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DISCOVERY CONFERENCE

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

Finance Docket  
No. 33388

Tuesday,  
November 25, 1997

Washington, D.C.

The above-entitled matter came on for a  
oral argument in Hearing Room 4 of the Federal  
Energy Regulatory Commission, 888 First Street, N.E.  
at 1:00 p.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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APPEARANCES (continued):

On Behalf of Philadelphia Beltline Railroad  
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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:08 p.m.)

3 JUDGE LEVENTHAL: We'll take appearances  
4 at this time. All right. For the applicants?

5 MR. HARKER: Drew Harker with Arnold and  
6 Porter for CSX.

7 MS. BRUCE: Patricia Bruce with Zuckert,  
8 Scoutt and Rasenberger for Norfolk Southern.

9 MR. GITOMER: Louis Gitomer with Ball  
10 Janik for APL Limited.

11 JUDGE LEVENTHAL: Just a minute. Gitomer?

12 MR. GITOMER: Gitomer, G-I-T-O-M-E-R.

13 JUDGE LEVENTHAL: G-I-T-O-M-E-R. And what  
14 were the other names?

15 MR. GITOMER: APL, the --

16 JUDGE LEVENTHAL: Who is going to be  
17 arguing? Mr. Gitomer?

18 MR. GITOMER: Yes.

19 JUDGE LEVENTHAL: Very well.

20 MR. WOOD: Frederick Wood, Your Honor, for  
21 the National Industrial Transportation League and the  
22 Erie-Niagara Rail Steering Committee.

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1 JUDGE LEVENTHAL: Right.

2 MR. AVITABILE: Gregg Avitabile -- I'll  
3 spell that for you: A-V-I-T-A-B-I-L-E -- of Galland,  
4 Kharasch and Garfinkle for International Paper.

5 JUDGE LEVENTHAL: Very well.

6 MR. VON SALZEN: Eric Von Salzen of Hogan  
7 and Hartson for Canadian Pacific.

8 JUDGE LEVENTHAL: One minute. Give me  
9 that again.

10 MR. VON SALZEN: Eric Von Salzen -- that's  
11 V-O-N S-A-L-Z-E-N -- of the law firm of Hogan and  
12 Hartson representing Canadian Pacific.

13 JUDGE LEVENTHAL: Very well.

14 MR. VON SALZEN: Thank you.

15 MR. DOWD: Kelvin Dowd, Your Honor, of  
16 Slover and Loftus representing the State of New York.

17 MR. SPITULNIK: Charles Spitulnik --

18 JUDGE LEVENTHAL: I'm sorry. I'm a little  
19 slow. Give me that name again.

20 MR. DOWD: Kelvin, K-E-L-V-I-N, Dowd,  
21 D-O-W-D.

22 JUDGE LEVENTHAL: Very good.

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1 MR. DOWD: I'm for the State of New York.

2 JUDGE LEVENTHAL: Right.

3 MR. SPITULNIK: Charles Spitulnik -- I'll  
4 spell that for you: S-P-I-T-U-L-N-I-K -- for the  
5 Philadelphia Beltline Railroad and New York City  
6 Economic Development Corporation.

7 JUDGE LEVENTHAL: Further appearances?

8 MR. OSBORN: Jack Osborn appearing for CN.

9 JUDGE LEVENTHAL: Osborn for CN. All  
10 right.

11 MR. NORTON: Gerald Norton, Harkins  
12 Cunningham, for Conrail.

13 JUDGE LEVENTHAL: Very good. Further  
14 appearances?

15 (No response.)

16 JUDGE LEVENTHAL: All right. Now, when  
17 parties argue, will you please be sure to identify  
18 yourself. Also be sure that only one party speaks at  
19 a time. I think what we will do first is take up the  
20 motion of New York City Economic Development  
21 Corporation and the Philadelphia Beltline Railroad  
22 Company and the State of New York because all three

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1 are seeking the similar -- well, I guess the very same  
2 information in the main from the applicants and CN  
3 Railroad. Is that satisfactory to the parties?

4 MR. DOWD: Yes, Your Honor.

5 MS. BRUCE: Yes, Your Honor. Well, Your  
6 Honor, this is Pat Bruce. I'm speaking on behalf of  
7 Norfolk Southern.

8 Prior to the hearing today, Norfolk  
9 Southern entered into an agreement with PBL, New York  
10 City, New York State on their motions to compel. So  
11 I think from Norfolk Southern's point of view, -- and  
12 I'll let Mr. Spitulnik and Mr. Dowd also read into the  
13 record our agreement -- I believe that those motions  
14 have been resolved as to NS.

