

SURFACE TRANSPORTATION BOARD

09/05/97

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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

Friday,
September 5, 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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APPEARANCES (continued):On Behalf of Atlantic City Electric, Delmarva
Power and Light, Indianapolis Power and
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APPEARANCES (continued):

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ALSO PRESENT:

Roger C. Prescott, L. E. Peabody & Associates,
Inc., Economic Consultants

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

2 9:30 A.M.

3 JUDGE LEVENTHAL: Good morning. Please be
4 seated. Will somebody get the rear door, please?

5 MR. MULLINS: Excuse us, Your Honor. Last
6 minute discussions.

7 JUDGE LEVENTHAL: All right. When you go
8 on the record, I would like you to make a brief
9 appearance.

10 All right. The oral argument will come to
11 order. This is an oral argument in STB Finance Docket
12 333888. We'll take appearances at this time.

13 MR. McBRIDE: Good morning, Your Honor.
14 I'm Michael McBride from LeBoeuf, Lamb, Greene and
15 MacRae, LLP, for American Electric Power, Atlantic
16 City Electric Company, Delmarva Power and Light
17 Company, Indianapolis Power and Light Company, and the
18 Ohio Valley Coal Company.

19 JUDGE LEVENTHAL: All right.

20 MR. McBRIDE: I have a preliminary matter,
21 Your Honor, when you conclude the appearances.

22 JUDGE LEVENTHAL: When we finish the

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1 appearances, sure.

2 MS. DURHAM: Your Honor, Brenda Durham,
3 with LeBoeuf, Lamb, Greene and MacRae, also
4 representing American Electric Power, Atlantic City
5 Electric Company, Delmarva Power and Light Company,
6 Indianapolis Power and Light Company, and the Ohio
7 Valley Coal Company.

8 JUDGE LEVENTHAL: Very well.

9 MR. MULLINS: William Mullins, Troutman
10 Sanders, representing New York State Electric and Gas.

11 MS. BROWN: Sandra Brown with Troutman
12 Sanders, also representing New York State Electric and
13 Gas.

14 JUDGE LEVENTHAL: All right.

15 MR. EDWARDS: Your Honor, John Edwards,
16 Zuckert, Scoutt and Rasenberger for Norfolk Southern.

17 MR. COBURN: David Coburn of Steptoe and
18 Johnson, LLP, for applicant CSX.

19 MR. DATZ: Your Honor, Chris Datz. I am
20 from Arnold and Porter for CSX.

21 MR. HARKER: Drew Harker with Arnold and
22 Porter for CSX.

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1 MR. NORTON: Gerald Norton with Harkins
2 Cunningham for Conrail.

3 MS. BRUCE: Patricia Bruce, Zuckert,
4 Scoutt and Rasenberger for Norfolk Southern.

5 MS. KHERA: Good morning, Your Honor.
6 Farhana Khera of Hogan and Hartson for the Canadian
7 Pacific parties.

8 MS. BOOTH: Good morning, Your Honor.
9 Karyn Booth with Donelan, Cleary, Wood and Maser, here
10 for Niagara Mohawk Power Company.

11 MR. McBRIDE: And if Your Honor, please,
12 this gentleman over here is one of our consultants,
13 Mr. Roger Prescott from the LE Peabody firm. He has
14 signed a confidential and highly confidential
15 undertakings.

16 JUDGE LEVENTHAL: All right. Very well.

17 All right, Mr. McBride?

18 MR. McBRIDE: Yes. Thank you, Your Honor.
19 As a preliminary matter, you may recall that in our
20 letter of August 28 forwarding our reply brief to Your
21 Honor, we informed you and counsel that we had been
22 furnished with some unredacted documents in error. We

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1 got the taped over version instead of the copied
2 version. We neglected to return them before now, but
3 I thought it might be appropriate to do that on the
4 record since I told Your Honor we would do that. We
5 haven't lifted the tape or copied what's underneath,
6 but I wanted counsel for CSX to have those documents.

7 JUDGE LEVENTHAL: All right.

8 MR. McBRIDE: If Your Honor has that
9 matter of redacting cost information before him, we
10 didn't think it was appropriate to seize on what
11 apparently was an inadvertent mistake.

12 JUDGE LEVENTHAL: Very well. By the way,
13 I have issued my order on the redaction matter. Have
14 parties received it yet?

15 MR. McBRIDE: The board hasn't served it,
16 as far as I know.

17 JUDGE LEVENTHAL: It should have been
18 issued yesterday. But all right. It's in the works.

19 (Whereupon, the foregoing matter went
20 briefly off the record.)

21 JUDGE LEVENTHAL: Back on the record.

22 MR. COBURN: Your Honor, obviously we

1 haven't seen the order. But knowing the way in which
2 you have ruled on it, we would ask that the Board stay
3 so that we would have an opportunity to appeal. I'm
4 confident that our clients are going to want to appeal
5 the issue. Once the cat is out of the bag, so to
6 speak, it's out of the bag.

7 So it seems to us that since this is an
8 issue that the Board has spoken on in previous cases
9 and it's obviously an issue of great importance to the
10 applicants, we would certainly commit to appealing
11 promptly. The board of course has been acting very
12 promptly on these appeals.

13 So we're adding a few more days. We
14 realize that, but I think in light of the gravity of
15 the issue, and in order to in fact preserve our rights
16 on appeal that stay would be appropriate.

17 JUDGE LEVENTHAL: All right. Just so the
18 record is clear, in our off the record discussion, I
19 indicated to the parties that I had ruled on the issue
20 of redacted material by a decision which I signed on
21 this last Wednesday in which I had requested the Board
22 to issue yesterday.

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1 Obviously it appears in any event, that
2 the order, that the decision was not issued yesterday.
3 But in order to move things along, I advised the
4 parties that I had ruled that the material that had
5 been redacted from the documents that were in question
6 I ordered unredacted.

7 I have to say that my order also required
8 the material to be furnished without further delay.
9 Mr. Coburn has asked that I stay my ruling. How long
10 a time did you ask for?

11 MR. COBURN: Pending a determination by
12 the Board on the appeal that we would file.

13 JUDGE LEVENTHAL: Well I think the Board
14 rules within three days, do they not? I think you
15 have three days to appeal.

16 MR. COBURN: That's right.

17 JUDGE LEVENTHAL: From the date of issue,
18 not from the date that I'm announcing now. Then the
19 Board rules within three days.

20 MR. COBURN: I don't know that the Board
21 necessarily rules within three days.

22 JUDGE LEVENTHAL: They have been doing

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1 that.

2 MR. COBURN: Well they have been ruling on
3 it quickly. I don't know whether it's been three days
4 or not, but they generally have been ruling quickly.
5 We would certainly ask for expedited consideration of
6 the appeal.

7 MR. McBRIDE: Your Honor, first of all as
8 you can tell from the fact that they didn't serve your
9 order yesterday, nobody around here can be sure of
10 when the Board is going to do anything.

11 There are matters pending before the Board
12 in this case that have been pending the Board for
13 weeks. The labor unions, for example, filed a
14 petition and asked the Board to declare that the
15 applicants already unlawfully control Conrail. They
16 have obviously opposed that, but the matter has not
17 been resolved. That's been weeks.

18 So we have to reply within three days to
19 their appeal. They have three days to appeal, we have
20 to reply in three days. But there is no obligation on
21 the Board to rule within any given period of time.

22 I must say to you that as you know from my

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1 correspondence, I hope I'm not wearing out my welcome,
2 but I have to say this. They have wasted seven weeks
3 of our time here since we first started these matters
4 before Your Honor. We only have six weeks left to put
5 our case on. They could string this out until
6 presumably on the eve or even past the time that our
7 evidence is due if Your Honor were to grant the stay.

8 So unless their clients are willing to
9 commit to a day to day extension in the October 21
10 date from today, for the filing of our comments and
11 evidence, so that if the Board takes two weeks plus
12 the three days and three days for their appeal and our
13 reply, then we would get that entire period of time.
14 But they won't commit, I can confidently predict right
15 now, that their clients would agree to give me even
16 one day extension.

17 Unless they are not willing to give me an
18 extension, then the applicants are hoist on their
19 petard here. I mean they insist on expedition and
20 they insist on the October 21 date. Yet they want to
21 string out our ability to put our case together.

22 I've got my consultant here who will

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1 attest if Your Honor needs what all these delays have
2 done to our ability to put our case together. It is
3 getting to be critical.

4 MR. EDWARDS: Your Honor, just two brief
5 arguments on Norfolk Southern. Wornall is the only
6 issue that is still pending from this week's period of
7 time, that is in fact this one item in the area of
8 petition. Any other appeal has been done in an
9 expeditious manner. We would join the ACE et al. We
10 would ask for expedited approval or expedited
11 consideration in this matter.

12 We are talking about perhaps if the order
13 was issued late yesterday, none of the parties would
14 have received copies of it. So it could have been
15 issued yesterday, in which case our reply would be --
16 our appeal would be due on Tuesday. Their response
17 would be due on Friday. We could conceivably see a
18 decision a week after.

19 If the stay is not granted, the appeal is
20 almost mooted given the nature of the issue.

21 MR. McBRIDE: That is simply not true
22 because if the Board were to grant their appeal, and

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1 I think Your Honor knows what the track record is on
2 discovery appeals, the Board denied them all in the UP
3 SP case. There weren't any in BN SF. I am 0 for one
4 in this case so far, Your Honor knows.

5 So I don't think it's very likely this
6 appeal is going to be granted. But in any event, if
7 it were granted and we have this documentation and we
8 are putting our case together, we could be ordered to
9 return it. And as I demonstrated in the first matter
10 on the record this morning, whatever they want to say
11 about me, we are honorable people and we return things
12 when we are supposed to. That is what I just did. I
13 would do that again.

14 JUDGE LEVENTHAL: No, but if the
15 unredacted, what good would be your returning it?
16 Once it's unredacted, it's unredacted.

17 MR. McBRIDE: Because we can only use the
18 data for purposes of this proceeding. That's what the
19 protective order says, that's what we're required to
20 limit our use of this data to. That's what we would
21 do. Therefore, if we return it, it would be of
22 utterly no value to us because we couldn't use it in

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1 the proceeding and we can't by terms of the protective
2 order use it any other way.

3 But if you deny us that data, then you are
4 preventing us from putting our case together.

5 JUDGE LEVENTHAL: Let me make a
6 suggestion. Both parties have briefed this. I don't
7 know that the Board needs any further argument than
8 you have already made before me. Perhaps you can
9 stipulate to let this go up on appeal today based upon
10 your submissions to me without any further time delay.

11 MR. MCBRIDE: I might consider that if
12 they were to agree to one thing. They filed an
13 impermissible reply to my reply. The Board's rules
14 are crystal clear that they don't allow replies to --

15 JUDGE LEVENTHAL: All right. I did not
16 consider their reply. I ruled that it was out of
17 order.

18 MR. MCBRIDE: But if Your Honor intends to
19 limit it to their August 25 filing and my August 28
20 reply, which is all the Board's rules permit, I would
21 be willing to have the appeal decided on the basis of
22 those two pleadings.

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1 JUDGE LEVENTHAL: All right.

2 MR. COBURN: Your Honor, I believe we
3 would as well, subject to the caveat that we haven't
4 read your order yet and there may be items, with all
5 due respect, in your order that we might want to say
6 something about to enhance the Board's views as to our
7 view as to what you said.

8 So I think what we could agree to do is to
9 submit the briefs as they are together with perhaps a
10 letter, a brief letter brief, if no more than perhaps
11 two or three pages, that we would produce very
12 quickly, if not today.

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

14 (Whereupon, the foregoing matter went off
15 the record at 9:43 a.m. and went back on
16 the record at 9:45 a.m.)

17 JUDGE LEVENTHAL: All right. Let's defer
18 this to the end of the morning session. We can check
19 whether or not it's been issued.

20 Let me tell you, I wrote a very simple
21 order. I found that your compliance with my earlier
22 ruling was without substance because you took out the

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1 material, the very material that they wanted. So that
2 my finding that it was relevant really was ignored.

3 I pointed out that not only did I find it
4 relevant, the but Board affirmed me in finding that
5 what I permitted was relevant.

