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ORAL ARGUMENT

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

Finance Docket  
No. 33388

Wednesday,  
September 17, 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 1:30 p.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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

2 (1:30 p.m.)

3 JUDGE LEVENTHAL: All right, the discovery  
4 conference will come to order. We will take  
5 appearances at this time for the Movant.

6 MR. MCBRIDE: Good afternoon, your Honor.  
7 I'm Michael F. McBride with LeBoeuf, Lamb, Greene, &  
8 MacRae, L.L.P. for American Electric Power, Atlantic  
9 City Electric Company, Delmarva Power & Light Company,  
10 Indianapolis Power & Light Co., the Ohio Valley Coal  
11 Company and thank you for accommodating us on a  
12 Wednesday.

13 JUDGE LEVENTHAL: Sure. All right.  
14 Applicants?

15 MR. EDWARDS: John Edwards, Zuckert,  
16 Scoutt & Rosenberger for Norfolk Southern. And your  
17 Honor, before we -- after we've done the appearances  
18 we have a brief preliminary matter for your Honor.

19 JUDGE LEVENTHAL: Sure.

20 MR. HARKINS: Drew Harker with Arnold &  
21 Porter on behalf of CSX.

22 MS. BRUCE: Patricia Bruce, Zuckert,

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1 Scoutt & Rosenberger on behalf of Norfolk Southern.

2 MR. NORTON: Gerald Norton, Harkins  
3 Cunningham for Conrail.

4 MR. COBURN: David Coburn, Steptoe &  
5 Johnson for CSX.

6 JUDGE LEVENTHAL: All right, your  
7 preliminary matter?

8 MR. EDWARDS: Yes, it's a factual matter,  
9 request for clarification, your Honor, whether or not  
10 Mr. McBride's consultants have access to the 1990 --  
11 1978-1996 weighbill data as for the Commission's -- or  
12 the Board's regulations and whether or not he has  
13 asked for the masking factors under that procedure.

14 JUDGE LEVENTHAL: Isn't that what this  
15 discovery conference is --

16 MR. EDWARDS: No, your Honor. In Part  
17 1244 of the Board's regulations there is a procedure  
18 for gaining access to the weighbill sample data for  
19 formal proceedings before the Board. And we are  
20 wondering if they haven't, then this hearing is moot.

21 JUDGE LEVENTHAL: You mean, if they  
22 haven't complied? Is that what you said?



1 MR. EDWARDS: Yes, if they have not asked,  
2 received access from the Board with regard to this --  
3 the data.

4 JUDGE LEVENTHAL: All right, Mr. McBride?

5 MR. MCBRIDE: We -- as I understand it,  
6 the LA Peabody firm has requested the highly  
7 confidential weighbill samples and the accompanying  
8 answers and questions. I didn't make the request. I  
9 don't have it in front of me. But they did make a  
10 request in accordance with the Commission -- the  
11 Board's regulations.

12 JUDGE LEVENTHAL: All right.

13 MR. COBURN: I'm not sure it answers the  
14 questions fully because the second part of the  
15 question was whether in making the request to the  
16 Board under its own regulations with respect to  
17 weighbill data, the masking factors were requested and  
18 how the Board might have responded to that request,  
19 there are regulations.

20 MR. MCBRIDE: A, I didn't make the request  
21 so I don't know. B, this wasn't in their brief, so  
22 they surprised -- and C, they have not cited any



1 authority under which even if the request was not made  
2 for the masking factors, I can't ask the Board for  
3 them, which is what I've done and what we are here to  
4 talk about.

5 JUDGE LEVENTHAL: Mr. Coburn?

6 MR. COBURN: Your Honor, it's true, it's  
7 not in our brief. But there is a, there is a set of  
8 regulations, 49 CFR 1244 the Board maintains with  
9 respect to access to this weighbill data because the  
10 weighbill data is compiled for the Board and for that  
11 ICC proceedings. That's what the data is there for.  
12 And the regulations are very specific. The requests  
13 have to be made to a specific office of the Board.  
14 The Board then publishes the request and it acts on  
15 the request under those regulations and either  
16 provides access or it doesn't.

17 And the question that I think is important  
18 to clear up is whether that request was made and  
19 whether the request was made specifically for the  
20 masking factors.

21 JUDGE LEVENTHAL: What do you want me to  
22 do? Mr. McBride has answered that he believes a

1 request was made, but he didn't do it personally.

2 MR. COBURN: I think he doesn't know  
3 whether the request was made for the masking factors  
4 or not, so we don't know if somebody on the Board has  
5 already made a determination of this issue or not.

6 MR. MCBRIDE: Well, I'm not aware of any  
7 determination, but I guess perhaps to moot this mini-  
8 controversy here, we might inquire of counsel whether  
9 they are aware of any precedent that would require me  
10 to seek this from the Board instead of from them?

11 MR. COBURN: I think that issue is at best  
12 unclear. It seems to us there are regulations that  
13 govern access to this data, and they are very specific  
14 as to how one goes about getting that access. To our  
15 knowledge, we are not aware that anybody in a  
16 litigation context, in a discovery context, has asked  
17 for data outside of the scope of those regulations.

18 So I'm not prepared to answer the  
19 question. I think perhaps the question ultimately  
20 that the Board might have to answer. But I don't know  
21 the answer. But it seems to me that a good argument  
22 could be made. I would suggest to you it is a good

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1 argument. There are these regulations. They do  
2 provide a process. And that's the process that one  
3 should go through to get access to the data.

4 MR. EDWARDS: Additionally, your Honor,  
5 just one other clarification point. There is an  
6 authorization that if somebody requests authorization  
7 for the weighbill data, if LA Peabody asked for it,  
8 they would receive a specific authorization back from  
9 the STB saying that you've got access to this series  
10 of data and not to that series, and for these years,  
11 for this proceeding. Because we've got it for our  
12 proceeding, for the 33388, it's very proceeding  
13 specific authorization.

14 And then attached to the authorization  
15 coming from the Board is a special confidentiality  
16 agreement that's separate and apart from the  
17 protective order that each of us must sign and submit  
18 an original to the Board with a copy to ALJ who is the  
19 depository of the data.

20 So it would have specifically stated --  
21 first off, there would be a very positive  
22 communication from the Board that you have access.

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1 And in that would be very specifically what is the  
2 scope of the access and finally with regard to time,  
3 etc. And there is a special confidentiality that goes  
4 along with it.

5 JUDGE LEVENTHAL: And what do you suggest  
6 my jurisdiction is here?

7 MR. EDWARDS: Well, your Honor, there is  
8 several different levels in the Part 1244. There is  
9 a special procedures for asking for access to  
10 weighbill data within a formal procedure. There is a  
11 special access for studies that are being conducted  
12 outside of a formal procedure. There is access by  
13 states and federal agencies. Three different levels  
14 of users.

15 And, with all due respect, your Honor, we  
16 suggest that if they are looking for weighbill data  
17 and the Board has said this is how you get weighbill  
18 data in a formal Board proceeding, then that's how you  
19 do it. And not through discovery. And especially,  
20 your Honor, if they have already asked for it and had  
21 that matter denied.