15 JUDGE LEVENTHAL: Does that include  
16 Philadelphia Beltline Railroad also?

17 MS. BRUCE: Yes, it does.

18 MR. DOWD: Yes, it does, Your Honor.

19 JUDGE LEVENTHAL: All right. Very good.  
20 Will you proceed to read the agreement into the  
21 record?

22 MS. BRUCE: If we could start with New

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1 York State?

2 MR. DOWD: Your Honor, Kelvin Dowd for the  
3 State of New York.

4 We have agreed with the applicant, Norfolk  
5 Southern, that Norfolk Southern will immediately place  
6 into its depository a copy of the CP settlement  
7 agreement with certain rate information redacted.

8 And in consideration of that, the state  
9 will withdraw its motion to compel without prejudice  
10 to subsequent discovery efforts should it become  
11 necessary for the state to seek either rate  
12 information or other related documents. And that  
13 right, of course, is also subject to Norfolk  
14 Southern's retained right to make any objections.

15 And we have agreed to defer any such  
16 further discovery efforts until after the December  
17 15th filing deadline for comments on our responsive  
18 application.

19 JUDGE LEVENTHAL: All right. Very well.  
20 Does that dispose of all of the --

21 MS. BRUCE: No. That disposes of New York  
22 State's. I think a similar agreement has been entered

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1 into with New York City. And I believe by virtue of  
2 the agreement with New York City and New York State,  
3 PBL's request is mooted.

4 MR. SPITULNIK: I agree with that, Your  
5 Honor. This is Charles Spitulnik.

6 JUDGE LEVENTHAL: All right. Very well.

7 MS. BRUCE: And I'd just like to on the  
8 record -- I know I agreed to produce or Norfolk  
9 Southern agreed to produce the CP agreement. And I  
10 would expect we would have it in the depository the  
11 beginning of next week.

12 JUDGE LEVENTHAL: All right. Very good.

13 MS. BRUCE: Okay.

14 JUDGE LEVENTHAL: Now, how about the CSX?

15 MR. DOWD: Kelvin Dowd, Your Honor. CSX  
16 has not agreed to similar terms. We had hoped they  
17 would, but I guess they're not able to. And so as to  
18 CSX, we continue to press our motion.

19 MR. HARKER: This is Drew Harker, Your  
20 Honor.

21 JUDGE LEVENTHAL: Yes.

22 MR. HARKER: If I could explain, my

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1 understanding of the basis for the NS agreement is  
2 that they have made a decision already that they will  
3 be relying on the settlement agreement in their  
4 December 15th filing, in their rebuttal filing.

5 And on that basis, as you know, it is a  
6 work paper once it is relied on in an evidentiary  
7 submission and is required to be deposited in the  
8 primary applicant's depository immediately.

9 In essence, what NS is doing is making an  
10 advance production of a work paper. CSX is in a very  
11 different position. CSX has made no decision as to  
12 whether or not it is going to rely on the CP  
13 settlement. And in advance of that determination, we  
14 are not in a position to agree to give it to New York  
15 State or any of the other movants.

16 My understanding of New York State's and  
17 other movants' interest is that they want to know  
18 whether or not CP and the CSX agreement would limit or  
19 preclude the ability of, say, CP to get trackage  
20 rights and use trackage rights if awarded to them by  
21 the Board, as requested by the movants.

22 And our position on that is that's not an

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1 issue in the case yet. There has been no indication  
2 by the primary applicants that that will be a line of  
3 defense, if you will, or a line of rebuttal. And  
4 until that determination is made, they're basically  
5 seeking discovery into an issue that's not in the case  
6 yet.

7           Should it come into the case on December  
8 15th, should CSX rely on it on the CP settlement  
9 agreement in their rebuttal filing on December 15th,  
10 I can assure the judge that we would promptly put the  
11 document in the depository on the same basis that NS  
12 is producing it today.

13           But we are not in that position yet. And  
14 it is clear that with 160 parties or so in this  
15 proceeding, that the discovery process needs to  
16 proceed in an orderly fashion. And that is what the  
17 precedent indicates. Otherwise all we'll be doing is  
18 fighting about discovery issues.