6 I did not discuss the cases either side
7 cited although I read them. But my finding was that
8 discovery has to be decided on a case by case basis.
9 So my ruling was very -- I don't like to call anything
10 I do simple, but it was simple. I think that your
11 briefing of both sides I think you argued well. In
12 all these things, somebody wins, somebody loses, but
13 I think the Board would certainly have sufficient
14 information before it to make a reasonable ruling on
15 your appeal.

16 So that if you decide that you want to go
17 up on a stipulated appeal today without any further
18 delay, would you object if I stay my ruling say for
19 one week?

20 MR. McBRIDE: Your Honor, I would
21 stipulate if they would give me the amount of time the
22 Board takes on an extension of the October 21 comments

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1 in evidence, then they don't have to give me the data
2 for however many days, from the date of the issuance
3 of the order.

4 MR. EDWARDS: We don't have the power to
5 do that.

6 MR. McBRIDE: Subject to the Boards
7 approval.

8 JUDGE LEVENTHAL: I was going to say I
9 don't know that they can.

10 MR. McBRIDE: But as subject to the
11 Board's --

12 JUDGE LEVENTHAL: Up to the Board's
13 approval?

14 MR. EDWARDS: We'd have to consult with
15 our clients.

16 JUDGE LEVENTHAL: You are talking about
17 one week.

18 MR. EDWARDS: We would have to talk to our
19 --

20 MR. COBURN: The procedural schedule is a
21 matter of great interest to our clients.

22 JUDGE LEVENTHAL: Obviously, but again,

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1 we're only talking about five business days. Even
2 though it's a huge merger, I don't know that five
3 business days is going to affect it one way or
4 another. Of course you don't know whether or not the
5 Board will go along with it.

6 MR. McBRIDE: They took an extra week to
7 file.

8 JUDGE LEVENTHAL: What's that?

9 MR. McBRIDE: They took an extra week to
10 file. They told all the world they were going to file
11 on June 16. They filed on June 23.

12 JUDGE LEVENTHAL: Yes, but I think that's
13 their privilege. I'll defer ruling on that until the
14 end of today's session.

15 I'm bothered by two things. Obviously I
16 am sympathetic to Mr. McBride's dilemma in getting his
17 case together. On the other hand, once the applicants
18 furnish unredacted material, it's unredacted and
19 nobody is questioning the honor of counsel on the
20 other side. Well, we'll see where we go by the end of
21 today.

22 All right. Anything else? Mr. McBride.

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1 MR. McBRIDE: Yes. I asked to be heard on
2 three matters this morning, Your Honor, if you will
3 recall. I would like to deal with each of them
4 briefly if I may.

5 The listing was of three matters and the
6 applicants quite honorably have kind of added a
7 fourth. I want to say first of all that nothing that
8 I say, as I said in my letter, intended to impugn the
9 integrity of anyone over there. They are a bunch of
10 honorable lawyers and they are working at least as
11 hard as I am, which means they are working too hard.

12 But apparently that's part of the reason
13 for the delay, because Norfolk Southern has been quite
14 candid with us in telling us it had 60 reel to reel
15 cases of I understand described them to one of my
16 colleagues, for the period 1980 to 1984. I've been
17 aware of this for some time, but Mr. Edwards seems to
18 be working night and day, and I gather maybe he or
19 Bruce or somebody is involved in the review of these
20 even though the applicants have 75,000 employees and
21 over 50 lawyers working on this. I'm told they
22 haven't yet reviewed those tapes. Our time is

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1 running.

2 There are relevant tapes within the scope
3 of Your Honor's order. These are the tapes, the
4 traffic data between 1980 and 1984. In order to cut
5 through this, I asked them to simply provide us the
6 tapes with both the record layout, which was part of
7 our original request, so we would understand what's on
8 the tapes so we could do the work. Because I am
9 trying to meet my obligations under the procedural
10 schedule the Board established. They don't want to do
11 that.

12 They say they haven't yet reviewed the
13 tapes. They won't say when they are going to review
14 them.

15 Now secondly, I ask you for an order
16 requiring them to state whether they have any
17 documents for that period of time, obviously other
18 than those tapes. They now say they don't. When
19 ccounsel said that, and counsel for CSX on behalf of
20 all the applicants, and I don't question his
21 integrity, but it seems a little hard to believe that
22 Norfolk Southern has no coal marketing records

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1 relevant to our clients for the period 1980 to 1984.
2 But if that's what they meant to say, so be it.

3 Now the fourth item, I am going to skip to
4 just for the moment. The same counsel, Mr. Harker,
5 was candid enough to volunteer in the letter what I
6 had been pressing for a statement on for some time.
7 Your Honor may recall that originally Mr. Harker said
8 at one of these conferences back I think in July that
9 CSX couldn't find any tapes from the 1978 to 1982
10 period.

11 We then suggested that he look in a
12 particular rate case file. There was a big coal rate
13 case at the time called the 22 Percent case. There
14 was a further report. They still hadn't found any.
15 I don't know where they found them, but he now quite
16 candidly reports that they have found tapes for the
17 1980 to 1982 period.

18 Again, these are within the scope of your
19 original order. We don't know when we are going to
20 get them. Apparently the applicants here, having the
21 same few people review everything, and that's really
22 slowing things down. So those are part of the

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1 problems that we are having.

2 Then the rest of the information, Your
3 Honor, that they have redacted is just as critical to
4 us as the cost information. I mean they are redacting
5 the very things that go to the heart of determining
6 the profitability of the movement. I wanted to give
7 Your Honor just an example of a hypothetical situation
8 here that we're trying to deal with. They asked for
9 a visual aid, so we brought some along this morning.

10 JUDGE LEVENTHAL: My secretary is on
11 leave. So you have markers?

12 MR. McBRIDE: Yes. Thank you. What we
13 have done here, Your Honor, just to kind of illustrate
14 for you what we have got so far and what we are trying
15 to develop is for American Electric Power's Cardinal
16 Plant, which is a plant that CSX provided us some data
17 on because it's a destination served by Conrail, the
18 red line if you'll notice on the graph, illustrates
19 all the data that we have received to date, which is
20 1995, 1996, 1997. You will recall under your order,
21 you limited it to those years.

22 Then what we would hope to get now, based

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1 on the CSX tapes for 1980 to 1982 which they have just
2 said that they have, would be to fill in in the
3 earlier periods. Apparently we won't be able to fill
4 in 1978 and 1979, even though you ordered them to
5 produce them if they have them, because they don't say
6 they have them.

7 Then what we would propose to do through
8 other publicly available data, is try to fill in in
9 between because Your Honor didn't require them to
10 produce that information. Because what we are trying
11 to do for each of our clients for each of its
12 destinations is to create what are called time lines.
13 Sort of if you'll think of it this way, lay them one
14 on top of the other and try to determine patterns to
15 the data. Then use that to determine statistically
16 whether we can conclude things about the pricing
17 policy of CSX or NS or Conrail from them.

18 Now in going into the process of setting
19 a rate for a plant, and most of these now are under
20 contract, there's a lot more to it than just picking
21 a number and saying it's five dollars a ton or
22 whatever. That's hypothetical.

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1 But you might, for example, if you don't
2 move any tons, and five dollars a ton isn't a
3 competitive rate, it's an irrelevancy. So you need to
4 know how many tons, whether there's any minimum
5 tonnage which there typically is in these big
6 contracts. You need to know what escalation factor
7 applies to that base rate. You need to know a whole
8 host of things that go into determining really what
9 we're talking about here is the net revenues, the
10 profitability of the traffic.

11 That goes to the heart of the matter that
12 we're trying to develop. It's precisely of course, as
13 you might expect, the very things that they have
14 redacted. So we're not getting tonnages or minimum
15 tonnages or escalation factors. We're not getting
16 contribution which is the comparison of revenue to
17 cost. Your Honor has now already informed us of your
18 ruling on the cost issue.

19 So the guts of the elements that make up
20 the profitability of any of these movements has not
21 been provided to us because of the redactions.

22 We have tabulated many, if not all of the

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1 documents we're talking about here. Your Honor, we
2 could spend the rest of the weekend with you here
3 going through document by document. I don't propose
4 to do it, but we have examples if Your Honor needs to
5 see them of categories of things that they have
6 redacted.

7 But just trying to make this simple, let
8 me tell you that our consultants inform us that the
9 following categories of things have been redacted.
10 The first heading is rates divisions and revenues.

11 JUDGE LEVENTHAL: Is that rate?

12 MR. McBRIDE: Rates/divisions/revenues.
13 Your Honor will recall, it already said they weren't
14 going to redact divisions. Apparently they have.
15 They have even redacted rates. I've got numbers of
16 documents on that.

17 Operating costs, Your Honor has now ruled
18 on that issue I gather. Contribution, which is the
19 comparison of the first two. Contract term/volume.
20 Term is very important too because sometimes a carrier
21 will be willing to give you a lower rate if you agree
22 to extend the contract for a longer period of time,

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1 and the converse can also be true.

2 Escalation/adjustments. Then we have a
3 category called unknown. We didn't list that tape on
4 those documents I gave back this morning to find out
5 if we could fill in the unknown. But this is what's
6 being redacted. This is not meaningless stuff. This
7 isn't somebody's social security number. This is
8 matters that go right to the heart of how you
9 determine the profitability of these movements.

10 I don't want to complicate it further
11 unless Your Honor wants to see documents, but we
12 believe that all of that was within the scope of your
13 original rule. They took it upon themselves to redact
14 the information from the documents Your Honor ordered
15 them to produce seven weeks ago. I don't think they
16 have any right to do it under the protective order.

17 Now yesterday in Mr. Harker's letter they
18 have resurrected this argument about your Grainland
19 ruling. You may recall on July 16, I took the risk of
20 wearing out my welcome with you forever by telling you
21 that they have cited the very statute that Your Honor
22 thought didn't permit the exchange of shipper specific

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1 information. They relied on that as authority to
2 permit one another, permit these applicants to
3 exchange shipper-specific information in the
4 application, in the petition for their protective
5 order.

6 I have got the order here if Your Honor
7 wants to see it. The Board relied on that very
8 statute to permit them to exchange a shipper specific
9 information.

10 So you know, I say this with the greatest
11 of respect to Your Honor and to Mr. Harker, but I am
12 afraid to say that given decision number one in this
13 proceeding, and decision number four which modified
14 the protective order and relied on that very statute
15 to allow them to exchange shipper specific
16 information, the notion that your ordering Grainland
17 somehow precludes now the shippers from getting
18 shipper specific information when the carriers have
19 already been permitted to exchange our information
20 with one another, would stand logic on its head.

21 I would like the documents without
22 redaction that Your Honor ordered them to produce

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1 seven weeks ago.

2 JUDGE LEVENTHAL: Mr. Coburn?

3 MR. COBURN: Your Honor, we are a bit
4 baffled as to Mr. McBride's discussion of what was
5 redacted because we over the last several weeks have
6 provided to Mr. McBride, and maybe there's just been
7 a failure of communication between Mr. McBride as well
8 because I am a consultant so I don't know, information
9 about their own rates, which of course they know
10 anyway. They know what they have been paying.
11 Information about each client's own divisions and
12 revenues. Costs is a different matter. Of course we
13 did not provide them. That's the subject of your
14 order and any order from the Board on appeal.

15 Contract term and volume, they should have
16 that. We're not withholding that. We are not
17 redacting it. We're not redacting escalation close
18 information relevant to their own client's movements.

19 I'm sorry. I am being corrected.
20 Escalation --

21 MR. DATZ: Yes. I should say that costs,
22 contribution and escalation were sort of generally

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1 lumped in the category of costs.

2 MR. COBURN: Okay. I apologize for that.
3 What we have been redacting, putting costs aside, is
4 information that would be of use in terms of being
5 used against us in pending and future negotiations
6 that we might have or are having with Mr. McBride's
7 clients. That comes in the form of market
8 intelligence information, information that goes to
9 bids that were considered by the railroads and never
10 made, and information flowing from bids that were
11 considered internally by the railroad and never made,
12 and other very sensitive market information that if
13 disclosed to Mr. McBride and really to his
14 consultants, could be used against us at the
15 bargaining table.