22 MR. MCBRIDE: This is not a preliminary

1 matter anymore. They are trying to argue my motion  
2 before I get to argue my motion. But in any event,  
3 your Honor, to answer your question on jurisdiction,  
4 they can't cite any precedent that says I can only get  
5 this from the Board. The regulations don't say that.  
6 All they do is provide a process for getting it from  
7 the Board and they impose confidentiality on it.

8 Well guess what, we have a procedure here  
9 for getting it from them. It's called the discovery  
10 guidelines. We have a procedure for confidentiality,  
11 your Honor. I've been through that ad nauseam. You  
12 know what the obligations are on us for highly  
13 confidential information such as this.

14 If we had the information, I wouldn't be  
15 putting them through this. I don't believe my  
16 consultants have it, if that's helpful. I'm trying to  
17 be candid with you. I'm not doing this for the fun of  
18 it. But they cannot cite any authority under which  
19 you cannot tell them to give it to me. They have  
20 merely cited authority for how I would get it from the  
21 Board if I were to try that way.

22 MR. NORTON: Your Honor, if I might. One



1 of the questions on any discovery issue and I don't  
2 need particular authority to cite it is that your  
3 Honor has to balance relevance against confidentiality  
4 or other consequences of disclosure. Surely, if they  
5 had made the request for masking factors through the  
6 Board, under the Board's regulations and been denied,  
7 that would be something you would want to take into  
8 account in ruling on the present request. It just is  
9 part of the overall set of circumstances that you  
10 would be obliged to consider.

11 So I think that is sufficient authority to  
12 make it a proper question. It may make the present  
13 issue premature until we get the answer to whether  
14 they have made a request and been denied or not.

15 MR. EDWARDS: Additionally your Honor,  
16 there is one other fact that may be a little clouded  
17 here. That is the question of whether or not the  
18 protective order covers the weighbill data. It does  
19 not. Canadian Pacific, for example, recently just  
20 submitted another letter to the Board asking for an  
21 expansion of their authority to receive access to the  
22 weighbill data for this case. And, that is presently



1 before the Board and there is objections to that  
2 access before the Board.

3 They would not receive access to the  
4 weighbill data under the protective order in this case  
5 because it doesn't cover the weighbill data. The  
6 weighbill data they have a separate confidentiality  
7 order, or agreement that they must sign with the FTE  
8 who is a party to that agreement, which they would not  
9 get access to that data simply by making  
10 representation or making a copy of the protective  
11 order in this case. That's totally separate.

12 JUDGE LEVENTHAL: I think that the best  
13 way to handle this issue this afternoon is for me to  
14 treat this motion on its merits. And then if any  
15 party is dissatisfied with the way I rule, you can  
16 take it to the Board. If I require you to produce the  
17 information that Mr. McBride has requested, you can  
18 appeal to the Board on any ground that you like.

19 So far as confidentiality is concerned, I  
20 think that I can order the same type of  
21 confidentiality in discovery that the Board has in its  
22 regulation 1244. I think that's the -- because of

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1 time limitation I take it Mr. McBride is anxious to  
2 have a ruling as fast as he can get it. And the  
3 fastest way for him to get it and for this proceeding  
4 to go forward is for me to rule. And then, of course,  
5 if parties aren't satisfied, you can go to the Board.

6 I think you would have a different ground  
7 for an appeal if you don't like my ruling than you've  
8 had in your previous appeal. I think that if your  
9 argument has merit and if I order you to produce this  
10 material, which, of course, I haven't done as yet, I  
11 think you have a different argument before the Board.

12 All right.

13 MR. MCBRIDE: Thank you. And by the way,  
14 your Honor, I concede the point that this is highly  
15 confidential information, I did in my letter to you.  
16 So we don't have to argue about whether you can order  
17 me to abide by the protective order, I will have to  
18 abide by the protective order.

19 JUDGE LEVENTHAL: All right. Let me begin  
20 by pointing out -- let me just note I have the letter  
21 written by Mr. McBride to me which enclosed the  
22 applicant's initial objections to the data request

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1 that's subject to this conference this morning. And,  
2 of course, I have the separately filed applicant's  
3 initial objection to the request.

4 So that the record is clear, the motion  
5 this morning involves ACE's -- ACE et al. I take it,  
6 all your clients --

7 MR. EDWARDS: Your Honor, for  
8 clarification, did you receive our response to the  
9 motion?

10 JUDGE LEVENTHAL: No, I didn't.

11 MR. EDWARDS: This was faxed to you last  
12 night. If I could --

13 MR. MCBRIDE: Oh sure.

14 JUDGE LEVENTHAL: Off the record.

15 (Whereupon, the foregoing matter went off  
16 the record at 1:44 p.m. and went back on  
17 the record at 1:45 p.m.)

18 JUDGE LEVENTHAL: Back on the record. Off  
19 the record I merely inquired when this was faxed  
20 because I did not receive it and that surprised me.  
21 In any event, I was told that it was faxed yesterday  
22 before 5:00 but that really wouldn't matter because

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1 our fax receives messages 24 hours a day.

2 Parties suggest that I take a half an hour  
3 recess to read this. Mr. McBride indicated no  
4 objection to it. And of course, it would be necessary  
5 for me to take some time to read it. So why don't we  
6 stand in recess a half hour. Rather than my going  
7 back upstairs and coming down, it's a pain in the neck  
8 travelling up and down, why don't I stay here. You  
9 people do whatever you like.

10 MR. EDWARDS: Thank you, your Honor.

11 (Whereupon, the foregoing matter went off  
12 the record at 1:46 p.m. and went back on  
13 the record at 2:15 p.m.)

14 JUDGE LEVENTHAL: It suddenly occurred to  
15 me we have two conference rooms here, nice and quiet.  
16 I never think of it when I have to use them.

17 MR. MCBRIDE: I was probably bothering  
18 you. I'm sorry.

19 JUDGE LEVENTHAL: No, no, no.

20 MR. MCBRIDE: -- sitting in the back of  
21 the room was a problem.

22 JUDGE LEVENTHAL: I should have thought of

1 our conference room. As a lawyer I have to make one  
2 comment. I read the Commission's decision No. 32 and  
3 I was puzzled by the fact that they said that they did  
4 not rule on the relevance. They specifically adopted  
5 my finding in their affirmance that the discovery  
6 sought could lead to relevant, to admissible evidence.  
7 And if that isn't a ruling on relevance, then in my  
8 career as a lawyer, I don't know what relevance is.  
9 However I don't argue with the --

10 MR. MCBRIDE: Your Honor, you wrote the  
11 order and some lawyer wrote that decision and it just  
12 goes to show you that you need a judge to review these  
13 things.

14 JUDGE LEVENTHAL: Well, we all know how it  
15 is to feel when other people don't accept our  
16 argument. All right.

17 MR. MCBRIDE: We are about even on that.

18 JUDGE LEVENTHAL: I just felt compelled to  
19 comment on it. I don't argue with appellate bodies.  
20 They make their rulings, I make mine. Sometimes we  
21 agree, sometimes we don't.

22 All right, back on the record. I've now

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1 had a chance to read the submission, the applicant's  
2 response to the motion. All right, we are now ready  
3 for argument.