19           And the Board's ruling on the New Jersey  
20 shared assets area I think shows that that's the  
21 Board's inclination as well as the Board granted  
22 specific authority for parties that wanted to take

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1 discovery against us between October 21 and December  
2 15th to take that discovery. It had to come by Board  
3 order. The Board understood that there was no  
4 automatic right to discovery against us; that is to  
5 say, the primary applicants, during that period of  
6 time.

7 So I would say that at this point there's  
8 no issue in the case to which the CP settlement  
9 agreement goes. If we respond, for instance, if we  
10 respond, to the New York State application and so on  
11 without referring to the Canadian Pacific agreement,  
12 it's clear that the Canadian Pacific agreement's not  
13 in the case.

14 On the other hand, if we were to respond,  
15 you know, if we were to say something like, "Oh, well,  
16 under the CP agreement, CP can't even exercise  
17 trackage rights should they be granted" or some other  
18 such thing like that, then clearly that's an issue in  
19 the case.

20 But if we respond on December 15th without  
21 referring to the agreement, without indicating that  
22 there is something in the agreement that somehow

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1 precludes the Board from granting the relief sought by  
2 any of the responsive applicants, then I would submit  
3 that that agreement is not relevant. And on that  
4 basis, as of November 25th, it's not relevant because  
5 it's not in the case.

6 And that's CSX's view. I don't know if CP  
7 wants to amplify that because they're also a target of  
8 this motion.

9 MR. VON SALZEN: Your Honor, Eric Von  
10 Salzen for Canadian Pacific.

11 JUDGE LEVENTHAL: Yes.

12 MR. VON SALZEN: Our position is identical  
13 to that indicated by Mr. Harker. We have not put this  
14 agreement into issue in this case. As far as Canadian  
15 Pacific is concerned, we have entered into commercial  
16 arrangements with another railroad. It is not an  
17 arrangement that requires regulatory approval. And it  
18 is not an arrangement that we have placed before the  
19 Board either in support of or in opposition to any  
20 application or responsive application in this case.

21 If the party with which we have contracted  
22 chooses to put that agreement in issue in this case,

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1 then that party should be answerable to discovery. My  
2 understanding is that that hasn't happened yet. If it  
3 happens, the discovery should be directed to the party  
4 that puts the agreement into issue, Norfolk Southern  
5 or CSX as the case might be, but not against Canadian  
6 Pacific because we have not and we will not so far as  
7 I can tell have any occasion to put our agreement into  
8 issue in this proceeding.

9 And, therefore, it's a commercial  
10 arrangement, and it is not the business of any of the  
11 other parties to this proceeding at this time.

12 MR. HARKER: You know, Your Honor, I'm  
13 sorry. Just to follow up, and then I'll conclude.  
14 There's also the issue of the fact that this is a  
15 settlement agreement. And under Rule 408 of the  
16 federal rules, settlement materials and the like are  
17 privileged from discovery. And this is something that  
18 would qualify under Rule 408. Now, that NS chooses to  
19 waive that, that's up to them. But that doesn't mean  
20 that that applies to us.

21 The other thing to point out is that the  
22 Board strongly encourages settlements and that if



1 these kinds of agreements were subject to wholesale  
2 discovery when they are, as Mr. Von Salzen said,  
3 commercial agreements not requiring Board approval and  
4 not relied on for anything that the Board may or may  
5 not do, I think it would be highly inappropriate to  
6 order discovery and, in fact, may pose problems in the  
7 future with respect to the Board's policy of trying to  
8 encourage settlements.

9 MR. DOWD: Your Honor, Kelvin Dowd for the  
10 State of New York.

11 JUDGE LEVENTHAL: Yes.

12 MR. DOWD: It goes without saying that the  
13 state takes issue with the points raised by CSX and  
14 Canadian Pacific regarding --

15 JUDGE LEVENTHAL: Deal with the issue of  
16 privilege first.

17 MR. DOWD: Okay. That's rather  
18 straightforward, Your Honor. The Federal Rules of  
19 Evidence do not apply to proceedings before the  
20 Surface Transportation Board. And on at least two  
21 prior occasions in rail consolidation proceedings, the  
22 Board or the Interstate Commerce Commission has

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1 specifically made clear that settlement agreements are  
2 subject to discovery if they are not voluntarily  
3 placed into the record.