16 But in terms of the actual rates, and to
17 use Mr. McBride's chart, the actual rates that his
18 clients are paying, well of course they know what they
19 paid, but we haven't redacted information about what
20 AEP has paid, what ACE has paid et cetera. We haven't
21 redacted it, so I don't understand why we are having
22 this problem.

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1 MR. MCBRIDE: I'll be happy to -- I have
2 a list. I'll give them the Bates numbers. The
3 consultants prepared this for us. They have now
4 conceded they have redacted contribution, escalation
5 and costs. But as to rates/divisions/revenues, I have
6 the very Bates numbers here. I can provide them for
7 the record. I am not making this up.

8 MR. EDWARDS: Your Honor, have two minor
9 points. I am not sure whether or not we are confusing
10 the issue as to whether or not the information that
11 Mr. McBride is discussing is redacted from the pockets
12 which are placed in the document repository per your
13 earlier order on this issue, or whether or not it's
14 redacted from the copies that were provided to Mr.
15 McBride and his consultant pursuant to your order.

16 Certain information with regard to AEP,
17 their own contract charges that are reflected in
18 contracts that they in fact should have and with rates
19 that they should have. In fact, should have been --
20 I'm not going to -- those have been redacted because
21 he has that information from the copies which have
22 been provided to Mr. McBride, because that's the

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1 shipper-specific item to AEP or to ACE or Delmarva
2 which Mr. McBride represents.

3 Those same items have been further
4 redacted pursuant to your earlier order for placement
5 in the document repositories for the ACE and
6 Delmarva's competitors and compatriots in the utility
7 industry, would not see the specific contract
8 information with regard to actual contracts, anything
9 to do with their parts plants.

10 So I am not sure. Maybe we're talking
11 about the first level and the second level, but it's
12 not very clear.

13 MR. McBRIDE: It's exactly what was
14 provided to us. So it's not what is in the
15 depository. I have the list here.

16 By the way, I should say in fairness to my
17 friend Mr. Norton over there, Conrail is not part of
18 this. Conrail hasn't redacted anything so far as we
19 can tell.

20 MR. MULLINS: We'll confirm that.

21 MR. McBRIDE: But I have a list here for
22 Norfolk Southern and for CSX by client.

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1 JUDGE LEVENTHAL: But your clarification
2 is that this material has been redacted from the
3 information furnished to you?

4 MR. McBRIDE: Correct, sir.

5 JUDGE LEVENTHAL: All right.

6 MR. McBRIDE: Absolutely correct. I'll
7 give you the list. We have the documents if they want
8 to see them. We'll cut through this. We don't have
9 to just argue about it. We have them right --

10 JUDGE LEVENTHAL: Is there more than one -
11 - is the only information redacted the cost type
12 information?

13 MR. McBRIDE: No, Your Honor. It's
14 rates/divisions/revenues, cost, contributions, term of
15 volume, escalation, and unknown.

16 JUDGE LEVENTHAL: Tony said that you have
17 the rate information.

18 MR. McBRIDE: He said it, but I am telling
19 you I have the documents right here and I can show you
20 that they have been redacted.

21 MR. DATZ: If I could just explain, Your
22 Honor. Actual rate information that was given to his

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1 clients he should have. Stuff that probably you are
2 referring to which may say on the document you are
3 talking about, revenues or rates or divisions but were
4 redacted, were things that never made it out of in-
5 house, never made it to the clients. So if it says
6 rates, but they aren't actual rates, they aren't
7 actual rates that your client ever got.

8 Because we are talking about the same
9 movements of coal year after year after year, costs
10 per ton vary by a few cents whatever, year by year by
11 year, these are proposals that never went to the
12 client. So they aren't the actual rates. I mean
13 that's probably what had led to some of the confusion.

14 But our client's concern is they have
15 given the same movements discussed year after year
16 after year. Knowing that same information at the
17 bargaining table to talk about this same movement,
18 even though it has been two years later, would
19 dramatically affect our ability to negotiate with Mr.
20 McBride's clients.

21 So that may clear some of the confusion.
22 We are happy to go document by document if you would

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1 rather do it that way.

2 MR. EDWARDS: The other question that Mr.
3 McBride might clarify is his categories, which we
4 haven't been privy to. So we don't know what, which
5 ones he is referring to. When he says rates, we are
6 unsure whether these are the actual rates that we are
7 talking about here which he said he needs this for or
8 internal analysis of what we might propose in the
9 future.

10 There is a basic difference between actual
11 rates and something that we are considering in-house.

12 MR. McBRIDE: We need them both because
13 what we are after here is how they set their rates.
14 A lot of this is back and forth, give and take
15 internal analysis and what have you. The consultants
16 are trying to use all available evidence within the
17 scope of your rule to use their internal work to
18 determine how they set their rates. These other
19 materials that they have now finally admitted they
20 have in fact redacted go right to the heart of how
21 they try to set their rates.

22 It is not just the actual rates. But it

1 is the process by which rates may be set. You see
2 what goes on here, Your Honor, often times is there
3 may be two or three of these applicants competing for
4 the business of one of our clients. That happens at
5 Delmarva, for example. All three of the applicants
6 are origin carriers. They may be bidding for the
7 business. Only one of them gets it or two of them,
8 each get part of it or what have you.

9 What these documents show is how they set
10 rates for the process of trying to bid for that
11 business. They have now said finally they have in
12 fact redacted that too. Your Honor didn't let them do
13 that. The protective order doesn't let them do that.
14 We have been putting up with this for seven weeks.
15 I'm telling you, we can spend the rest of the day and
16 into the night going through this document by
17 document. They don't have the time. I don't think
18 Your Honor should take the time. I don't have the
19 time.

20 MR. EDWARDS: Your Honor, I am not sure
21 that I heard a clarification that I understand whether
22 we are talking about actual numbers here or things

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1 that our client is thinking about. We've got several
2 categories where supposedly we've redacted rates. Mr.
3 McBride needs to say are we redacting in his
4 understanding, actual rates that were in effect and
5 rates that are hypothetical or both.

6 MR. McBRIDE: I can not answer that
7 question because there is a category called unknown.
8 They know what they redacted. How do I know what they
9 redacted? But I know it's rate/division and revenue
10 information.

11 Your Honor, you can not constantly revisit
12 every document line by line. Conrail gave us 2,000
13 pages. Thank god they didn't redact or I would be
14 down here every day. But you know, we just got
15 hundreds more pages in the other night. I stayed in
16 to the night reading these things by a couple of the
17 clients. This will go on into December, not just
18 October 21, if we don't cut through this and tell them
19 just give us the documents that Your Honor ordered us
20 to get without redaction.

21 They didn't raise that on July 16. They
22 could have. They didn't. They could have said, Your

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1 Honor, now are we permitted to redact things that we
2 really don't want them to see because we're worried
3 about them across the bargaining table, which is what
4 they just said? That's precisely what the protective
5 order doesn't permit me to do with this information.
6 My clients are in the dark about this. The
7 consultants are limited to using the information for
8 purposes of putting our case together, period, end of
9 discussion. Don't worry about it. We abide by
10 protective orders. We're honorable people. Just give
11 me the documents.

12 What I got a ruling on on July 16, and I
13 know Your Honor tries to be fair and give each side a
14 little bit, and that's commendable. But today is
15 different. All we are asking you to do is enforce
16 your earlier ruling.

17 JUDGE LEVENTHAL: Mr. Coburn?

18 MR. COBURN: Your Honor, the protective
19 order is not the issue here because as a practical
20 matter, because there is a small fraternity of
21 attorneys, Mr. McBride among them and his consultants
22 certainly among them, attorneys and consultants who

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1 regularly advise his clients on negotiations, ongoing
2 negotiations, they are the functional equivalent of
3 in-house counsel.

4 The protective order says that it bars in-
5 house counsel from receiving highly confidential
6 information. Obviously we are providing lots of
7 highly confidential information to Mr. McBride and his
8 consultants. But when it comes to information that
9 could be used against us as we bargain year after year
10 with the utility clients on these highly important
11 commercially sensitive rate matters, we can't give
12 away the store to people who will be using the
13 information against us.

14 Now having said that, we are providing
15 lots of information. What we are not providing, what
16 we have been redacting is information of great market
17 sensitivity.

18 For example, if CSX is considering,
19 doesn't propose a particular rate but considers a
20 particular rate for purposes of in-house analysis to
21 see where that rate measures up in terms of CSX's
22 needs, but that rate was never proposed, was never

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1 proposed because on the basis of the in-house
2 analysis, CSX decided not to make the rate proposal,
3 we're not giving them that because that is information
4 that if he had it, if he knew what we were thinking
5 about, he could, his consultants and his client could
6 make use of that information in negotiations that are
7 ongoing with us.

8 There is nothing in the protective order
9 that protects us against the possibility that his
10 consultants, who are advising his client, will knowing
11 what they know, will use the information to our
12 detriment. That is the problem.

13 JUDGE LEVENTHAL: What kind of document
14 have you furnished him that deals with your internal
15 discussion?

16 MR. COBURN: There are notes, for example.

17 MR. McBRIDE: I have one right here if you
18 would like to see it, CSX.

19 JUDGE LEVENTHAL: Mr. Coburn?

20 MR. COBURN: If I may, Your Honor. I'll
21 allow Mr. Datz to describe the document. I am
22 reminded because this is a highly confidential

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1 document, we should be certain that everybody in the
2 room has signed the protective order.

3 MR. MULLINS: Is that the protective order
4 for the super super highly confidential stuff or just
5 the protective order for the case? I am a little
6 unsure.

7 JUDGE LEVENTHAL: No. He means the highly
8 confidential, I take it. All right? Everybody in the
9 room has signed the confidentiality agreement.

10 All right. You have given me both. You
11 have given me the document with redactions and the
12 unredacted document.

13 MR. DATZ: Correct, Your Honor. This
14 document appeared in the depository at CSX 31 HC
15 000174. This is a good example of the kind of
16 documents that we were talking about. As Mr. Coburn
17 said earlier, all of the documents that deal with
18 actual rates, actual divisions, those kinds of things
19 that relate to Mr. McBride's clients, he should have.

20 This sort of thing probably when he looked
21 at it appeared to be stuff that we were withholding,
22 but in fact, it's not. This document deals with a

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1 rate that never made it to his client IP&L.

2 What we redacted, and even in this case,
3 we only redacted a little bit. Most of the
4 information was furnished him completely unredacted.
5 If you'll note, the document talks about assumptions,
6 about a mine that didn't even exist at the time the
7 thing was done, assuming that the mine was X number of
8 miles up the track, assuming that a certain tonnage
9 was used. Again, the kind of thing we're talking
10 about was an analysis that was done internally, a
11 work-out that was assuming all of these factors, and
12 then assuming, if you'll note, there's a 75 car and 50
13 car column. Again, assuming certain sized trains were
14 used, how would the rates work out.

15 But this is the kind of thing that never
16 made it to his client. Yet if this sort of thing came
17 up again, this is a thing that would be extremely
18 damaging in any kind of negotiations with Mr.
19 McBride's client. Yet even when all of that is said
20 and done, all that was redacted were costs and
21 contributions, which I understand are the subject of
22 your order. But then the potential rates on the 50

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1 car train, which is in that first column on the
2 righthand side there, that was redacted. The rest of
3 the document was produced and unredacted.

4 MR. McBRIDE: These are the advocates over
5 there, Your Honor, so they picked a document that I
6 guess they thought would make their case for
7 themselves pretty well. But even the one they picked,
8 they deleted the escalation factors down there to the
9 right of percent, which has a lot to do with --

10 JUDGE LEVENTHAL: I was going to ask an
11 explanation of this document. Can you tell me what
12 the lefthand column is? Under the date appears to be
13 something 1695. The first word under that appears to
14 be -- I can't read it. T-E-S?

15 MR. DATZ: Your Honor, that says, as far
16 as I know in this document, as was explained to me by
17 people in-house, so I'll give you the understanding of
18 the document as I have it. But the first column
19 there, it says rates I believe. Second line there
20 says costs. The third line I believe says
21 contribution --

22 JUDGE LEVENTHAL: What was that first

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1 word?