4 MR. MCBRIDE: Thank you, your Honor. I'm  
5 going to try to be fairly brief. But I did want to  
6 begin where we just were off the record just for a  
7 moment and go back to your Honor's ruling --

8 JUDGE LEVENTHAL: Off the record?

9 MR. MCBRIDE: -- we were served on July 18  
10 -- no, this is on the record.

11 JUDGE LEVENTHAL: On the record, yes.

12 MR. MCBRIDE: I want to remind your Honor  
13 that you probably have this better in mind even than  
14 I do, given the conversation we just had, but you said  
15 on page 2 of your order that was served on July 18,  
16 that you balanced the burden asserted by the  
17 respondent against the need of the movants to know and  
18 used that as the basis for determining what we  
19 obtained on July 16th in your ruling.

20 So when the applicants say on page 1 of  
21 the response you've now had a chance to read that they  
22 filed yesterday, that our request was denied before,

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1 that's both misleading because your Honor did not say  
2 that all of what we asked for previously was  
3 irrelevant. And in any event, it's contradicted by  
4 what they say on page 10. Because on page 10 they say  
5 -- I'll give your Honor a moment -- in the first full  
6 sentence on the page, it begins on the fourth line,  
7 "At that time, ACE Utilities could also have made the  
8 very same request for disclosure of the masking  
9 factors as they have now made."

10 So, your Honor should not be mislead by  
11 the fact that the argument was made that we asked for  
12 this before and it was denied. We did not ask for  
13 this before. So it was not denied.

14 In any event, your Honor may recall that  
15 at the hearing on July 16th, Mr. Allen was here, lead  
16 counsel for Norfolk Southern. And he represented, and  
17 so I attached these pages to our submission last  
18 Friday, your Honor, he represented to your Honor that  
19 we could use the weighbill samples to make our case.  
20 We didn't have to ask for these traffic tapes. We  
21 didn't have to put them to all this burden that your  
22 Honor was concerned about, that he was complaining

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1 about.

2 We, we are not quarreling with your ruling  
3 for purposes of putting our case here together. We  
4 feel that we lost, I understand. That's it. But, we  
5 have now elected after some considerable internal work  
6 and discussion with our experts, and I'm going to back  
7 to the visual aid I went back with the last time to  
8 try to, as I told you in my letter last Friday, to  
9 fill in the gaps of the years of data that we are  
10 getting from their own traffic tapes pursuant to your  
11 Honor's earlier ruling.

12 And if I may, just to help you visually,  
13 you may recall this visual that I showed you the last  
14 time, and we used the pink to demonstrate the years  
15 that we had the data for the AEP plant, '95, '96, '97  
16 and the rest we would have to fill in either with CSX  
17 data or from the weighbill sample. And CSX has now  
18 given us some data for some earlier years. So for a  
19 few earlier years, we would be able to make this a  
20 solid pink line. But still have to fill in the rest  
21 of this for this origin and destination period. This  
22 particular power plant.

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1 And then through the process of assembling  
2 as many of these timelines as we can, given the  
3 limitations on the discovery we have obtained and  
4 through the weighbill sample, we are trying to put a  
5 study of how these people set their rates.

6 Now, the weighbill sample contains, and  
7 now we are by the way talking about the confidential  
8 weighbill sample, not the public weighbill sample.  
9 This is a confidential weighbill sample. It's been  
10 requested from the Board. We are going to work with  
11 it. You can buy it subject to the protections that  
12 Mr. Edwards described to you earlier. But it's  
13 subject to the same kind of protective requirements as  
14 your Honor is familiar with in this proceeding. And  
15 we understand our obligations.

16 But, all we are trying to do is take this  
17 weighbill sample and use it for purposes of analysis  
18 of how they set their rates. The problem is that the  
19 weighbill samples revenue factors are altered by a  
20 series of factors that they applied, apparently they  
21 can be different factors for every year. They don't  
22 have to be, but they can be. This should drive to the

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1 following problem.

2 Suppose that we have, for these latter  
3 years for the American Electric Power Plant, actual  
4 rates which we now do. That's what the pink color  
5 shows you now for those years. And we are trying to  
6 match this up. Or we do this for another origin  
7 destination period. And they have masks, these  
8 revenues, on the weighbill sample. They will not be  
9 able to match it up. The data won't match. And when  
10 Dr. Kahn and Dr. Dunbar review the evidence that the  
11 LA Peabody firm samples, they won't be able to make  
12 sense of it unless they can convert the revenues into  
13 the actual rates that are charged according to the  
14 carriers.

15 And the carriers conceded, right back at  
16 the beginning of this whole process, when they  
17 objected to our motion to compel your Honor heard on  
18 July 16th, they said we were free to do a study based  
19 on the weighbill samples. They said that in this  
20 motion to compel here, too.

21 But, the problem is that without the  
22 masking factors so that we can convert the actual

1 revenues -- convert the revenues that are showing to  
2 the actual revenues, our experts can't make sense of  
3 them and can't make a sensible presentation to the  
4 Board without making the assumption which they then  
5 would be able to rebut if they so chose that we've got  
6 it wrong because Dr. Kahn thought the rate went up and  
7 in fact the rate went down. And maybe the only reason  
8 that he thought that is because he didn't have the  
9 masking factors. This could lead to all sorts of  
10 confusion.

11 So, and I believe your Honor has already  
12 ruled on this issue. This is not privileged  
13 information. Your Honor ruled that they can't redact  
14 confidential or highly confidential information under  
15 the materials we have asked for in discovery.

16 And there is absolutely no burden to the  
17 request that we have made and they haven't argued that  
18 there is any burden. Because if your Honor would  
19 simply turn to their pleading -- I didn't bother you  
20 with our initial request because they properly  
21 repeated them at page 2 of their objections which I  
22 attached to my letter. It's one interrogatory. It's

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1 one document request. All we are asking for are the  
2 masking factors from each carrier for those years.  
3 They are just numbers, and probably on a few pieces of  
4 paper.

5 Now let me just skip, if I may, through a  
6 few of the points that they made and respond quickly  
7 to them. Let me give you an example of how we are  
8 being subjected to a double standard here.

9 For example, they say that they provided  
10 the weighbill samples, they use the weighbill samples  
11 for 1995 in their pleading. There is a footnote on  
12 this at page 9, footnote 14. They used the highly  
13 confidential weighbill sample apparently, maybe I  
14 misunderstand this. But they use highly confidential  
15 data, actual data, for 1995. No masking of the rates.  
16 So they can provide the actual revenues when it suits  
17 their case.

18 But now when we try to convert to the  
19 actual revenues for the other years because that suits  
20 our case, suddenly it's in violation of all these  
21 rules and regulations. Well it's not in violation of  
22 any rules or regulations.

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1           We simply are subject to the protective  
2 order. We've agreed we would be subject to it. And  
3 we need it for our work in this case. And they have  
4 the factors and there is no burden on them to provide  
5 it.

6           Now I wanted to point your Honor to a  
7 statement they made on page 6 near the top. They say  
8 each railroad shares its own actual masking factors  
9 with only a few agency employees so that the agency  
10 can be assured that the masking factors will not  
11 significantly skew studies based on the weighbill  
12 sample, and will not effectively disclose contract  
13 rates, etc. Well, that's precisely what I'm concerned  
14 about. I don't want the masking factors to  
15 significantly skew my study.