4 They did that in Decision Number 19 in the  
5 BN/Santa Fe merger case, Finance Docket 32549, and  
6 reflected the same principle in Decision Number 41 in  
7 that same docket, in both instances holding that  
8 parties had an opportunity to propound discovery  
9 regarding settlement agreements if those agreements  
10 were not placed into the record.

11 Secondly, a preliminary point regarding  
12 timing and timeliness. The only moratorium on  
13 discovery that the Board placed in this case is the  
14 moratorium that expired on October 21st.

15 There is nothing in the discovery  
16 guidelines. There is nothing in the Board's  
17 procedural order which precludes parties other than  
18 the applicants from propounding discovery, otherwise  
19 proper discovery, after October the 21st.

20 So the notion that because the Board  
21 entered a special order regarding the North Jersey  
22 shared assets area supplemental operating plan somehow

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1 amounts to a broad proscription on discovery on other  
2 subjects I think is plainly wrong.

3 The only issue here, Your Honor, is  
4 relevance. CSX takes the position that the terms of  
5 the settlement agreement and any associated  
6 operational terms are only relevant if CSX chooses to  
7 cite them in defense of its comments on New York's  
8 responsive application.

9 And, to be perfectly honest with you, Your  
10 Honor, I wish that was the case because then if CSX  
11 remained silent, we would be able to take that silence  
12 as an effective stipulation that there is no  
13 impediment.

14 But the fact is these agreements exist.  
15 Their terms exist. And those terms will remain what  
16 they are, regardless of whether CSX chooses to raise  
17 them as a defense.

18 The State of New York has propounded a  
19 responsive application. As a consequence, the state  
20 has the burden of persuasion on the elements of  
21 relief; to wit., the need for the trackage rights  
22 based upon an anti-competitive impact arising out of

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1 the transaction and the feasibility of those trackage  
2 rights from an operational standpoint.

3 It is no big secret that when one looks at  
4 the map in relation to New York's responsive  
5 application, the two prime candidates for the exercise  
6 of the trackage rights are Canadian Pacific and the  
7 New York and Atlantic, the two carriers that connect  
8 with the trackage rights line at the north and south  
9 ends, respectively.

10 It is relevant to New York's ability to  
11 carry its burden of persuasion on the issue of  
12 operational feasibility if one or both of those  
13 carriers have entered into agreements that inhibit or  
14 prohibit their ability to operate over the line in  
15 question. And such inhibitions or prohibitions will  
16 exist, regardless of whether CSX chooses to raise them  
17 as arguments in this case.

18 And it's on that basis that we think the  
19 relevance of the terms of these agreements is clearly  
20 established and is appropriate for discovery at this  
21 time without regard to whether they're raised as a  
22 defense at some later time.

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1 I would also point out that in the  
2 objection that was raised by CSX, there was no  
3 indication that if the agreements were raised, then  
4 they would be produced. There was only a general  
5 statement that they may be entitled to discovery at  
6 some future time.

7 I am somewhat more relieved to hear Mr.  
8 Harker say that they will produce them if they do rely  
9 upon them, but it does not change the fact that the  
10 relevance of the agreements does not depend on CSX's  
11 choosing to raise them in their defense.

12 So we don't believe that the objections  
13 are well-taken. We ask that Your Honor overrule the  
14 objection. And we are willing to amend our motion to  
15 compel and ask that you simply order CSX to make the  
16 agreement available on the same terms that we've  
17 agreed to with the Norfolk Southern.

18 JUDGE LEVENTHAL: Do I understand, then,  
19 that if they make the agreement available, that  
20 satisfies your motion?

21 MR. DOWD: If the settlement agreement is  
22 placed into the depository on the same terms that

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1 we've agreed to with Norfolk Southern, then we would  
2 consider that to be satisfaction of our motion to  
3 compel with respect to the CP settlement. There is a  
4 second portion regarding the New York and Atlantic,  
5 but I think that Mr. Harker and I have worked that  
6 out.

7 As to the CP settlement, an order  
8 directing deposit on the same terms as Norfolk  
9 Southern has agreed to we would accept, yes.

10 JUDGE LEVENTHAL: Now, if this is made  
11 available to you, how do you propose to use the  
12 information you obtain?