2 MR. DATZ: Rates, Your Honor. Again, I
3 would point out, I'll agree with Mr. McBride that the
4 escalations were redacted. As I said before, when we
5 did our redactions or when I should say when our
6 client did the redactions, the escalations were lumped
7 in with costs and contributions and will therefore I
8 guess be subject to the order earlier.

9 But escalations aside, again, the
10 information that was redacted were the costs and
11 contributions which all again are all hypothetical.
12 But then the rate information under the 50 car train,
13 that never made it to his client, never made it into
14 the form of an actual bid, at least as I understand
15 it.

16 MR. McBRIDE: Now let's, if I may, Your
17 Honor, put before you another couple of documents.
18 Since this is an adversary proceeding here, I ought to
19 be permitted to show you some evidence that makes my
20 case.

21 MR. COBURN: Your Honor, can I make one
22 other point about this document?

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1 JUDGE LEVENTHAL: All right.

2 MR. COBURN: Before we move onto others.
3 This document is a document relative to Indianapolis
4 Power and Light, which is not one of the Mr. McBride's
5 clients that has any vertical competition issues
6 raised as a result of this transaction. The Board
7 indicated in decision number 17 that only one of his
8 clients, that is Delmarva Power and Light, has any
9 semblance of a one lump issue.

10 So it is not clear to us what use, what
11 constructive use could be made with respect to this
12 case of this document.

13 JUDGE LEVENTHAL: I was going to get to
14 that. We'll give you your chance to show me your
15 document. Let's deal with this document.

16 You are familiar with the document they
17 have given me a copy of?

18 MR. McBRIDE: Yes.

19 JUDGE LEVENTHAL: Why do you need this
20 information?

21 MR. McBRIDE: First of all, I want to
22 respond to the last point. The Board did not say what

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1 Mr. Coburn just said. The applicants said that this
2 ought to be limited to Delmarva. The Board said, the
3 Board got it straight despite what they were trying to
4 do to confuse the issue, that I am arguing something
5 well beyond the one lump theory. You may recall this
6 from decision number 17.

7 The Board understood that my concern is
8 any one of my client's rates, in NYSEG and other
9 utilities, the rates might go up as a result of what
10 we say and the Board repeated, is a bad business
11 decision to spend four to five billion dollars more
12 for Conrail than it was worth. We now know it's even
13 more than that.

14 But that is what the Board understood. So
15 it applies to all of them. So let's not go re-argue
16 that point. That point has been decided.

17 Now as to this particular document, Your
18 Honor, this is precisely the information you just
19 ruled on. Let me say, by the way, I understand the
20 logic in what Mr. Datz because contribution is what is
21 left after you subtract cost from rates. So when they
22 took the position they had the right to redact cost,

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1 logically that would include the contribution issue
2 too. So we don't have to re-argue that. You have
3 decided that.

4 But I understood why they redacted both at
5 the same time, because the logic of their position was
6 the two went hand in hand. So contribution is just
7 what is leftover after you subtract cost from rates.
8 If Your Honor would look at the unredacted version,
9 for example, the very first column, this is not higher
10 math. Under RR, far left, rate 3.06, cost 1.81,
11 contribution 1.25, which is the arithmetic of
12 subtracting 1.81 from 3.06.

13 So that is what those are about. Now you
14 see this goes to the very core of what we're trying to
15 get at because contribution is what they say is the
16 profitability of the movement. The theories that we
17 are working on under here, they say don't worry about
18 it shippers, we're already maximizing the net
19 revenues, the contribution, the profitability, however
20 you want to characterize it. So what they redacted
21 was precisely what we need to test whether the claims
22 they have been making to the Board and to Your Honor

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1 are true.

2 JUDGE LEVENTHAL: You just read to me the
3 material that has been redacted. Do you have a copy
4 of the unredacted?

5 MR. McBRIDE: They just gave it to me for
6 purposes of this argument.

7 JUDGE LEVENTHAL: Oh okay.

8 MR. McBRIDE: I wasn't violating any
9 orders.

10 JUDGE LEVENTHAL: I wasn't concerned with
11 your violation. I wanted to be sure that they haven't
12 already furnished it.

13 MR. McBRIDE: Just for purposes of the
14 argument. Okay? So this goes to the very heart of
15 things.

16 Then if Your Honor, please, then the rate,
17 the 3.06 in this case or whatever it would be in a 50
18 car as to how they set rates to, these would be
19 adjusted via formula. The shippers and the railroads
20 have been fighting about this for 16 years. Mr.
21 Norton's partner, Mr. Cunningham and I have been to
22 the Court of Appeals five times on this issue about

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1 rail cost adjustment factor.

2 That is what is referred to here by RCAF.
3 That's the unadjusted form and they are applying a
4 percentage of that for the escalation. That is what
5 they are trying to do. That goes as to how the rate
6 will change over time, which is precisely the sort of
7 thing that we are trying to demonstrate and why we
8 brought in the hypothetical.

9 So this information goes to the very core
10 of determining the profitability of movement and how
11 they set their rates.

12 Now if I may get to the document that I
13 wanted to show you or a couple of examples of
14 documents I want to show you to make my best case, and
15 I don't think they have made much of a case with that
16 one. But here is CSX 26 HC 000157, Atlantic City
17 Electric, another one of my clients.

18 We have got headings. If they want to
19 look on here, this is fine. You know, plant England,
20 time share rates, they give you the rate. Then they
21 have got a heading for division. Then the heading for
22 refund, then a heading for net rate, then a heading

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1 for cost per ton, then a heading for contribution, et
2 cetera. It goes out with several different
3 calculations of contribution.

4 Then there is another rate for a different
5 time period. The first one was for a certain number
6 of tons, short term. The second one is long term and
7 on it goes. Everything but the initial rates.
8 Everything on the entire page has been redacted. This
9 is as it was provided to us.

10 The same sort of example, CSX 31 HC
11 000125. Virtually everything on the page, I think
12 Your Honor will attest by the document I am showing
13 you, has been redacted. The form of the document
14 provided to us. Therefore, all that we can give to
15 our consultant.

16 JUDGE LEVENTHAL: Let me ask a question
17 before we continue. If you appeal my ruling on the
18 redacted material that I have already ruled upon,
19 would that dispose of the matter? If whatever the
20 Board rules, whether they affirm my ruling or reverse
21 me, does that dispose of this argument?

22 MR. McBRIDE: I think it would.

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1 JUDGE LEVENTHAL: It seems to me that we
2 are arguing about the same thing.

3 MR. COBURN: Your ruling, we obviously
4 haven't had the opportunity of reading it, but
5 certainly the briefing and presumably the ruling go to
6 one element of what we are talking about, which is the
7 cost issue, which is certainly a very highly sensitive
8 category.

9 JUDGE LEVENTHAL: This is what I have been
10 hearing.

11 MR. COBURN: This is other very highly
12 sensitive data, not necessarily costs, but --

13 JUDGE LEVENTHAL: Which of the other data
14 isn't included in the cost?

15 MR. COBURN: Information about bids that
16 have not been made.

17 JUDGE LEVENTHAL: Take the document you
18 gave me a copy of. Is this what you are talking
19 about?

20 MR. DATZ: For example, Your Honor, the
21 rates column, I mean on the righthand side there under
22 the 50 car, the rates column has been redacted. That

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1 is a rate based on the 50 car train with the four --
2 I believe not a whole lot about how coal shipments
3 are, I gather the four and the 24 has to do with
4 turnaround time or the amount of time it takes the
5 cars to load. So assuming both of those factors with
6 the 50 car train, what the rate would be.

7 Immediately below that are the costs and
8 the contribution columns, which as we just discussed
9 are the subject of your order. So again, they are
10 related in a sense to the cost and the contributions,
11 but they aren't strictly speaking the same thing.
12 They are every bit as sensitive to our client as the
13 costs are.

14 JUDGE LEVENTHAL: They aren't strictly
15 speaking the same thing because this is a rate that
16 didn't go into effect? Is that what you are saying?

17 MR. McBRIDE: No. It's because they are
18 not the same thing, but they are close. They are all
19 related. I think he stated it exactly right. They
20 are not precisely the same thing. Escalation is not
21 the same as cost. Contribution was not the same as
22 cost. But they are all related to the net

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1 profitability of the movement.

2 MR. EDWARDS: Your Honor, one other way
3 that they are distinguished is a cost is an actual
4 dollar that is a real dollar figure. What has been
5 redacted and in fact as you can see from the document
6 that Mr. McBride has placed before you, are
7 hypothetical internal analysis that have -- they are
8 not in the marketplace. They are things that our
9 internal market people are playing with, trying to
10 figure out. One is real, one is hypothetical. Costs
11 are real. Proposed rates are hypothetical that we are
12 dealing with and we're thinking about. That's market
13 strategy that we think is protected. So in that way,
14 they are different.

15 JUDGE LEVENTHAL: They are different, but
16 we are really dealing with the same thing. They are
17 trying to establish a theory based upon how you reach
18 your rate. I found that on the specific items you
19 argued before me the last few times, that they are
20 entitled to it because it might lead to relevant
21 admissible evidence and it might not.

22 It seems to me this falls into the same

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1 area. Now let me ask you this. Would it satisfy you
2 if instead of dealing with all of your clients
3 involved here that you pick out say two clients and go
4 through it with two?

5 MR. McBRIDE: No. I'll tell you why for
6 a couple of reasons. I understand Your Honor is
7 trying to figure out some resolution to this. I don't
8 think it is going to work, a couple of reasons. With
9 all due respect, I am trying to work this out too.

10 But for one thing, some of our clients are
11 very close to resolving matters with them and without
12 our negotiation at the table at all. So first of all,
13 we could end up with a couple of clients and then find
14 out they have settled and then that's the end of our
15 evidentiary presentation.

16 Secondly, the fact of the matter is, and
17 I say it with all due respect, I am not trying to
18 reargue your ruling either, but you can see since what
19 we are trying to do is construct time lines, a
20 handicap that we have got because of the ruling about
21 what years we would get and what years we wouldn't,
22 and we're trying to fill in from other sources as best

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1 we can.

2 But also I will tell you, and probably if
3 I argued this in July 16, it might have helped Your
4 Honor understand it a little better. But for the
5 statisticians Mr. Prescott over here working with Mr.
6 Crowley and Dr. Kahn and the others at the NERA firm,
7 the more of these timelines they can lay on top of one
8 another the better for our statistical reliability.
9 That is what they have to do.

10 If I only have one sheet of paper or two
11 sheets of paper, three sheets of paper for a few
12 clients, and I say it proves that CSX sets its rates
13 this way or Norfolk Southern sets its rates that way,
14 and it turns out that there was some aberrational
15 circumstance at this one particular plant, you know,
16 maybe they did their arithmetic wrong or there were
17 different market conditions or whatever, they will
18 blow me out of the water with their reply.

19 If I only have a couple data points, no
20 statistician in the world would say that two data
21 points prove anything statistically. They may prove
22 a lot on their own merit. If you have somebody saying

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1 that's what I did or that the internal document shows
2 that's what happened, then you don't need a
3 statistician. Then you can make your case directly.

4 But you know, their pricing people are
5 pretty good. I have deposed them all now. They know
6 how to testify and they know what's going on. They
7 don't come in and say, you know, I confess that's how
8 I set my rates. You got it right, Mr. McBride. They
9 don't do it that way. So I have to prove my case
10 statistically.

11 The fewer piles I have, the less of a
12 statistical case I am going to have. The more I have,
13 the better. That's why I strove so hard to get more
14 utilities than just my own clients, to get more views,
15 and not just in destinations served by Conrail. You
16 ruled on those matters, I am not arguing that. But I
17 can't now limit myself even more from where you rule
18 either. I think you have just got to stick to the
19 rule and just tell them to produce what you previously
20 told them to produce.

21 I think you are exactly right. You are on
22 the right track. All this information is related.

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1 You ruled on the cost issue. I think the appeal on
2 that ruling will dispose of this entire matter because
3 from a legal point of view, sure we can talk costs
4 today and escalation tomorrow and tonnage the next day
5 and term the day after that, et cetera, et cetera.
6 It's all the same thing.