16           So, I think we understand one another here  
17 and I want to make one other point and that's on page  
18 13. They are back into relevance again and I think  
19 that you adequately disposed of this in the ruling  
20 last Friday. Whether or not your Honor, they affirmed  
21 your determination on relevance, and I thought they  
22 did too. They certainly said last Friday that it was

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1 far too late in the day for railroad counsel to be  
2 arguing lack of relevance. And I don't understand how  
3 it could be irrelevant, in any event, for us to do a  
4 study of their rates.

5 So with that, it seems to me your Honor's  
6 ruling in Decision No. 26 that they can't redact. The  
7 Board's affirming to that in Decision No. 32 disposes  
8 of this issue. And I would like to have this  
9 information by Friday which is when it's due under my  
10 request, which would only give us a month about until  
11 our comments and evidence are due. And that's why I  
12 asked for this conference originally and I appreciate  
13 your Honor hearing us today.

14 JUDGE LEVENTHAL: How does this -- Mr.  
15 McBride, how does this differ from your original  
16 interrogatory of the July 16th? If I had granted your  
17 request at that time, would you not have had all this  
18 information?

19 MR. MCBRIDE: No, I didn't ask for this.  
20 Because what I asked for in the original request on  
21 July 16th were three things. I asked for the 100  
22 percent traffic tapes which don't have masking. They

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1 have their own records. They keep them without  
2 masking. They put the masking factors on the  
3 weighbill sample when they go to --

4 JUDGE LEVENTHAL: No, but just that point.  
5 If I had given you that, if I had found that that was  
6 relevant, wouldn't you have had the information you  
7 are seeking now? You would have had the rates without  
8 the masking factors?

9 MR. MCBRIDE: No I wouldn't because --  
10 well, if you had given me the traffic tapes without  
11 any limitation, I would have had all the data. But,  
12 you limited it to origin and destination of our  
13 clients and those served by Conrail. So if you want  
14 to add those limitations you wouldn't have had.

15 But the point is that they represented to  
16 your Honor at that time that we could do our work in  
17 an entirely different way. Nobody disputes that we  
18 can present our case before the Board through  
19 weighbill sample evidence. All we are trying to do is  
20 have the masking factors so that we can present that  
21 analysis that they concede we can make in a coherent  
22 fashion. And we didn't ask for these masking factors

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1 then. They concede the point.

2 We asked for them subsequently only when  
3 we were forced to go to an analysis based on the  
4 weighbill samples, because we didn't have the 100  
5 percent traffic tapes.

6 JUDGE LEVENTHAL: All right. Mr. Edwards?

7 MR. MCBRIDE: And I just -- I remind you  
8 that your ruling on July 16th, as I started out, I  
9 will conclude with you, you denied me all the  
10 documents I was asking for all those years because you  
11 found that the burden outweighed my need for the  
12 information, not that it was irrelevant.

13 JUDGE LEVENTHAL: All right. Mr. Edwards?

14 MR. EDWARDS: Thank you, your Honor. Had  
15 your Honor granted Mr. McBride's -- ACE Utilities  
16 initial requests, he would have had access to unmasked  
17 revenues. And that's the goal of the request today is  
18 to get the masking factors so we would get the  
19 unmasked revenues. And the Board, in affirming your  
20 decision specifically did talk about ALJ properly  
21 tailoring discovery to evidence that might be relevant  
22 to shippers. Page 2 of the decision, goes on to show

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1 that the one lump theory is for some reason  
2 inapplicable to their particular situation.

3 With regard to Mr. McBride's claim that it  
4 is far too late in the day to argue relevance and the  
5 fact that we've got one document request and one  
6 interrogatory. With all due respect, we look -- I  
7 understand that we looked at relevance with regard to  
8 each document request and each request individually.  
9 This request has already been before you and you've  
10 already determined the relevance of the unmasked  
11 contract from this.

12 I -- Mr. McBride said that he thinks that  
13 we understand one another with regard to whether or  
14 not the applicants used the weighbill sample, or the  
15 100 percent tapes for our studies. And he pointed to  
16 footnote no. 14 on page 9. Footnote 14 on page 9  
17 talks about a highly confidential 1995 traffic tape  
18 for CSX and Conrail has been placed in the evidence  
19 depository. And what you don't see there is Norfolk  
20 Southern.

21 Norfolk Southern, in fact, used weighbill  
22 figures for its traffic diversion study. And it's

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1 offered in plant study, it's on that basis that we  
2 submitted our study to the Board. And the consultant  
3 who did that study did not have access to the  
4 weighbill -- masking factors for Norfolk Southern.  
5 Not even that consultant knows the masking factors.  
6 That's how highly confidential this is.

7 He pointed to the -- he questions whether  
8 or not this, the masking factors would not  
9 significantly skew the study. That's the purpose of  
10 delivering the masking factors to the few Board  
11 members who review it. The Board has had literally  
12 thousands, in the ACE Utilities own words, studies  
13 submitted to it. And it has never once said in a  
14 control proceeding that the weighbill study is  
15 unacceptable because it involved unmasking -- masking  
16 factors.

17 The -- finally I would like to address his  
18 timeline and if I could I'd like to -- could I borrow  
19 your --

20 MR. MCBRIDE: Sure.

21 MR. EDWARDS: This is my copy?

22 MR. MCBRIDE: Yes sir.

1 MR. EDWARDS: Thank you. Your Honor, this  
2 timeline can either be based upon the weighbills for  
3 traffic going to one thing from a particular source or  
4 destination, and that's the pink line here. Or it can  
5 be based upon, which if we extended it back to 1978,  
6 would make sense if you wanted to go ahead and you  
7 didn't order all of the data for the deliveries to  
8 that one plant. The -- in this case, the AEP's  
9 Cardinal plant.

10 But the weighbill sample is a different  
11 creature all together. It's a sample. So what he is  
12 asking for doesn't make sense. Conceptually it  
13 doesn't make sense.

14 This is a sample weighbill over time and  
15 either you do the study based on the weighbill for  
16 revenues, etc., to Conrail served plants and AEP  
17 Cardinal plant, or you do it on the basis of  
18 individual 100 percent loads. You don't mix the two.  
19 It just doesn't make sense. Masking factors or not.

20 So, this argument it just doesn't work.  
21 There is no relevance to what he has asked for. You  
22 have ruled on that relevance. And the rest is set

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1       forth in the paper.

2               I think this is a program that the Board  
3       itself has kept confidential throughout the years.  
4       This is an unprecedented request and it should be  
5       denied.

6               JUDGE LEVENTHAL: All right, Mr. McBride,  
7       I'll hear your reply.

8               MR. MCBRIDE: Last point first. The  
9       doesn't make sense point. The worm has turned here.  
10       That was my argument back on July 16th for why I  
11       shouldn't have to mix and match, but your Honor  
12       rejected it and I was then put in a position where I  
13       had to do it. Do I wish I had the 100 percent traffic  
14       tape so I didn't have to proceed with my mix and match  
15       study? Yes. But I told you, I'm not correlating with  
16       the rules. That's the problem though.