13 MR. DOWD: Well, we would determine or try  
14 to determine from the text of the agreement itself  
15 whether CP has entered into any agreements that will  
16 inhibit or prohibit their ability to exercise the  
17 trackage rights should they be granted or that would  
18 influence the terms on which those trackage rights  
19 could be exercised.

20 And that evidence is relevant to our  
21 carrying our burden of persuasion and operational  
22 feasibility.

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1 JUDGE LEVENTHAL: All right. Mr. Harker?

2 MR. HARKER: Well, thank you, Your Honor.

3 JUDGE LEVENTHAL: I have to tell you I  
4 think he's made out a case of relevance.

5 MR. HARKER: Well, actually, I think  
6 that's what I was going to talk about unless you tell  
7 me that there's no point in it.

8 JUDGE LEVENTHAL: No, no, no. I haven't  
9 decided. I'm willing to listen to your argument.

10 MR. HARKER: Okay. I think, as I  
11 understand the argument, the linchpin of it is set out  
12 sort of on Page 5 of his motion, which says, "As the  
13 party with the burden of persuasion on the issue, New  
14 York is entitled to discover whether one or both of  
15 these railroads have entered into agreements with  
16 applicants that, quote, 'limit or even preclude their  
17 ability to participate in New York's trackage rights  
18 remedy.'"

19 Well, at this point, that is not an issue  
20 in the case. It's just simply not in the case. If,  
21 on the other hand, we were to argue that the reason  
22 why the State of New York's trackage rights remedy is

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1 not operationally feasible is somehow because as a  
2 result of this agreement CP is precluded from using  
3 such trackage rights, then it would obviously become  
4 relevant.

5 But the fact that there is a settlement  
6 agreement with CSX that we don't know -- I honestly  
7 haven't seen it. And so on that basis, I would submit  
8 to you that's an indication that CSX doesn't view it  
9 as terribly relevant to this proceeding.

10 I am unaware of any reason why we should  
11 have to produce something before we basically put it  
12 in issue. I mean, Mr. Dowd talks about needing to  
13 deal with the burden of persuasion.

14 If we put the operational feasibility or  
15 infusibility of their remedy, their requested relief,  
16 at issue in our filing, then I agree it's at issue.  
17 But nobody has put that in issue yet.

18 And Mr. Dowd is concerned that somebody on  
19 December 15th might put it in issue. Well, if that  
20 happens, then he's entitled to discovery on it then,  
21 not now.

22 With respect to privilege, I haven't had

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1 an opportunity to look at the BN/SF cases that he  
2 cites to, but my understanding is that settlement  
3 agreements are subject to privilege.

4 You know, with respect to discovery, as I  
5 said, I don't think that the fact that the Board felt  
6 inclined or felt it necessary to specifically  
7 authorize discovery against the applicants now in a  
8 different matter I think is relevant.

9 I mean, I guess I'm trying to help out Mr.  
10 Dowd. And, one, I'm just trying to explore something.  
11 We haven't yet talked about New York and Atlantic.  
12 But would it help in order not to produce the CP  
13 agreement?

14 Would you in exchange accept a stipulation  
15 along the lines of what we're going to talk about with  
16 respect to New York and Atlantic, that essentially we  
17 know of nothing in the settlement agreement that would  
18 preclude CP's using trackage rights that were granted  
19 to it?

20 I mean, that's what we're going to do in  
21 the context of New York and Atlantic. Why doesn't  
22 that satisfy you with respect to CP?

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1 JUDGE LEVENTHAL: Mr. Dowd?

2 MR. DOWD: Well, Your Honor, the simple  
3 answer to that is that I don't see how that's a  
4 stipulation that could be entered into today in light  
5 of the fact that counsel says he hasn't seen the  
6 agreement.

7 We are obviously concerned about the  
8 feasibility issue. We are concerned about the issue  
9 of this agreement being held up as resolving the  
10 problem that we have pointed to as the cause for the  
11 need for trackage rights.

12 I'm not in a position right here to accept  
13 a stipulation which by definition wouldn't be based on  
14 the terms of the agreement.

15 MR. HARKER: Yes. But, well --

16 MR. DOWD: And the fact is that the most  
17 expeditious way to resolve this matter is to simply  
18 order the agreement produced. We have agreed with  
19 Norfolk Southern that subject to further proceedings  
20 after the 15th of December, we'll accept a version of  
21 their agreement that has the rates redacted.