7 The issue is very simple. Are they
8 permitted to redact anything that's not privileged
9 from the documents you ordered produced under the
10 protective order? I submit the answer is no.

11 JUDGE LEVENTHAL: All right. Mr. Coburn?

12 MR. COBURN: Your Honor, I would propose -

13 -

14 JUDGE LEVENTHAL: Let me ask you this. If
15 we limit this to -- I assume you are not only
16 concerned with Mr. McBride's four clients, but you are
17 concerned it may spread over the entire universe of
18 people involved in this case. Is that your concern?

19 MR. COBURN: We certainly have some
20 concern along those lines, although I would point out
21 that there are dozens of parties in this case, perhaps
22 hundreds at this point, I haven't counted. We only

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1 have one party that is interested in all of this
2 information, including other utilities who are
3 apparently are not interested in it. But yes,
4 certainly we don't want the precedent out there to
5 encourage others to seek this kind of information.

6 JUDGE LEVENTHAL: Well let me ask this.
7 If I were to limit my ruling say to four clients that
8 Mr. McBride is representing, five, does it add every
9 day?

10 MR. McBRIDE: No, no, no. I listed five
11 to start. NYSEG and Niagara Mohawk have joined in
12 this, and Your Honor has included them you will recall
13 too.

14 JUDGE LEVENTHAL: So how many do we have
15 all together?

16 MR. McBRIDE: Seven. And Your Honor also
17 ruled by the way, that anybody else can join in this
18 by asking.

19 JUDGE LEVENTHAL: I know what I ruled.

20 MR. McBRIDE: I am not arguing with it, I
21 am just reminding you.

22 JUDGE LEVENTHAL: All right. Mr. Coburn,

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1 suppose we were to limit it say -- I started with
2 four. Let's say to the seven parties we have now.
3 Would that make it more palatable to you?

4 MR. COBURN: It would not, Your Honor.

5 JUDGE LEVENTHAL: I am not going to stop
6 you from appealing. I am not saying I want you to
7 agree not to appeal.

8 MR. COBURN: What Your Honor might -- it
9 would not, Your Honor. We are reluctant to provide
10 this information even as to --

11 JUDGE LEVENTHAL: But let's say I am going
12 to order you to produce the information. Does it help
13 if I limit it to seven rather than make it? Because
14 my ruling is open. Anybody who comes in can ask for
15 the same thing.

16 MR. COBURN: Yes. It's better than if you
17 opened the ruling to the universe, certainly. But it
18 doesn't resolve our problem.

19 JUDGE LEVENTHAL: No. I realize that. I
20 am not asking you not to appeal from any ruling that
21 I make if I rule against you.

22 How about it, Mr. McBride, suppose we

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1 limit it to seven. I think your people have a pretty
2 fair universe to create their theory.

3 MR. McBRIDE: Statistically, with all due
4 respect, Your Honor, and I could put Mr. Prescott on
5 the stand if you wanted me to attest to this, it isn't
6 possibly enough. It depends on how much data we get,
7 how many destinations and what have you.

8 But I will tell you this. You limited me
9 already to my clients. Then you included NYSEG. Ms.
10 Booth is here for Niagara Mohawk and you included
11 them. You have ruled on those seven. I don't
12 represent any other people who have an interest in
13 this, and neither does Mr. Mullins, as far as I know
14 neither does the Donelan Cleary firm. So you don't
15 need to rule on people who are not before you.

16 JUDGE LEVENTHAL: I do because somebody
17 else could come in next week.

18 MR. McBRIDE: But look, I can't -- yes.
19 Somebody could hire me next week and I would be back.

20 JUDGE LEVENTHAL: I am asking you whether
21 you would be satisfied. I am not asking you to speak
22 for unknown possible future movants.

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1 MR. McBRIDE: I'll take that today because
2 it's all I am entitled to today.

3 JUDGE LEVENTHAL: All right.

4 MR. COBURN: Your Honor, I have another
5 proposal that you might wish to consider, which is
6 that you not rule on this issue. We are going to be
7 filing our appellate briefs, perhaps the same briefs
8 with the Board on the cost issue. If we can have an
9 opportunity within the next day or two to supplement
10 those briefs to bring this issue before the Board as
11 well at the same time, and let the Board decide
12 without a ruling from you on this specific issue.

13 MR. McBRIDE: Why don't we do it this way.
14 I have a better idea. Since they were willing to
15 limit themselves to their brief and my reply. Let's
16 limit ourselves to their brief and my reply and the
17 cost issue. Let's give me the time that I need while
18 the Board ponders that and then let Your Honor be
19 informed by the Board's ruling.

20 But I ought to have these documents now
21 without any redactions, is my position. But for them
22 to now say now they are going to take a few more days

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1 and re-brief this thing, and then of course I would
2 have to re-brief my reply and then who knows how long
3 the Board will take to rule on all of this. Now they
4 are just buying more time and we have already had too
5 much delay already.

6 I am entitled to the documents now. I
7 will promise Mr. Coburn. I'll sign anything that says
8 this if he wants me to, even though I am already
9 committed to it under the protective order. We will
10 return all the material that we get in unredacted form
11 if the Board tells us we weren't entitled to it on
12 appeal. We'll return every bit of it, every single
13 page. We won't keep anything.

14 Of course the clients won't get it anyway,
15 but the consultants will get it in the interim and if
16 the Board says we weren't entitled to it, we'll get it
17 back from them and we'll give it back to the counsel
18 for the applicants.

19 I am under a deadline here. I can't agree
20 to open-ended things like this.

21 JUDGE LEVENTHAL: Your parties aren't
22 going to receive this information under any

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1 circumstances.

2 MR. McBRIDE: Wait a minute. I thought
3 Your Honor's thinking at the outset was just like with
4 those 12 pages I gave back this morning, they could
5 just give them to me. They have them. They have all
6 this stuff in unredacted form because they went to the
7 trouble of redacting it. So they could produce this
8 stuff probably --

9 JUDGE LEVENTHAL: No. That is not what I
10 am talking about. Under the highly confidential
11 designation, only you and the consultant get this
12 material. Your clients don't get it in any event.

13 MR. McBRIDE: Agreed. We are not arguing
14 about that. But all I am saying is we get it --

15 JUDGE LEVENTHAL: I am trying to move this
16 along for your benefit, Mr. McBride, so that we have
17 one appeal goes up on both issues so they don't have
18 an appeal on the order I have already issued and I
19 issue another order today and they have another appeal
20 on that.

21 I was suggesting that we combine
22 everything and let the Board.

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1 Now Mr. Coburn has suggested that I leave
2 this up to the Board to decide in the first instance.
3 How do you feel about that, Mr. McBride?

4 MR. McBRIDE: I thought you were
5 addressing Mr. Coburn.

6 JUDGE LEVENTHAL: You have a choice
7 between listening to me or --

8 MR. McBRIDE: I apologize.

9 JUDGE LEVENTHAL: Mr. Coburn has suggested
10 that I let the Board decide on this issue rather than
11 my ruling and appeal. I was asking how you feel about
12 it, but you don't have to answer because I don't like
13 it. So I don't think the Board wants to do that. I
14 mean that's why they have me here this morning, is
15 because they don't want to decide these things. They
16 will decide it on appeal because they must, but they
17 don't want to decide it initially.

18 I think rather than have this extended
19 argument and go on and argue about each one of these
20 documents, why don't I make my broad ruling now.
21 Order you to supply the material in unredacted form.
22 You go up on appeal. I think that's the fastest way

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1 to dispose of it, and I think everybody is working
2 under an expedited -- I mean I'm not working on an
3 expedited schedule except that I give you rulings as
4 promptly as I can, but both parties, both sides are on
5 an expedited schedule and I think you want to dispose
6 of this as rapidly as you can.

7 MR. EDWARDS: We most certainly do want to
8 dispose of this issue as rapidly as we can. We of
9 course had not agreed to restricting the earlier
10 briefs. Perhaps Mr. McBride misunderstood that we
11 were not -- but if I understand your ruling now, we
12 are combining everything for an order that you are
13 issuing today which we would be able to brief and
14 bring before the Board on an expedited basis with us
15 agreeing to a request or to be done on an expedited
16 basis. We would renew our request for a stay, again,
17 going back to the question of the cat out of the bag
18 with regard to all of this material.

19 JUDGE LEVENTHAL: You see, I was
20 considering your request for a stay provided that you
21 go right on up to the Board. But that you do it on
22 what you have already briefed.

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1 Your arguments, I have heard you. I have
2 listened to you carefully. Are exactly the same that
3 you are making today, that you made last week or the
4 week before, whenever we had the argument on the
5 redacted material to start with.

6 If you go up today to the Board, if you
7 appeal my rulings immediately without any further
8 briefing time, I would consider strongly giving you a
9 stay to the end of next week.

10 But if we are going to have you making
11 your motion within three days and then having them
12 answer within three days, you are not asking for a
13 week's stay, you are really asking for two, three,
14 four weeks stay.

15 MR. EDWARDS: Your Honor, we could commit
16 to filing the brief on Monday. Mr. McBride could
17 commit to filing the brief on Monday. We could ask
18 for an expedited schedule. We could have a decision
19 by Friday.

20 MR. McBRIDE: That won't work first for
21 two reasons. First of all, they do want to rewrite
22 this. Your Honor has already understood that clearly.

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1 Secondly, now they are asking me to reply
2 to their appeal in effect before I have seen their
3 appeal on Monday. We don't know that the Board is
4 going to rule by next Friday. I mean I think Your
5 Honor is right on the right track with saying well,
6 let the appeal be decided on the basis of the brief
7 and my reply that were filed before Your Honor. I am
8 not agreeing to a stay. I can't agree to any period
9 of time.

10 If they want a stay, it is going to be
11 over my objection unless they give me the same number
12 of days that it's going to take to resolve this matter
13 before the Board, and they won't agree to that. I
14 think my position on that is reasonable. I am not
15 asking for more time. I am simply saying if you are
16 going to delay this, then you ought to be willing to
17 delay my evidentiary presentation as well, and they
18 won't commit to that.

19 But they can not bind the Board to rule by
20 next Friday. For all we know, the Board members are
21 going to be traveling for something, or this will be
22 like that ARU petition and it will sit there for a

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1 month.

2 JUDGE LEVENTHAL: Well, I take it then you
3 don't want to go along with my proposal?

4 MR. COBURN: Well, Your Honor, with your
5 proposal, with the modification that we file
6 simultaneous briefs on Monday to inform the Board of
7 these other issues.

8 JUDGE LEVENTHAL: Well you have to inform
9 the Board of the new issues. I mean that's obvious.

10 MR. McBRIDE: And agree that they should
11 be resolved on the same basis. They are all the same.

12 MR. COBURN: And frankly, at this point,
13 the difference between today and Monday is not that
14 great. We couldn't get the briefs down to the Board
15 much before the end of the day anyway.

16 MR. McBRIDE: Sure we could.

17 JUDGE LEVENTHAL: Why do you have to brief
18 it though? Suppose we say that you agree upon this
19 appeal going forth on Monday. I think you are
20 entitled to a one-page explanation adding these
21 additional issues.

22 MR. COBURN: Right.

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1 JUDGE LEVENTHAL: But without further
2 briefing.

3 MR. COBURN: What I had envisioned is a
4 two to three -- something a little longer than that.
5 Two or three page letter in which we add the
6 additional issues and offer a little explanation as to
7 why we think the additional issues --

8 JUDGE LEVENTHAL: Well, let's go off the
9 record.

10 (Whereupon, the foregoing matter went off
11 the record at 10:40 a.m. and went back on
12 the record at 10:44 a.m.)

13 JUDGE LEVENTHAL: Back on the record. All
14 right, off the record I was trying to see if the
15 parties could agree on some procedure to expedite an
16 appeal from the ruling that I'll make this morning.
17 I have to say I met with complete failure.

18 All right. Do parties wish to make any
19 further arguments on the merits?

20 MR. COBURN: Just one other issue, Your
21 Honor, on the issue of the stay.

22 JUDGE LEVENTHAL: Let me tell you what I

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1 intend to do. I intend to give you a stay until next
2 Friday.