17               But no one has ever disputed, in fact they  
18       conceded it at that time, that I could do a weighbill  
19       sample study. They made that representation to your  
20       Honor. And I submit it was only on the grounds of  
21       burdensomeness that you denied me all of the  
22       information. Because I think it obviously was

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1 relevant when I was asking for rate information to put  
2 on a rate study, the effect that this would have.

3 They say that their brief, Mr. Edwards'  
4 says that their brief you know answers everything  
5 else. I might remind your Honor what we talked about  
6 before, they keep citing this Statute 11904 but that  
7 doesn't preclude the disclosure of this information to  
8 me because the Board itself relied on that in issuing  
9 the protective order in this proceeding. They invoked  
10 that statute in order to permit them to expunge the  
11 information as the Board found last Friday, in  
12 Decision No. 32.

13 They said that the people at the Board can  
14 take my evidence and apply these factors and make some  
15 sense of it, I guess. But that supposes that Dr. Kahn  
16 is supposed to put in nonsense I guess and then have  
17 it turn into sense by the Board in translating with  
18 these masking tapes. He has to know whether rates are  
19 going up or down and what the trend lines are in order  
20 to be able to make a judgement. He can't do that  
21 without knowing what the actual rates are.

22 They change the factors every year, which

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1 they are entitled to do, then it's going to be awfully  
2 difficult to form any judgements about data that may  
3 not in fact be going up and down, and it's only the  
4 masking factors that make that happen.

5 I didn't mean to suggest they couldn't  
6 challenge the relevance of this now. I simply  
7 suggested that the relevance of what I'm trying to do  
8 is already determined long ago. And I think that this  
9 is just another way in which we've devised to try and  
10 put on the evidence that we are trying to put on.  
11 This was not part of my original request.

12 It's very much our second best effort at putting our  
13 evidence together.

14 And, finally they argue confidentiality.  
15 Here we go again. How many times have we argued that?  
16 They say, gee, this is really highly confidential.  
17 And even their own consultant didn't have access.  
18 Well, that was their choice. They could have asked  
19 the Board to make that available to their consultant.  
20 I bet the Board would have said yes. That's subject  
21 to the same kind of -- would have been subject to the  
22 same kind of restriction as here.

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1           So, all we are asking for are simple  
2 factors so that we can make sense out of the  
3 information they have submitted to the Board so that  
4 we can do our study. And I think you Honor has  
5 already ruled on whether they have any right to deny  
6 us that because you ruled last Friday that they can't  
7 redact things. And I think that this is just in  
8 another category. It's as if they were to change the  
9 rate from what we were given and then not tell us the  
10 real information. All we are trying to do is turn it  
11 into the real information.

12           And there is nothing that they have cited  
13 that says your Honor can't order them to provide it to  
14 us. This business about the regulations that the  
15 Board is how you go about asking the Board for this  
16 information. I'm asking for this in discovery. Those  
17 procedures apply when there is no proceeding. They  
18 admitted that there are times when you can make those  
19 requests and use those statutes to put on some kind of  
20 study, or different kind of regulations when there is  
21 a proceeding when notice and have the carriers been  
22 aware of that and an opportunity to object.

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1 But the Board has a variety of purposes it  
2 puts these weighbills to and it has regulations for  
3 the purpose of asking for that information in a  
4 variety of those contexts. But we have a discovery  
5 judge here and a process for doing it in this case and  
6 nobody can cite any ruling in this case or any  
7 regulation that said I have to go to the Board instead  
8 of you to get this information.

9 JUDGE LEVENTHAL: I'm not going to rule on  
10 1244. I indicated that earlier. You'll have to take  
11 that -- if you don't like whatever the ruling I'm  
12 going to make in this argument this morning, you will  
13 have to take that up with the Board. I'm not going to  
14 rule on 1244.

15 MR. MCBRIDE: Thank you.

16 JUDGE LEVENTHAL: But before we go  
17 further, I intended to do this at the very start of  
18 our conference and I simply forgot to do it. Although  
19 I started to and then I was taken up with argument.

20 This discovery conference this morning  
21 involves the Interrogatory No. 1 and Document Request  
22 No. 1. Interrogatory No. 1 asks

1 "State the revenue masking factors  
2 applicable to the one percent weighbill  
3 samples filed with the ICC/STB for the  
4 years 1978 through the most recently  
5 filed time period for Conrail, CSX and  
6 Norfolk Southern."

7 And Document Request No. 1 requests:

8 "Provide all of the revenue masking  
9 factors applicable to the one percent  
10 weighbill samples filed with the ICC/STB  
11 for years 1978 through the most recently  
12 filed time period for Conrail, CSX and  
13 Norfolk Southern."

14 All right. I just thought the record ought to  
15 contain exactly what it is we are arguing about this  
16 morning.

17 MR. MCBRIDE: Yes, your Honor.

18 JUDGE LEVENTHAL: Is there any further  
19 argument? Mr. Coburn?

20 MR. COBURN: Your Honor, we've heard this  
21 afternoon from Mr. McBride that the issue of relevance  
22 has been decided against us on this particular issue.



1 I frankly don't see how one could read Decision 17 and  
2 reach that conclusion.

3 You ruled, your Honor, and the order  
4 appealed that resulted in Decision 17, that Mr.  
5 McBride was not entitled to see confidential traffic  
6 tape data for movements to utilities other than his  
7 own clients. And my understanding of your ruling, and  
8 I certainly think it comes through loud and clear in  
9 Decision 17, was that he wasn't entitled to see it  
10 because it's not relevant to this case. The burden  
11 was not the issue with respect to the tapes. The  
12 issue was relevance.

13 It's the same issue here. The masking  
14 data that he is looking for, that his clients are  
15 looking for, gets them to the same goal that they were  
16 trying to get at with respect to the traffic tapes.  
17 I think you heard Mr. McBride concede that this  
18 morning. So we really are rearguing the same issue in  
19 a different -- under a different mask, so to speak.  
20 But it really is the same issue. I think the ruling  
21 has been made that it isn't relevant.

22 The concerns of confidentiality, the fact

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1 that this is specially protected data, maintained by  
2 the Board, I think are persuasive. The fact that it's  
3 never been asked for before, notwithstanding that  
4 there are, by Mr. McBride's own admission, thousands  
5 of weighbill studies that have been done over the  
6 years without it, I think really are the beginning and  
7 the end of the argument --

8 MR. MCBRIDE: I have to respond to that  
9 relevance point because here is the thought,  
10 apparently apply the same masking factor for all the  
11 movements on the tape for a given year. That  
12 necessarily means that it would apply to my clients'  
13 movements that happen beyond that weighbill sample for  
14 that year. So clearly those are relevant to what we  
15 are trying to do here. It's the same making factor  
16 throughout.

17 In any event, he conceded that I do a  
18 weighbill sample analysis, not just for my clients,  
19 the weighbill sample analysis. The Board does that  
20 all the time. What we are after here is not about how  
21 they set the rates just to our clients, it's about how  
22 they set their rates. Because what they do for other

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1 people yesterday or today they might do to my clients  
2 tomorrow, or after this transaction is approved.