22 Now, with the most sensitive commercial

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1 data shielded from discovery, at least temporarily  
2 perhaps, it seems to me that concerns of privilege and  
3 whatnot go by the boards. And, rather than go through  
4 a process of adjourning a hearing, trying to negotiate  
5 a stipulation, maybe we come to terms, maybe we don't,  
6 maybe we come back before you again next week, rather  
7 than go through that process, it seems to me it's more  
8 expeditious.

9 And given that the law very clearly favors  
10 discovery in this case, the two cases that I have  
11 cited make clear that the proper ruling is to simply  
12 order the document produced.

13 JUDGE LEVENTHAL: All right. Mr. Harker,  
14 do you have anything further?

15 MR. HARKER: No, Your Honor. As I said,  
16 I mean, we're going to talk in a minute about the New  
17 York and Atlantic stipulation. I would submit that if  
18 what they're interested in, as they indicate on Page  
19 5, is whether or not we're essentially going to argue  
20 that there's something in the CP agreement that  
21 inhibits the operational or would preclude the  
22 operational feasibility of their proposed relief, I

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1 think the most straightforward way to deal with that  
2 is to essentially explore the possibility of  
3 stipulating.

4 MR. DOWD: Your Honor, let me just make  
5 one -- this is Kelvin Dowd the last time.

6 JUDGE LEVENTHAL: Yes.

7 MR. DOWD: Let me just make one point  
8 about the New York and Atlantic issue because it is  
9 considerably different. We don't know whether there  
10 is any agreement between CSX and New York and Atlantic  
11 or CSX and Anacostia and Pacific.

12 As we said in our motion, our document  
13 request directed at New York and Atlantic was prompted  
14 by this rather mysterious filing by the New York and  
15 Atlantic stating an intention to oppose the  
16 pro-competitive relief that Congressman Natler and his  
17 colleagues have asked for. And so we saw that, and we  
18 became suspicious that perhaps there is some sort of  
19 an arrangement that's been entered into. So we asked  
20 about it.

21 But we don't know whether there is or is  
22 not any sort of an agreement involving the New York

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1 and Atlantic. And the stipulation that Mr. Harker and  
2 I have discussed goes to that issue: whether there  
3 are any agreements. In this particular case, we know  
4 there's an agreement.

5 The agreement exists. It's been signed.  
6 It's been the subject of a press release, which  
7 selectively describes in part its terms. And it is  
8 considerably different than the situation with the  
9 NY&A. And since it's there and it's capable of being  
10 produced, we think it's appropriate that it be  
11 produced.

12 JUDGE LEVENTHAL: All right. Mr. Harker,  
13 let me ask you this question: If you blank out the  
14 rate information, if you redact the rate information,  
15 what prejudice is there to you if you produce the  
16 agreement at this time?

17 MR. HARKER: Well, there are other  
18 sensitive commercial terms and conditions in there  
19 besides rate information. It's my understanding that  
20 there are currently settlement discussions going on  
21 with the State of New York.

22 And so on that basis, there is a concern

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1 that some of those provisions are commercially  
2 sensitive. And on that basis, there would be a  
3 concern about producing it.

4 MR. DOWD: Your Honor, I have to interject  
5 here. Mr. Harker just made a statement as to which  
6 there is no public foundation and has no relevance at  
7 all to anything we're talking about today.

8 I will take this up with him separately,  
9 but, for the record, I'm going to move to strike his  
10 comment regarding discussions with the State of New  
11 York. But, at any rate, you know, that's irrelevant.

12 JUDGE LEVENTHAL: All right. I don't see  
13 a need to strike the comments. Your motion to strike  
14 the comments is denied.

15 Let me ask you this. If I require Mr.  
16 Harker to produce the documents but to redact the  
17 material that he thinks is commercially sensitive,  
18 would that satisfy your request?

19 MR. DOWD: Well, Your Honor, we have  
20 accepted redaction of rates.

21 JUDGE LEVENTHAL: Oh, no. He hasn't told  
22 us what the other commercially --

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1 MR. DOWD: Right. I'm not sure that he  
2 knows because he says he hasn't seen the agreement.  
3 So I would be taking a pig in a poke there. I mean,  
4 I understand --

5 JUDGE LEVENTHAL: Well, no. Just a  
6 minute. If the agreement tells you everything you  
7 want to know about trackage rights, et cetera, why  
8 would commercially sensitive material affect your  
9 case? Suppose you get it with the redactions and see  
10 if it doesn't satisfy your need.