3 MR. COBURN: Okay, Your Honor.

4 JUDGE LEVENTHAL: All right?

5 MR. McBRIDE: Would you add the proviso,
6 I am not arguing that point, that they be prepared to
7 turn those documents over on Friday?

8 JUDGE LEVENTHAL: That I'll rule if they
9 appeal that to the Board. I mean so be it. If I give
10 them a stay until next Friday, my order said that they
11 should furnish the material forthwith. The order that
12 you haven't seen yet required them to provide it
13 forthwith. I'll make the same ruling. I'm going to
14 give them a stay until next Friday and I'll make the
15 same ruling.

16 MR. McBRIDE: Fine, but all I mean to say
17 is if the stay dissolves next Friday, could you have
18 this resolved at like 4:00 so I get the documents that
19 day?

20 MR. EDWARDS: Your Honor, I was going to
21 ask for clarification. Are we talking about 5:00 on
22 Friday, 8:00 on Friday morning? I mean we need to

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1 know that.

2 JUDGE LEVENTHAL: I was talking about
3 close of business on Friday. All right?

4 MR. McBRIDE: I do not agree to the stay,
5 but I agree to that definition of things given Your
6 Honor's ruling.

7 JUDGE LEVENTHAL: I am going to rule that
8 I find -- Mr. Norton, you haven't gotten into this
9 argument.

10 MR. NORTON: I just wanted to clarify
11 something. I don't think it bears on what your ruling
12 is going to be, but I didn't want the record to be
13 left with a possible misapprehension.

14 There were several statements made about
15 what Conrail has done or concerning redaction. In
16 fact, as I indicated at one of the hearings in early
17 August, we were going to do, we did redact a very
18 limited amount of information from documents
19 concerning Ohio Valley and Centerior which related to
20 a rate that a competing mine was quoting to Centerior.
21 These were redacted as I said in the hearing at the
22 request of the utility because it didn't want its

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1 competing sources to have that information. It wasn't
2 relevant to the issues that were being presented. We
3 did that, and I take it there has been no objection,
4 that that question has not been raised.

5 We also did redact cost information as the
6 other applicants did, but that will be governed by
7 Your Honor's ruling.

8 MR. McBRIDE: I appreciate the
9 clarification. I did not realize that he had, but I
10 don't want to ask Your Honor to rule on the first item
11 he brought to your attention today, the other mines
12 because he says Centerior objects. Of course it
13 wouldn't go to our client anyway, but he has also been
14 very candid that he redacted the cost stuff, which I
15 frankly hadn't even realized. I had been focusing
16 more in NS and CSX.

17 So obviously that would be encompassed by
18 your ruling. But I think the one category that he
19 identified, I don't think he had a right to redact,
20 but I understand what he said and I don't want to get
21 into an argument or have a ruling about that now. I
22 am not trying to pick another fight with Centerior

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1 here. So why don't we just leave that one over to the
2 side.

3 JUDGE LEVENTHAL: All right. Very well.
4 All right. I have heard all argument parties wish to
5 make.

6 I am going to find that the material that
7 we are arguing about, the redactions that we were
8 arguing about this morning -- let me give this back to
9 you before I forget. That the redactions we have been
10 arguing about this morning I find fall into the same
11 category as those that I have ruled upon in my
12 decision which I assume will be issued today.

13 I am going to further limit the applicants
14 in their appeal in that they have until Monday to
15 appeal from this order together -- from this ruling
16 that I am making this morning together with the ruling
17 that I have made on the redactions that I have
18 previously ruled upon.

19 Mr. McBride may have whatever time he
20 likes to respond to the appeal, but the stay that I am
21 giving will expire -- I am going to stay the
22 production of the redacted material that I have

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1 ordered furnished to Mr. McBride until close of
2 business on Friday, September 20?

3 MR. McBRIDE: Twelfth.

4 JUDGE LEVENTHAL: September -- I never was
5 good at math. My wife is a mathematician, but I'm
6 not. To close of business on Friday, September 12.

7 I think we have to have one more thing.
8 I think you have to get your answer in promptly. If
9 you want the stay to expire on Friday, you have to get
10 your answer to whatever they file on Monday in
11 promptly. Is Tuesday too short a time for you?

12 MR. McBRIDE: You see, we do have a
13 deposition scheduled that day. But I will try to
14 abide by this.

15 I wonder if Your Honor would modify
16 something just ever so slightly. Make them file their
17 appeal by 2:00 on Monday. I can try to get mine
18 filed, my reply filed by 2:00 on Tuesday. One of the
19 reasons I am asking for this is in addition to a
20 deposition, I am supposed to be on an airplane to go
21 meet with a client on Tuesday evening. So I am going
22 to try to get this done in a day and having somebody

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1 else do the deposition. But if they will have it in
2 my hands as well as filed by 2:00 on Monday, we'll try
3 to follow the reply by 2:00 on Tuesday.

4 JUDGE LEVENTHAL: All right. So ordered.
5 All right. Then you have -- my order is clear? My
6 ruling is clear and you have a stay until close of
7 business on Friday.

8 MR. McBRIDE: Would you say 5:00, Your
9 Honor, just to --

10 JUDGE LEVENTHAL: I assume 5:00 is close
11 of business. It is close of business here at the
12 Commission.

13 MR. COBURN: Your Honor, just one other
14 thing. We will commit to calling the Secretary of the
15 Board today and alerting him to the briefs that are
16 about to befall the Board, and to the fact that the
17 stay would expire on Friday, in the hopes that the
18 Board would rule by Friday.

19 JUDGE LEVENTHAL: All right. That is
20 reasonable.

21 MR. McBRIDE: Oh sure. They can inform
22 the Secretary. That's fine. I gather that what Your

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1 Honor is ruling then is if the appeal is not granted,
2 at 5:00 Friday I get all these same documents
3 unredacted.

4 JUDGE LEVENTHAL: That is my ruling.

5 All right. Now what's left?

6 MR. McBRIDE: Three items. The two I
7 brought to your attention and the third Mr. Harker
8 brought to your attention. They are all sort of
9 related. That is, NS now has some tapes from the 1980
10 to 1984 period. They say they have not reviewed them.
11 CSX has some tapes from the 1980 to 1982 period.
12 Apparently they say they just found them. So I gather
13 they haven't reviewed them. Gosh, we're --

14 JUDGE LEVENTHAL: What do you want me to
15 do?

16 MR. McBRIDE: I want you to order them to
17 give them to me next Friday or complete their review
18 and give me from those tapes what I am entitled to
19 within the scope of your prior ruling, one way or the
20 other.

21 MR. HARKER: Your Honor, on behalf of CSX,
22 I think that we can adhere to that time schedule and

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1 maybe even do a little bit better. We're not going to
2 give Mr. McBride the 1980, 1981, 1982 tapes before we
3 review them, and he is going to get the information
4 that's responsive to his requests that's on those
5 tapes. But I understand from talking to CSX that
6 that's a process they think they can finish by next
7 Friday.

8 JUDGE LEVENTHAL: All right.

9 MS. BRUCE: And Your Honor, for NS, I
10 would just like to for the record say that NS has been
11 working diligently to try to locate these tapes, as
12 we've said in our letter to Mr. McBride. The problem
13 is is they are month to month. Each tape is on a
14 month. Some of the months overlap.

15 I was informed by the people that are
16 working on this, who are the IT people in Roanoke, not
17 just the lawyers who are doing this, but we have IT
18 people, information technology people because it is
19 old information, that needs to be converted to a
20 format that they can start feeding up the tapes on
21 year to year basis. They are reviewing every year,
22 all 12 tapes for each year. They can start to feed

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1 those up to us by the beginning of next week. I think
2 on Tuesday, Mr. McBride will be able to have 1984.
3 Then we'll go backwards from there.

4 They told me they think every few days
5 they will be able to feed up a diskette for him to
6 review on a year to year basis. We did that to try to
7 expedite the process, to strike accusations to the
8 contrary.

9 JUDGE LEVENTHAL: All right. Mr. McBride?

10 MR. McBRIDE: They have been vigilant. I
11 have said that at the outset, and I said it in my
12 letter. I am not impugning counsel here at all. I
13 appreciate what she just said. We'll live with it
14 precisely as she stated it.

15 I just want to say for the record so there
16 is no confusion on this, please direct these materials
17 to my secretary, Donna Mercer Jones, because Ms.
18 Durham has two weeks of duty to her country over the
19 next two weeks. If they go to her, they might get
20 lost. I am doing depositions and traveling. But they
21 will get them to my secretary, we can keep this
22 process moving.

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1 JUDGE LEVENTHAL: All right.
2 MS. BRUCE: That's fine, Your Honor.
3 JUDGE LEVENTHAL: All right. Very well.
4 What else do you have, Mr. McBride?
5 MR. McBRIDE: That's it.
6 JUDGE LEVENTHAL: That's it.
7 MR. McBRIDE: I think Mr. Mullins is up
8 next.
9 JUDGE LEVENTHAL: All right.
10 MR. McBRIDE: Thank you, Your Honor.
11 JUDGE LEVENTHAL: Sure. Anybody want a
12 recess?
13 MR. MULLINS: I'll take a five minute
14 recess.
15 JUDGE LEVENTHAL: Five minute recess, all
16 right. A five minute recess.
17 (Whereupon, the foregoing matter went off
18 the record at 10:55 a.m. and went back on
19 the record at 11:04 a.m.)
20 JUDGE LEVENTHAL: All right. The oral
21 argument will come back to order. I am going to
22 further limit the ruling that I had just made to the

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1 seven shippers that have presently asked the same
2 information. That is, Niagara Mohawk, New York State
3 Electric and Gas, and the five shippers represented by
4 Mr. McBride.

5 All right. To further clarify my ruling,
6 I am not now ruling out any other motion, any other
7 party to this proceeding may make. I am just ruling
8 that while my previous rulings have been universal in
9 nature, this ruling applies only the seven shippers
10 that are presently involved in this proceeding before
11 me now.

12 All right. Mr. Mullins?

13 MR. MULLINS: Your Honor, we had a very
14 similar problem. However, due to discussions between
15 myself and Mr. Edwards, at least Mr. Edwards speaking
16 on behalf of Norfolk Southern, and quite frankly, due
17 a lot to what you have just ruled on this morning,
18 probably that takes care of about half or three-
19 quarters of our concerns this morning.

20 The brief issue was that you had ordered
21 that they give us everything that you had ordered for
22 ACE. They were giving things to Mr. Crowley and the

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1 consultants and then putting redacted versions --
2 well, the stuff that they were giving to Mr. Crowley
3 had redactions in it as well, as we just learned this
4 morning, not only cost redaction but other redactions.
5 Then they would put that same document in the document
6 depository, but then do further redactions.

7 So when we would go to get the document
8 from the document depository, we would get the
9 redacted redacted version. We were having a big
10 dispute about you know, we wanted to see, consistent
11 with your order, everything that you had given to ACE.

12 We have since learned though because based
13 upon my discussions with Mr. Edwards and Mr. McBride
14 and the discussions that went on this morning, and on
15 top of the fact that we did go to the document
16 depository and we reviewed all the documents that you
17 had ordered produced for ACE, et al, we went to those
18 document depositories to try to determine if Your
19 Honor's order, whether those documents were going to
20 help our cause.

21 If you'll recall from last week, you said
22 Mr. Mullins, the documents I'm ordering, can't that

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1 help your theory. Why don't you go, Mr. Mullins, look
2 at the document depository, and then come back and
3 talk to me. Let's see if that resolves your concern.
4 Quite frankly, it doesn't. There's a reason why that
5 is.

6 That is because you ordered the documents
7 that relate to Mr. McBride's client, NYSEG and NIMO
8 for destinations served by Conrail, meaning that for
9 the plants that are not destinations served by
10 Conrail, they didn't have to produce those documents.

11 For NYSEG's situation, the only parties
12 that are going to have the documents are Conrail.
13 Conrail has I think responded they placed copies of
14 our contracts into the document depository, unredacted
15 versions of our contracts in the document depository
16 which we don't object to, because it's highly
17 confidential.

18 I don't care who Mr. McBride and his
19 consultants go see it or anybody else who is a highly
20 -- you know, outside counsel or outside consultant.