3 So that's what I say. I think the  
4 relevance is clear. You didn't deny the original  
5 request all together. You just limited them, and I  
6 quoted the language because of the burden. You  
7 balanced the burden against our need to know. You  
8 didn't say we didn't need to know this information.  
9 And I'm now just trying to fill in and I need the  
10 factors to fill in. That's all. And that's why I  
11 said it was already determined to be relevant.

12 JUDGE LEVENTHAL: Now, with respect to the  
13 material that's already been furnished to you, you now  
14 have unredacted material. Is that correct? If you  
15 don't have it, I assume you will have it.

16 MR. MCBRIDE: I got the second last batch  
17 of unredacted documents after I left today but before  
18 I got here. There is one set they are now claiming  
19 privilege on. As to the rest of it, I got them from  
20 CSX and then as I'm told, I thought Conrail had  
21 redacted documents for us, they say now it's only  
22 NYSEG and Niagara Mohawk. And if that's so,

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1       apparently those have been provided. So I do believe  
2       they gave us the unredacted documents.

3               But I'm just qualifying that because it's  
4       a moving target.

5               JUDGE LEVENTHAL: But you will have it.  
6       I mean, I'm sure they will comply with the Board's  
7       order. Now you are not seeking the masking factors  
8       for the material you currently have, or you will have,  
9       are you? You don't need it.

10              MR. MCBRIDE: I could take the traffic  
11       tapes and convert, but I will tell you -- I'm glad  
12       your Honor reminded me -- of a problem one of my  
13       consultants raised with me. I wasn't going to try to  
14       complicate this further, but, on one of the tapes, on  
15       one of the weighbill samples they have access to, the  
16       masking factor for the year that we got the actual  
17       rates, they don't seem to have applied the masking  
18       factor to one clients' movement and they did to  
19       others. So there is a further confusion here that the  
20       masking factors apparently weren't applied  
21       consistently in all cases.

22              So I can't answer the question with an



1 unqualified yes. But generally, I have the actual  
2 data. I can apply it to the weighbills for the years  
3 you Honor ruled, and determine what the masking factor  
4 was.

5 JUDGE LEVENTHAL: Do you --

6 MR. MCBRIDE: It kind of complicates it --

7 JUDGE LEVENTHAL: Do you want the masking  
8 factor for those years if that's all I'll give you?

9 MR. MCBRIDE: I want whatever you will  
10 give me. But, I think your Honor will concede --

11 JUDGE LEVENTHAL: Will it be helpful to  
12 you is what I'm asking?

13 MR. MCBRIDE: It would be marginally  
14 helpful, just to check on the accuracy of the kind of  
15 thing I just described to you. But I can't do this  
16 kind of timeline analysis without the other years and  
17 that's why I don't want to not just respond to your  
18 question, but to tell you, you can't make sense of a  
19 few years here and a few years there without trying to  
20 fill in. And that's what we are trying to do so that  
21 we can present, over a long enough period of time, a  
22 statistical analysis of how they set their rates.

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1 Surely no one can say that the inbetween  
2 years are irrelevant when the years before and the  
3 years after are relevant. It was a question, back on  
4 July 16th, of the burden. There is no burden to  
5 giving us these factors. We've got the tapes from the  
6 Board.

7 JUDGE LEVENTHAL: All right.

8 MR. EDWARDS: Your Honor?

9 JUDGE LEVENTHAL: Mr. Edwards?

10 MR. EDWARDS: I wasn't sure I understood  
11 the clarification. I think your Honor asked whether  
12 or not Mr. McBride had unmasked revenue data for the  
13 moves to his plants. And I don't believe, I know  
14 Norfolk Southern applied no revenue masking factors.  
15 I believe CSX did not apply any revenue masking  
16 factors, and I believe that Conrail did not to those  
17 weighbills which were already produced. And if he is  
18 implying otherwise, that's very important for us to  
19 know. Because I don't think that there was.

20 And if there was not, then he does not  
21 need these masking factors for those years.

22 JUDGE LEVENTHAL: Are you saying that

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1 those years that you've furnished pursuant to my order  
2 and the Board's order were not part of -- no part of  
3 those -- that material was part of your one percent  
4 sample? One percent in quotes, of course.

5 MR. EDWARDS: What I'm saying is that the  
6 material produced to him had weighbills which didn't,  
7 all the weighbills on those tapes were unmasked. Did  
8 not have any masking.

9 JUDGE LEVENTHAL: The question I put to  
10 Mr. McBride, and I thought he understood my question,  
11 was if there were masking factors used, if any part of  
12 the material that you gave to Mr. McBride or about to  
13 give to Mr. McBride for the years I ordered produced,  
14 if any part of that material was used in your one  
15 percent sample, did he receive, would the masking  
16 factor be of use to him? That was the question I put  
17 to him.

18 MR. EDWARDS: Well, the only thing, your  
19 Honor, that would -- you have a weighbill here, which  
20 includes data A, B, C, D and E, E being revenue,  
21 unmasked given to Mr. McBride, you have a weighbill  
22 sample over here which may include a weighbill with

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1 the same stuff, A, B, C, D and E revenue masked. It  
2 would be useless because -- to give him the masking  
3 factor for that weighbill, because he has already  
4 gotten it unmasked. The only thing that it would give  
5 him is the contract revenue for other shippers.

6 JUDGE LEVENTHAL: Let me see if I  
7 understand the problem. Let me say in the -- at the  
8 outset, I made a ruling on our July 16th argument.  
9 Mr. McBride did not get all the information he sought.  
10 If he tries to get that same information through some  
11 other data request, I don't see anything wrong with  
12 it. But whether I allow it or not is a different  
13 story. But he is entitled to try to circumvent my  
14 ruling by getting the information he wants some other  
15 way. So I don't think there is any, that he hasn't  
16 done anything that could conceivably considered  
17 inappropriate. Obviously that's what he is trying to  
18 do with the motion before us this morning.

19 I was thinking, have you finished your  
20 argument, Mr. McBride?

21 MR. MCBRIDE: I did -- would it help for  
22 me to respond to what Mr. Edwards said that your Honor

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1 understands what we have here?

2 JUDGE LEVENTHAL: Yes, all right.

3 MR. MCBRIDE: I am not suggesting that  
4 they masked anything of what they gave us.

5 JUDGE LEVENTHAL: No, I know that.

6 MR. MCBRIDE: I didn't say that.

7 JUDGE LEVENTHAL: No.

8 MR. MCBRIDE: I just simply was trying to  
9 explain that there is a problem on the weighbill  
10 sample that we've discovered, where they don't seem to  
11 have applied the masking factors consistently. And  
12 that's why having them might be of some value. But,  
13 in any event, if that helps. I certainly didn't  
14 suggest any impropriety over there either.

15 JUDGE LEVENTHAL: No, I didn't think you  
16 did. I didn't think you did. Obviously, I'm about to  
17 deny his motion completely. I'm about to deny the  
18 complete information that he is seeking. I'm inclined  
19 to grant him the masking factors used for any of the  
20 material that you furnished to him that you have used  
21 in your one percent sample.

