2 Honor may be asking us to go much further than a  
3 settlement discussion.

4 JUDGE LEVENTHAL: Mr. Edwards, I'm making  
5 Ms. Brown live up to her agreement which you say she  
6 made. Now I'm making you live up to the agreement  
7 which she says you made. So I think I'm being fair to  
8 both sides.

9 Now if this were a de novo request, she  
10 might get much more than I'm ordering you to give her  
11 now.

12 MR. EDWARDS: I understand.

13 JUDGE LEVENTHAL: But I'm saying that she  
14 made an agreement. She has to live up to it. And I'm  
15 saying the same thing to you.

16 Unfortunately, both sides don't agree upon  
17 what the agreement was, but I'm giving you the best of  
18 the argument when you make it and I'm giving her the  
19 best of the argument on her side.

20 MR. EDWARDS: I understand, Your Honor.

21 JUDGE LEVENTHAL: I think that's fair.  
22 All right. Now is there anything else before us?

1 Does that dispose of your motion, Ms. Brown?

2 MS. BROWN: I would ask when, if they  
3 could state when these documents would be produced and  
4 I would ask for new copies of what you got from CSX  
5 designating shipper A, shipper B, when that could be  
6 done.

7 JUDGE LEVENTHAL: All right.

8 MR. HARKER: Your Honor, I would say that  
9 we are essentially talking about a new discovery  
10 request. I mean we're now being ordered to produce  
11 all the files for three shippers for three years.  
12 That is a big job. And obviously, the redactions will  
13 take time. I think in light of where you're coming  
14 from, Your Honor, I would propose two weeks. It's a  
15 new discovery request. We have 15 days under  
16 guidelines. This is not a narrowing. I know in the  
17 past you said that when you narrow discovery requests,  
18 you're thinking of a week after a ruling. I would say  
19 here, Your Honor, that we've essentially got a new  
20 request and I understand that you're trying to help  
21 out both sides, but I would say that from my client's  
22 perspective, two weeks is going to be necessary.

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1 JUDGE LEVENTHAL: But you know I narrowed  
2 the request from 50 shippers to 3. That's a  
3 considerable narrowing, isn't it? Wouldn't you think  
4 so?

5 MR. HARKER: I don't disagree with that,  
6 Your Honor. I'm just thinking of -- I'm being  
7 practical, Your Honor. I understand --

8 JUDGE LEVENTHAL: Let's --

9 MR. HARKER: I'm sorry, I didn't mean to  
10 cut you off.

11 JUDGE LEVENTHAL: I was going to say let's  
12 see what Ms. Brown says. Maybe she'll say that's  
13 okay.

14 MR. HARKER: I was just going to say  
15 though that in light of how long it took to produce  
16 these documents, I'm loathe to agree to anything less  
17 than two weeks.

18 MS. BROWN: First, I would say in light of  
19 how long it's taken to produce any documents, I would  
20 be loathe to disagree to two weeks since we're running  
21 out of time. The issue of redactions which seems to  
22 be the reason why it's going to take so long is

1 something they don't have to do. I would be willing  
2 to save everyone a lot of time, energy and money and  
3 accept them under the protective order and highly  
4 confidential designation, the way they should be, and  
5 save all that time and money, but like I said, I will  
6 live by my agreement and I don't believe that they  
7 should have a full two weeks to produce these.

8 JUDGE LEVENTHAL: Suppose we say 10 days?  
9 How will that be?

10 MS. BROWN: Ten days in counting weekends?  
11 Ten days. I mean Your Honor, we're working every  
12 weekend. I know they are too. We need these  
13 documents. Ten days including weekends, Saturday,  
14 Sunday.

15 JUDGE LEVENTHAL: Let's pick a date. When  
16 is ten days from today?

17 MR. EDWARDS: Your Honor, is it possible  
18 to go off the record for a minute?

19 JUDGE LEVENTHAL: All right, off the  
20 record.

21 (Off the record.)

22 JUDGE LEVENTHAL: In our off the record

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1 discussion, Mr. Edwards brought up the issue of the  
2 petition which is present before the Board made by  
3 NYSEG asking for a clarification or modification of  
4 the protective order.

5 Mr. Edwards requested that my rulings made  
6 here this morning dealing with the discovery requests  
7 that we have been discussing and I think they're 1  
8 through 16, is that -- 1 through 5 and 14 through 16?

9 MS. BROWN: Correct.

10 JUDGE LEVENTHAL: My rulings are final,  
11 regardless of what the Board orders in response to the  
12 petition and all parties agree to that. Did I  
13 summarize what we discussed off the record fairly?  
14 Does anybody wish to add anything?

15 MR. EDWARDS: I believe so, but also I  
16 understand that off the record we discussed the  
17 production time table, Your Honor.

18 JUDGE LEVENTHAL: Oh yes, and the time  
19 table for production will be production of these  
20 documents will be on a rolling basis with production  
21 to be completed by October 1st.

22 I think that covered everything. Right,

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1 Ms. Brown?

2 MS. BROWN: Yes, Your Honor. Thank you.

3 JUDGE LEVENTHAL: All right, the discovery  
4 request now is resolved, finally. Correct?

5 MS. BROWN: For NYSEG 3, yes.

6 JUDGE LEVENTHAL: Mr. Harker?

7 MR. HARKER: Yes, Your Honor.

8 JUDGE LEVENTHAL: Mr. Edwards?

9 MR. EDWARDS: Yes, Your Honor.

10 JUDGE LEVENTHAL: All right. We have  
11 nothing else before us. The discovery conference  
12 stands closed.

13 MR. HARKER: Thank you, Your Honor.

14 MS. BROWN: Thank you, Your Honor.

15 (Whereupon, at 11:04 a.m., the discovery  
16 conference was concluded.)

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**CERTIFICATE**

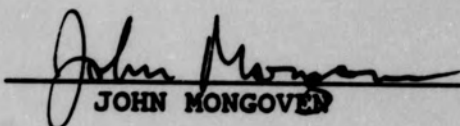
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matter of:                   DISCOVERY CONFERENCE

Before:                   SURFACE TRANSPORTATION BOARD

Date:                   SEPTEMBER 18, 1997

Place:                   WASHINGTON, D.C.

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
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JOHN MONGOVEN