21 CSX has not told us whether or not they
22 found any documents responsive to -- this is just

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1 NYSEG's situation. NS says they have looked, they
2 don't have any documents.

3 So our letter where you -- our first
4 letter where you said okay, I'm going to throw NYSEG
5 in with the ACE panel and you guys go find documents
6 relating to NYSEG, we still haven't even got an answer
7 from CSX on whether or not they have even got any
8 documents.

9 But I am getting a little bit ahead of
10 myself because that goes to my second thing that I
11 want to bring up to you today, which deals with the
12 timing and the response and when they should be
13 ordered to actually respond.

14 Going back to this issue of Mr. Mullins,
15 go look at the documents, are they responsive to what
16 you are trying to accomplish. This is basically
17 related to interrogatories one through five in NYSEG
18 Three, where we are asking for them to identify the
19 contracts, produce communications related to those
20 contracts. We had a big debate about what you were
21 trying to accomplish, Mr. Mullins. Then you said, go
22 look at documents. We have done that. They don't

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1 answer our concern.

2 If I could just take a little bit of time
3 to walk you through why it doesn't answer our
4 concerns, we can deal with that. For one thing, the
5 only -- this goes to the fact that you have limited it
6 to only destinations served by Conrail. There is only
7 one plant that AEP, one of Mr. McBride's clients, the
8 parent company there of one of Mr. McBride's clients,
9 they only have one plant that would be responsive to
10 that order that they are having to produce.

11 Indianapolis Power and Light only has two
12 plants that would be responsive to that order. These
13 are plants, not companies. These are just plants.
14 These plants, by the way, are served by Conrail.

15 Then for Atlantic City Electric and
16 Delmarva, you have the situation, I think I have drawn
17 this diagram before, but you have it where you have
18 CSX, NS, Conrail, and this is the plant. Now what you
19 have ordered them to produce is documents related to
20 this plant, but only for Mr. McBride's clients, and
21 again for AEP and Indianapolis Power and Light, that's
22 only one plant and two plants.

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1 For Delmarva and Atlantic City Electric
2 there is I think two plants that are involved for both
3 of those. Mr. McBride can correct me, but we have
4 gone and looked at all the documents. What those
5 documents do show is how CSX and Conrail or how CSX
6 views competition for a joint line haul between CSX
7 and Conrail to the plant.

8 It also shows how NS views competition
9 like that. So it does show them, how they consider
10 themselves competing for this plant. But that
11 competition is in conjunction with Conrail. That is
12 not our situation.

13 I have kept trying to explain that we are
14 not your classic one lump shipper. We are not this
15 kind of shipper. We don't get coal right now from CSX
16 or NS. We never have for 20 some years, ever since
17 the creation of Conrail.

18 What we are concerned about and what is
19 not included in this document is CSX comes here,
20 there's a plant right there, of course then CSX goes
21 there. NS comes here and there's a plant right here.
22 This is NS. This could basically be utility company

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1 number one, this is utility company number two, or
2 they could be different plants of the same utility.
3 It doesn't really matter because this is our situation
4 post-transaction.

5 Post transaction, NYSEG is having their
6 plants divided like this, where CSX would serve one of
7 our plants, NYSEG and Norfolk Southern would serve our
8 other plant. It's actually three plants. We have a
9 plant like this. They tell us in their application
10 and in their witness statements that we shouldn't
11 worry because we are going to get the benefit of the
12 fact that CSX and NS are going to compete for these
13 plants.

14 They are saying don't worry about it, what
15 are you guys complaining about. You are going to have
16 two railroads competing for service to your plants.
17 Well, Your Honor, that's what we want to find out.
18 Their witnesses have said you know, Southern Company
19 does this, plays us against each other like this all
20 the time. Virginia Power plays us against us all the
21 time like this. So you are going to be able to do the
22 same thing.

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1 So all we are trying to ask for, Your
2 Honor, is trying to test that. We are just trying to
3 get into the documents to see if this is in fact the
4 case. You know, if it is the case, if it's true and
5 that we could do it, then maybe NYSEG would say great,
6 we're getting two railroad competition. Let's get out
7 of this case.

8 But if we can't do it, that goes right to
9 the issue of the fact that we are going to be harmed
10 by the competition, by the transaction.

11 So under the diagram, you can see, Your
12 Honor, how this information that I am really trying to
13 search for is not included in the information that you
14 have requested for ACE. So what we are trying to do,
15 and I am willing to limit this, Your Honor. I am
16 willing to work with you and with the other side to
17 try to limit this to their top five utility companies,
18 you know maybe even the top three. I am willing to
19 work with them on some sort of limitation.

20 I am not just trying to come in here and
21 throw some burden on them and all that kind of stuff
22 because this is stuff we really need. It is not in

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1 the ACE stuff because we're not in the same situation
2 as ACE. That's why I came back to you today, Your
3 Honor.

4 We had all that other problem, which you
5 resolved. Mr. Edwards and I would resolve. But that
6 has to do with redactions and all that. But this is
7 really the heart of the matter of what we were asking
8 for. So that is why we have come back to you to
9 revisit that.

10 Then once we deal with this issue, we
11 would like to deal with the sort of the timing delay,
12 lack of production, things that you have already
13 ordered to be produced.

14 JUDGE LEVENTHAL: What information are you
15 seeking here?

16 MR. MULLINS: Pardon me, sir?

17 JUDGE LEVENTHAL: What information are you
18 seeking here?

19 MR. MULLINS: We want to know if it is
20 true that when CSX is trying to determine a rate for
21 this plant right here, and when NS is trying to
22 determine a rate for this plant right here, that CSX

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1 and NS do view themselves as competitors. Because
2 they say they are going to be competitors.

3 JUDGE LEVENTHAL: What documents do you
4 want them to produce?

5 MR. MULLINS: I would like them to produce
6 the information that is related, to get the internal
7 communications that lead up to the contract that they
8 entered into for the transportation of coal to this
9 plant or this utility company. Because that is going
10 to tell me, Your Honor, whether or not they themselves
11 view themselves as competitors in that market.

12 JUDGE LEVENTHAL: All right. Who is
13 replying?

14 MR. HARKER: Well, Your Honor, first of
15 all, Mr. Mullins, despite his offer to narrow this,
16 has on the table a very broad request. That is what
17 we objected to when we filed our initial objections.

18 In fact, his request would go to the
19 entire universe of coal contracts. His request number
20 one, identify and produce all contracts between or
21 among any of the applicants for delivery of coal to
22 any shipper whereby the amount of coal delivered

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1 exceeded or is expected to exceed 100,000 tons per
2 year.

3 So his request is not so narrowly defined
4 as he has indicated there.

5 JUDGE LEVENTHAL: Well, how can we narrow
6 it down? What are you willing to give him?

7 MR. HARKER: Well it seems to me that we
8 should first of all get off the table any kind of
9 situation that doesn't fit his scenario. That is, to
10 say one company with two different railroads serving
11 different plants in the company, I mean as a starting
12 point. Because he has already said that the top
13 diagram, the situation described in the top diagram,
14 his paradigm there doesn't help him, the ACE documents
15 and so on.

16 So to say that his discussion about or his
17 offer to limit it to the top three or five, I'm not
18 sure if the top three or five are going to fit into
19 Mr. Mullins', the paradigm that Mr. Mullins is
20 concerned about now. That is to say one company, but
21 with more than one plant being served by CSX and NS.

22 So I guess in order to satisfy Mr.

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1 Mullins, he wants information where CSX and NS have
2 competed head to head to serve different plants within
3 the same company. Right?

4 MR. MULLINS: That's absolutely.

5 MR. HARKER: And I am not in a position
6 here to argue or to offer that for my client because
7 I do not know how burdensome that would be. I mean we
8 have just been dealing with Mr. Mullins' very broad
9 requests and having tried ourselves to formulate what
10 it is that he is looking for. We are still trying to
11 figure that out ourselves. Today is a start in that
12 direction.

13 So I guess in answer to your question,
14 Your Honor, I am not in a position to offer anything
15 at this point because I have not been authorized to.

16 MR. EDWARDS: Additionally, Your Honor, as
17 spelled out in our letter responding to Mr. Mullins,
18 we had understood that you had --

19 JUDGE LEVENTHAL: Tell me where in your
20 letter that you are talking about.

21 MR. EDWARDS: Yes, Your Honor. It's the
22 colloquy that is reproduced beginning in the middle of

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1 page two in which you state that "I am going to rule
2 on NYSEG's that NYSEG is entitled to receive the same
3 information that I have previously ruled, that ACE can
4 receive." Then you go on briefly after that saying
5 all right, that's number one and number two.

6 Then there is a series of clarifications
7 from Mr. Mullins about that. That ruling was made
8 several days ago. It hasn't been appealed. So it is
9 our understanding that in fact that was off the table.
10 In fact, only at that same hearing we have a
11 discussion as in fact what was deferred to today.
12 That colloquy appears in footnote number one, where
13 Mr. Mullins points out that I think that he would be
14 happy to go ahead and defer to questions as to three,
15 four, and five.

16 With regard to number three, four, and
17 five, those interrogatories or discovery requests deal
18 with shippers whose rates have been decreased during
19 a time period applicable to requests or where they
20 could have been increased but were not. We understand
21 that Mr. Mullins is willing to discuss limitations and
22 I think that it might be beneficial for us to consider

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1 those limitations on those requests.

2 But with regard to interrogatory number
3 one and two, I believe that the order was issued and
4 not appealed.

5 MR. MULLINS: Your Honor, what he is
6 saying is that one and two you have ruled on and it's
7 only three, four, and five that you have deferred and
8 allowed me to come back on. One through five though
9 are all --

10 JUDGE LEVENTHAL: All right. Let's see if
11 we can cut this down.

12 I understand that they are willing to
13 consider your limitation. The problem is they aren't
14 aware exactly what it is that you want. They want
15 some time to speak to their client. Do you want to
16 see if you can reach an agreement and then come back
17 next Thursday if you can?

18 MR. MULLINS: No, Your Honor. I will tell
19 you why. We don't --

20 JUDGE LEVENTHAL: What do you want me to
21 rule on is what I don't know. You are saying you are
22 willing to limit it to three shippers. They are

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1 saying well, we haven't heard that before. We have to
2 go back and speak to our client.

3 MR. MULLINS: It's not true that they
4 haven't heard it before because in the conference that
5 we were here last week on, we offered to limit it,
6 these same exact limitations. At that point, they
7 were just arguing that you can get those documents
8 from the ACE documents, Mr. Mullins. In fact, we
9 discussed all of these limitations in your transcript,
10 these exact same limitations.

11 Their argument to you was you can get this
12 from the ACE documents. You agreed. You said Mr.
13 Mullins, go look at the ACE documents and then come
14 back. We have done that, Your Honor. This is what
15 the ACE documents show. But it doesn't show this.

16 So look, I can suggest a way right now
17 which is in their own application. They say that
18 Southern Company does this against them and that
19 Virginia Power does this, you know, is able to play
20 them off of each other for shipments. Give me the
21 Virginia Power files and give me the Southern Company
22 files and let me test whether or not what you said.

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1 That's just two right there that they themselves --

2 JUDGE LEVENTHAL: Are you satisfied with
3 those two?

4 MR. MULLINS: If they would commit to me
5 that -- yes. I am satisfied with those two. Yes,
6 absolutely, because they say that. So let's test it.

7 JUDGE LEVENTHAL: All right.

8 MR. EDWARDS: Your Honor, it may be
9 worthwhile for us to spend five minutes off the record
10 to discuss what's on the table at the moment. We were
11 searching diligently before. We haven't seen some of
12 this, and we need to consider it. Five minutes would
13 probably help quite a bit.

14 JUDGE LEVENTHAL: You want to confer
15 amongst yourselves?

16 MR. EDWARDS: Yes, Your Honor.

17 JUDGE LEVENTHAL: All right. Fine. We'll
18 go off the record, recess. We have room for you to
19 discuss. You can discuss it here or go out into one
20 of the other rooms.

21 All right. We are in recess.

22 (Whereupon, the foregoing matter went off

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1 the record at 11:26 a.m. and went back on
2 the record at 11:33 a.m.)