22 MR. EDWARDS: But your Honor, we haven't

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1 used any masking factors in the material we have  
2 supplied --

3 JUDGE LEVENTHAL: No, but if you have  
4 included any of the material that you have given him  
5 into your weighbill sample and have masked it --

6 MR. EDWARDS: So, if I may clarify.  
7 Should we go back and determine whether or not the  
8 weighbill that we have given to Mr. -- the individual  
9 weighbill that we have given to Mr. McBride is  
10 included in the weighbill sample for that year?

11 JUDGE LEVENTHAL: Yes, that's what I'm  
12 considering. I want to know what burden it is and  
13 what problem you would have with such a ruling.

14 MR. MCBRIDE: I can tell you, I can help  
15 you with that. It would be a lot more burdensome than  
16 just giving me the masking factors, because you see  
17 these one percent weighbill samples as they have  
18 indicated to you are more like two and a half percent.  
19 I don't know exactly. But let's say that they are  
20 right, it's about two and a half percent. There are  
21 tens of millions of movements by railroad in this  
22 country every year.

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1           This sample is just that, a sample.  
2           Whatever percentage. If it's 40 million movements,  
3           it's got a million movements on the weighbill sample.  
4           And if they just gave me the factor, we wouldn't have  
5           the delay of them going through all the million  
6           movements to figure out whether the ones they gave me  
7           are on there.

8           JUDGE LEVENTHAL: I don't think they have  
9           to do that. I don't know, though. Would it be a  
10          factor if he used any of his -- any of these shipments  
11          in your weighbill sample, wouldn't you apply the same  
12          factor for any particular year? Let's take the year  
13          1978. You don't apply more than one factor for that  
14          year, do you?

15          MR. EDWARDS: Your Honor, I can't answer  
16          that question because first off, the -- I mean not  
17          even -- there is like very few people who know what  
18          the factor is, what the type of factor would be,  
19          whether it changes from year to year, what it --

20          JUDGE LEVENTHAL: No, but in a particular  
21          year it doesn't change does it? Wouldn't they have a  
22          record that in 1978 they applied a factor of 1.10 or

1 whatever to these shipments?

2 MR. EDWARDS: Perhaps to a particular  
3 commodity.

4 JUDGE LEVENTHAL: You don't have to look  
5 at each individual weighbill. It's only one factor  
6 for the year, isn't it? For one shipper. Or do I  
7 misunderstand what you have told me?

8 MR. EDWARDS: I think what I'm saying is  
9 that the railroads are permitted by the Board to apply  
10 a factor to the contract revenues. And whether that  
11 same factor is the same over commodities or not, the  
12 nature of the factor and how it would change year to  
13 year or commodity by commodity --

14 JUDGE LEVENTHAL: We are only talking  
15 about one commodity here, aren't we?

16 MR. EDWARDS: But I don't -- what I'm  
17 saying is all that I am doing is being very careful to  
18 say that I can't answer your question. Your question  
19 is answerable, but in open court on the record, I  
20 can't answer that question. And if I knew it. And,  
21 the other thing that I would ask your Honor is if you  
22 give him this piece of information with regard to

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1 these specific weighbills, there is no information  
2 that you would be giving him. He has the unmasked  
3 revenues for those moves. I'm not sure --

4 JUDGE LEVENTHAL: He may be able to  
5 construct a study using whatever masking factor you  
6 have used for shipments to his client to make some  
7 kind of projection for the rest of his study. I don't  
8 know.

9 MR. MCBRIDE: Your Honor, if I may respond  
10 to what he said here. He has now identified precisely  
11 the problem. It's not that he can't answer the  
12 question, I suspect. He said that even if he knew the  
13 information he wouldn't answer the question in open  
14 court.

15 They may apply more than one factor, given  
16 your I don't know. But your Honor hit upon the point.  
17 If there is only one factor for coal, even if there is  
18 a different factor for scrap metal or something, I'm  
19 only asking about coal. And I need the masking  
20 factors. And if they are using different masking  
21 factors in the same year, God knows how complicated  
22 this is going to be for us to study.

1 And I'm simply trying in an expedited  
2 proceeding to use the data the Board says I can use,  
3 they said I can use, the weighbills, and use them in  
4 an intelligent fashion, and without these masking  
5 factors, it's going to be very hard.

6 JUDGE LEVENTHAL: The argument you made  
7 before me this morning has been that you use one  
8 factor a year. That's what I understood you to say.  
9 Mr. Norton, that's not so?

10 MR. NORTON: No, your Honor. I think we  
11 have been trying to be very careful in not  
12 characterizing these masking factors. Partly because  
13 we don't all have the actual knowledge to be able to  
14 do so. And secondly because those characterizations  
15 themselves reveal significant aspects of the masking  
16 factors, which could be useful in using them in ways  
17 that are not intended.

18 I think you have to assume that there  
19 could be either the same factor used from year to year  
20 or it may be different. It may be different factors  
21 used for different commodities. And there may be  
22 other variations.

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1 JUDGE LEVENTHAL: You are confusing me.  
2 Are we speaking of one commodity here, coal?

3 MR. NORTON: No, his request covers  
4 everything.

5 JUDGE LEVENTHAL: No, but the shipments --  
6 the information you've already given him only concerns  
7 coal shipments to various plants.

8 MR. NORTON: Well that's true.

9 JUDGE LEVENTHAL: So that's all we are  
10 talking about, coal. Nothing else.

11 MR. NORTON: But, the masking factors used  
12 for coal may or may not be the same masking factors  
13 used for other commodities.

14 JUDGE LEVENTHAL: Yes, but he wouldn't  
15 know that. You are not divulging anything to his  
16 consultant in that manner. All you are telling him is  
17 what is the masking factor used for coal for shipments  
18 to his plants.

19 MR. NORTON: It does give a part of the  
20 masking factor itself, which has been so carefully  
21 kept confidential over these years.

22 But there is, I think, a further point

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1 about it. Which is that he simply doesn't need it.  
2 He has total 100 percent information about the  
3 revenues on his clients' facilities and shipments to  
4 them. He doesn't need any masking factors to get a  
5 more accurate number. He has the most accurate  
6 number.

7 The only thing that, even within the coal  
8 unit, that the masking factor would do is perhaps  
9 permit him to get information about the revenues to  
10 other coal utilities, other coal shippers. Which is  
11 exactly what the line you drew in limiting the  
12 production of the paper information in July 16th --

13 JUDGE LEVENTHAL: No, but let's say  
14 suppose you inflate the rates by 10 percent a shipment  
15 of coal to the plants that you have already given him  
16 the information for. Does that mean that you wouldn't  
17 inflate the rate for some other shipper to some other  
18 point by the same 10 percent? Might not you use  
19 three percent or decrease the rate by ten percent?

20 MR. NORTON: Your Honor --

21 JUDGE LEVENTHAL: It doesn't tell him  
22 anything other than a guess, other than the shipments

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1 to his own plant. Now, I agree he might --

2 MR. NORTON: Which he doesn't need.

3 JUDGE LEVENTHAL: -- he might take no --  
4 he might take that -- let's say you have inflated the  
5 rate by ten percent. He might take that ten percent  
6 and take all the rates and assume that you've done  
7 that for all your other shipments. Whether or not you  
8 have actually done it. But he is guessing at that for  
9 purposes of the study. He is making a projection  
10 which may be right, may be wrong.