3 JUDGE LEVENTHAL: Are you ready to go back
4 on the record? All right. Oral argument will come
5 back to order.

6 Mr. Coburn?

7 MR. COBURN: Your Honor, Mr. Mullins has
8 made a proposal with respect to the production of a
9 certain category of documents from the files of
10 Virginia Power and Southern Company. Subject to
11 further discussion with our clients and further
12 refinement of the proposal with Mr. Mullins, I think
13 we can accomplish if not today, then Monday. We are
14 prepared to pursue those discussions, take it back to
15 our clients and I think perhaps we have the framework
16 for a resolution of his requests, numbers one through
17 five.

18 We are prepared also to say that in the
19 event we can't work it out with Mr. Mullins over the
20 next day or two, that we would schedule a conference
21 for Tuesday afternoon, perhaps, Tuesday at whatever
22 time is convenient for you to, if we have to bring it

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1 back to you. But I think we have the framework of
2 some good possibilities.

3 JUDGE LEVENTHAL: Mr. Mullins?

4 MR. MULLINS: It sounds promising. During
5 the recess, I was thinking that, Your Honor, since
6 they themselves have mentioned Virginia Power and
7 Southern, they have obviously had some sort of peak at
8 these files in order to be able to establish what they
9 said in their verified statements and depositions was
10 true.

11 That doesn't allow me some sort of control
12 check. I was thinking maybe if it would be okay that
13 we add a third shipper so that we can -- you know,
14 somebody that they haven't vetted, you know, that they
15 haven't -- do you see what I am trying to say though?
16 I mean because they have already vetted Southern and
17 Virginia, so if the files, if it's true then those
18 files are going to say it. But what if there is some
19 other utility company out there that doesn't, where
20 they have said that they can't do this to.

21 Originally I started at five, and now I
22 down to two. So I am thinking three is fairly

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1 reasonable since they mentioned two, you know. I want
2 one they didn't mention, in other words.

3 JUDGE LEVENTHAL: All right. Do you have
4 a reply?

5 I was going to suggest, why don't we do
6 this. Why don't we schedule another conference for
7 Tuesday. I am available whatever time you like. If
8 you want to make it 9:30, fine. But I think maybe we
9 are better off doing it in the afternoon, say 1:30?

10 MR. McBRIDE: Could you make it just a
11 little later in case we're all trying to meet that
12 2:00 p.m. filing deadline for the replies?

13 JUDGE LEVENTHAL: What time do you want?
14 I am available all day. I'll do whatever you want me
15 to do.

16 MR. McBRIDE: Say 2:30.

17 MR. MULLINS: 2:30 is fine.

18 JUDGE LEVENTHAL: We shouldn't need a lot
19 of time on Tuesday. I mean I can't believe there will
20 be an extended argument. We would want it so that we
21 have something on the record and a ruling.

22 So why don't we do that, 2:30 on Tuesday.

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1 All right. So we'll defer further consideration of
2 this until Tuesday afternoon at 2:30.

3 Ms. Reporter, will you see that your
4 company supplies a reporter at that time? So we don't
5 have to call the reporter. All right?

6 All right. That disposes of -- we're
7 deferring disposition of that argument until Tuesday
8 at 2:30. Off the record.

9 (Whereupon, the foregoing matter went
10 briefly off the record)

11 JUDGE LEVENTHAL: That's Tuesday,
12 September 9, 1997.

13 Now with respect to timeliness of
14 responses, I generally expect material to be furnished
15 as soon as possible after I make a ruling. I don't
16 set a time limit because I think parties are operating
17 in good will. I don't believe anybody is purposely
18 delaying the furnishing of any material.

19 I don't know what kind of an order you
20 want me to make, Mr. Mullins.

21 MR. MULLINS: It is always helpful if you
22 do put in some sort of deadline.

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1 JUDGE LEVENTHAL: What do you want? Tell
2 me.

3 MR. MULLINS: Well let me just -- okay.
4 I think that you know, what is happening here is we
5 are having this pattern. They get 15 days to respond.
6 Then they respond. Then we have a week go by while we
7 go and argue in front of you. Then you rule that they
8 have to produce it. Then another two weeks go by and
9 before things are actually in place.

10 So what you are looking at there is a
11 total time of seven to eight weeks before something is
12 actually produced. This is becoming a serious problem
13 because we only have 45 days left.

14 Now I filed 20 interrogatories, well, I
15 filed the letter first. Then I filed 20
16 interrogatories the next day. Now this was all back
17 in August 12 and August 13 that I filed all this. To
18 this date, Your Honor, the only people that have
19 responded are Conrail, by placing copies of the NYSEG
20 contracts into the document depository, and Norfolk
21 Southern, by producing two studies and some letters
22 from some congressmen and senators. CSX hasn't given

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1 me a piece of paper yet.

2 JUDGE LEVENTHAL: What do you want me to
3 do? I am ready to do something for you, but tell me
4 what it is.

5 MR. MULLINS: I would like a ruling that
6 they have to produce all these documents that you have
7 already ordered previously produced by next Friday.

8 JUDGE LEVENTHAL: All right. Any problem?

9 MR. HARKER: Your Honor, I don't think
10 that would be a problem, but yes, I think that we are
11 making diligent efforts. In Mr. Edwards' letter that
12 he sent to Mr. Mullins last night, there was a
13 paragraph in there describing what we were doing to
14 find files. In fact, we made a representation that
15 today material would be going into the depository
16 responsive to Mr. Mullins' request.

17 I would only note that with respect to the
18 material or the interrogatories and document requests
19 which were the subject of our five day objections, as
20 I recall, each one of those as a result of the hearing
21 was narrowed. So we really didn't start searching for
22 those records until -- we had no reason to begin

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1 searching for those records until after last Thursday
2 when Your Honor held this hearing.

3 As I say, as it turns out at least you
4 found our objections to be in part meritorious. As we
5 represented to Mr. Mullins, we are searching for
6 records responsive to those particular document
7 requests.

8 With respect to the document requests that
9 were not objected to and which were answered last
10 week, again, I think Mr. Edwards' letter is very
11 clear. We said that we're not aware of any studies
12 that are responsive to requests 13, 18 and 19. We
13 have not been sitting on our hands. We have been
14 looking for things. We haven't found them. But
15 that's not to say that we're done with our search.

16 As I say, with respect to document request
17 number 20, we have represented to Mullins that
18 documents will be going in no later than the close of
19 business today.

20 Let me just say one thing. With respect
21 to the informal request of Mr. Mullins dated August 6
22 or August 7, something like that, that basically the

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1 me too request, joining onto Mr. McBride's earlier
2 discover, CSX tells me that they have no documents nor
3 tape information relating to NYSEG.

4 No surprise, because I think everybody
5 understood that CSX didn't serve NYSEG. But in any
6 event, it's on the record. Mr. Mullins, you just got
7 your representation.

8 But I think that with that background in
9 mind, I think that we can commit to putting material
10 in the depository by next Friday.

11 But as Mr. McBride pointed out before, we
12 have just found tapes that actually turn out to be
13 responsive to his prior requests. I represented on
14 the record in good faith, because I was told not by
15 just one person, but by a number of people at CSX that
16 in fact the company didn't have information in 1978,
17 1979, and 1980. Actually I guess 1978 through 1982.
18 I believed it because I had no basis otherwise. But
19 the company did continue to look. They found the
20 tapes.

21 Now should I be criticized? Should I be
22 penalized because I made a good faith representation

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1 to Mr. McBride and my client continued to look for the
2 tapes, and low and behold they found them? I don't
3 think so.

4 Similarly, we'll make a good faith effort
5 as we have been doing to put everything in the
6 depository by next Friday. But you know, if we find
7 something the following week that we hadn't
8 anticipated, I don't want to be criticized for that.
9 I mean I don't think that is what you have in mind.

10 But on that basis, I can make a
11 representation that next Friday makes sense. That is
12 what we will shoot for. In fact, we're going to put
13 some material in today.

14 JUDGE LEVENTHAL: All right.

15 MR. NORTON: Your Honor, if I might just
16 add another perspective. I was involved in UP SP
17 proceedings for the applicants. We responded to 1,200
18 discovery requests there, which I thought set a mark
19 that would not be approached in modern history. Last
20 night, Mr. McBride served his seventh or eighth
21 request on behalf of another one or another of his
22 clients which took us over the 1,000 mark. We're not

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1 nearly done with discovery. We have been responding
2 to an enormous volume of discovery right along,
3 diligently and as timely as I think can reasonably be
4 expected given the volume and the scope.

5 I think that has to be kept in mind, that
6 there is an awful lot that's been going on that you
7 are not seeing because we're getting a lot of
8 requests, we're responding to them. People don't have
9 problems, but it keeps everyone very busy.

10 JUDGE LEVENTHAL: All right. Mr. Mullins,
11 are you satisfied?

12 MR. MULLINS: I am satisfied. Just for
13 the record, again, CSX hasn't given me one piece of
14 paper. They say well they are going to put something
15 in today. It's only responsive to one interrogatory.
16 That interrogatory was give me copies of the letters
17 you have sent to governors and senators and
18 congressmen. So you know, this --

19 JUDGE LEVENTHAL: But you see, you are
20 raising a problem that I really don't know the
21 solution to. I mean I can make -- the guidelines
22 don't provide for any time limit on producing

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1 information after I make a ruling. I expect parties
2 to operate in good faith. I expect them to furnish
3 material as fast as they can. But I keep in mind that
4 we are all only human and if they can't do it, they
5 can't do it.

6 I would think that after I make a ruling,
7 parties should be able to produce material within a
8 week.

9 MR. MULLINS: That is basically all I am
10 asking too. I think that's fair and reasonable.

11 JUDGE LEVENTHAL: All right. Well that's
12 our understanding. Of course if a party finds that
13 they can't, they just simply can't find the material
14 though they have made a good faith search, you don't
15 want me to sanction them, do you?

16 MR. MULLINS: Not for that.

17 JUDGE LEVENTHAL: No. Of course not. So
18 I think we are on the right track. If you have a
19 specific problem, you bring it before me again. We
20 meet virtually, well, I think we have been meeting
21 every single week. I am here, available to settle
22 disputes. If you need conferences other than our

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1 previously scheduled conference, I certainly will try
2 to --

3 MR. MULLINS: We may have to start taking
4 advantage of that.

5 JUDGE LEVENTHAL: I'll certainly try to
6 accommodate you in so far as my schedule permits. But
7 as I told you, we can always arrange time things.

8 So I don't think we have a problem. But
9 right now you have a commitment they will do their
10 very best to furnish all the information I have
11 ordered by next Friday.

12 MR. MULLINS: That is all I wanted, Your
13 Honor. Thank you.

14 JUDGE LEVENTHAL: All right.

15 MR. MCBRIDE: May I just say that I hope
16 Mr. Harker understood that I was praising him earlier
17 for his continuing efforts to find those tapes and not
18 being critical.

19 On the point of perspective, I just
20 somehow had a feeling that this was going to get snuck
21 in here. So I brought along what I served last night.
22 I don't want you to think somehow that I am

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1 responsible for the hounding discovery requests.

2 MR. NORTON: That's not the one.

3 MR. McBRIDE: One interrogatory and one
4 document request.

5 MR. NORTON: That wasn't the one that took
6 us over the top.

7 JUDGE LEVENTHAL: Well you know, you say
8 that each time the responses grow. I remember when a
9 four minute mile was a big accomplishment. Now today,
10 I almost do it. All right. Anything else before us?

11 MR. McBRIDE: Thank you.

12 JUDGE LEVENTHAL: All right. We stand
13 closed.

14 (Whereupon, at 11:47 a.m., the proceedings
15 were concluded.)

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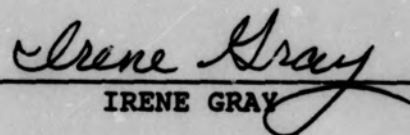
This is to certify that the foregoing transcript in the matter of: CSX Corporation and CSX Transportation, Inc., et al., Finance Docket No. 33388

Before: Surface Transportation Board
The Honorable Jacob Leventhal
Administrative Law Judge

Date: Friday, September 5, 1997

Place: Hearing Room 3
Federal Energy Regulatory Commission
888 First Street, N.E.
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represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.


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