11 MR. EDWARDS: He can do that now, your  
12 Honor. He has got access to the weighbill. He has  
13 got access --

14 JUDGE LEVENTHAL: He doesn't know what  
15 your factor was, though. He doesn't know --

16 MR. EDWARDS: He's got access to the  
17 weighbill. He's got access to the records. We've had  
18 one to the other.

19 MR. NORTON: Which he says he has already  
20 done.

21 MR. EDWARDS: And so what you -- what are  
22 you giving him that he doesn't already have? If it's

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1 -- let's say it's a ten percent factor for the  
2 commodity of coal, for the weighbill that he has in  
3 his hand. And he looks at this weighbill and it's  
4 \$100. And he looks at the weighbill sample, which you  
5 have asked us to, or are thinking of asking us to do,  
6 and sees that is's 110.

7 JUDGE LEVENTHAL: That's a good argument.  
8 Can't you do that Mr. McBride?

9 MR. MCBRIDE: I can do that as I told you  
10 for the years that your Honor gave me the actual data  
11 with the proviso, what I already told you was that  
12 there appear to be inconsistencies on the weighbills.  
13 So I need to know what masking factors were used. I  
14 already made that representation. You never dealt  
15 with that.

16 But beyond that, if your Honor please,  
17 I've now drawn for you a picture of the problem. CSX  
18 subsequently gave us for AEP data for, I believe, is  
19 the years '80-'82. I'm just being descriptive here.  
20 So I've drawn that in green. We don't have the  
21 masking factors for the years inbetween.

22 The years inbetween, however, we have

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1 data. The Board makes it available. Why do you think  
2 they make it available? So that people can do studies  
3 and present them to the Board. But the problem is,  
4 without knowing the masking factors, I have no idea of  
5 how to draw a line here. And the masking factors are  
6 what are going to help me turn this nonsense on the  
7 orange line into something sensible on the blue line.  
8 And that's all I'm trying to do.

9 And of course it's highly confidential.  
10 Mr. Norton makes that argument all over again. We've  
11 been through this 18 times. Highly confidential  
12 information is given to me under the protective order.  
13 I just need these factors. They don't have to go to  
14 any work of the sort your Honor just described. If we  
15 are just given the factors, we will do the work.

16 MR. EDWARDS: Your Honor, one last point.  
17 He needs to fill in the data. He's got that. He  
18 knows that rate he paid during the entire year -- for  
19 the entire time period. He's got the weighbill data.  
20 If he wants to conduct that study, he's got the  
21 information he needs to conduct that study. If he  
22 knows that he paid \$100 in 1987, compare it, do it.

1 JUDGE LEVENTHAL: All right. Is there any  
2 further argument?

3 MR. NORTON: Your Honor, I just want to --  
4 Mr. McBride referred to this confidentiality argument  
5 that I was making again. We are making a very  
6 different and significantly different argument. In  
7 addition to the underlying -- confidentiality,  
8 sensitivity of the underlying data, there is an  
9 institutional interest here which is, I think, very  
10 unusual and very strong in favoring the protection of  
11 the masking factors themselves as the key to the  
12 integrity and efficacy of this program, which is an  
13 important program to the agency. And that is  
14 something that has to be weighed in the balance, which  
15 was not part of the balance the last time around.

16 JUDGE LEVENTHAL: The ruling I'm about to  
17 make is I'm going to deny his motion except I am  
18 considering requiring you to give him the masking  
19 factors for the data you have already given him. What  
20 I want to inquire from you before I make this final  
21 ruling is what's involved? Is an examination millions  
22 of documents? I don't think it is. I think all you



1 have to do is find out what the policy of your client  
2 is for the particular years involved with respect to  
3 the material you have already furnished him.

4 I think it's one figure that you should be  
5 able to get without expending considerable burden. If  
6 I'm wrong in that, I'm willing to take it into  
7 consideration.

8 My ruling is that I find that my previous  
9 ruling with respect to the material that we discussed  
10 on July 16th, my ruling, I thought was clear.  
11 Evidently it wasn't as crystally clear as I thought it  
12 was. I ruled on two basis. One, I found that that  
13 material requested, as limited by me, could lead to  
14 admissible evidence. And secondly, I compared the  
15 burden of producing the material with the need to  
16 know. So that I feel that I ruled on the relevance of  
17 the material requested at that time.

18 With respect to the discovery dispute  
19 before me this morning, I find that although it's not  
20 exactly the same, it seeks the same information in  
21 another form that I previously ruled on on July 16th.  
22 I will require you now, subject to my reconsideration,

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1 that you furnish the masking -- the masking formula  
2 for the material that you have already furnished to  
3 Mr. McBride.

4 I will give you until tomorrow. We have  
5 another discovery conference tomorrow. I take it you  
6 are not going to be there, Mr. McBride. It doesn't  
7 really concern your client. Do you have any objection  
8 to their telling me what their burden is tomorrow?

9 MR. MCBRIDE: No, but I just want to  
10 clarify something you said for the material already  
11 furnished. Do you mean for the years?

12 JUDGE LEVENTHAL: For the years you  
13 already got.

14 MR. MCBRIDE: I'm going to be at the  
15 deposition of the CSX Chairman tomorrow. I don't have  
16 any objection. I wonder if maybe I could call your  
17 law clerk and have her report to me what was discussed  
18 here and what they said and what you said in response  
19 to it or something.

20 JUDGE LEVENTHAL: Well, let's go off the  
21 record.

22 (Whereupon, the foregoing matter went off



1 the record at 3:05 p.m. and went back on  
2 the record at 3:27 p.m.)

3 JUDGE LEVENTHAL: In our off the record  
4 discussion, we agreed that we will continue this  
5 discovery conference on Friday, September 20 --  
6 September 19 at 9:30 a.m. The time for either party,  
7 any of the parties to appeal from my ruling runs from  
8 the conclusion of the discovery conference on Friday.  
9 Anything else? Everything -- now everybody  
10 understands my ruling.

11 MR. MCBRIDE: What I just have as a  
12 courtesy that any follow-up you might ask of Mr. Snow  
13 to my questions be done while I'm there tomorrow,  
14 instead of Friday when I'm here?

15 JUDGE LEVENTHAL: Mr. Coburn?

16 MR. COBURN: I will raise that request  
17 with the attorney who is going to be defending Mr.  
18 Snow. I'm not.

19 MR. MCBRIDE: We've done some immediate  
20 follow-up to keep it within the same counsel. I can't  
21 be in two places at once here.

22 JUDGE LEVENTHAL: All right, you will try

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1 to cooperate?

2 MR. COBURN: We will try to cooperate.

3 JUDGE LEVENTHAL: All right. We'll stand  
4 adjourned -- Ms. Reporter? I don't have to do any  
5 further ordering with regard to your services? You  
6 will have somebody here Friday? All right. The  
7 discovery conference is adjourned.

8 (Whereupon, the above matter was concluded  
9 at 3:28 p.m.)

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