11 MR. DOWD: Well, Your Honor, the concern  
12 is I understand what rates are. I understand the  
13 redaction of rates. But Mr. Harker is referring to  
14 some other provisions, unrelated to rates, which are  
15 commercially sensitive. But we have no description of  
16 what they are.

17 And I can't agree without any  
18 understanding of what the subject matter is. I can't  
19 agree to have that information redacted because I have  
20 no way of knowing whether and to what extent it may  
21 impact on the flexibility or the ability of the  
22 Canadian Pacific after the fact. I mean, it's a

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1 mystery.

2 MR. HARKER: Well, you know, Your Honor,  
3 I --

4 JUDGE LEVENTHAL: But let me get back to  
5 Mr. Harker. Mr. Harker, you know, we have the  
6 protective order with the highly confidential  
7 provision. You can tell from what I'm saying that I'm  
8 inclined to grant the motion to produce the document.  
9 If there is material that's highly sensitive, doesn't  
10 the highly confidential provision protect you?

11 MR. HARKER: Well, Your Honor --

12 JUDGE LEVENTHAL: I've heard that argument  
13 a number of times.

14 MR. HARKER: I know that, Your Honor. And  
15 we have discussed that, of course. I would say this,  
16 that the Board itself in, I think it was, Decision 42  
17 recognized that, even with the protective order, there  
18 were circumstances where the redaction of highly  
19 confidential information was still appropriate.

20 And, in fact, at one point -- and you'll  
21 recall that one of the parties to the proceeding filed  
22 a motion with the Board seeking a direction that no

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1 redaction was appropriate. And the Board denied that  
2 finding, that certainly there were cases where  
3 redaction was appropriate.

4 And you'll recall that even last week,  
5 when we were seeking agreements from Mr. Morell's  
6 client, Indiana Highway, Indiana Southern, and New  
7 England Central, you ordered production of those  
8 agreements with reasonable redactions.

9 And we indicated that that would be  
10 acceptable, although we would obviously be looking at  
11 what was given to us to see whether or not what was  
12 given to us still met our need. And if it didn't,  
13 then we would renew our motion to compel. And if it  
14 did, then we would leave you alone and leave everybody  
15 else alone and go about our business.

16 And so it would seem to me that perhaps,  
17 Your Honor, if you don't like the idea of some kind of  
18 a stipulation, perhaps Your Honor would entertain that  
19 suggestion to require production but permit CSX to  
20 redact information which it felt was highly  
21 confidential and then let Mr. Dowd review the  
22 document, see if it meets his particular need. And if

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1 it doesn't, he's without prejudice to coming back to  
2 you.

3 MR. DOWD: Your Honor, the --

4 JUDGE LEVENTHAL: Mr. Dowd, I have to tell  
5 you that that is the order I issued last week.

6 MR. DOWD: And I don't have that  
7 transcript in front of me, but my recollection of the  
8 dispute was that the redacted information was  
9 acknowledged to be not relevant to the purpose for  
10 which the applicants sought access to the document.

11 If Mr. Harker wants to redact highly  
12 confidential data, there's a highly confidential  
13 designation in the protective order.

14 JUDGE LEVENTHAL: Yes, but just a moment.  
15 All that you would be losing under such an order is  
16 one week. We meet again next Thursday. And I'm  
17 willing to meet with you people on Wednesday if the  
18 day makes a difference.

19 And if you find that the material redacted  
20 is something you think you need, we can take it up  
21 once again next week. Meanwhile, you'll have the bulk  
22 of the information you're seeking. I think that's a

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1 reasonable resolution of the problem that you posed.

2 All right. Do you have anything further  
3 to say? I'll make my ruling.

4 MR. DOWD: I would just ask --

5 MR. HARKER: No, Your Honor.

6 MR. DOWD: I would just ask, Your Honor:  
7 Will your ruling include a timing directive as the  
8 production of this redacted document so that we would  
9 have time to review it and then, if necessary, be back  
10 next Thursday?

11 JUDGE LEVENTHAL: You mean a time when CSX  
12 has to produce its document?

13 MR. DOWD: Yes, Your Honor.

14 JUDGE LEVENTHAL: Yes. Well, surely. I  
15 assume it would be produced immediately. Isn't that  
16 so, Mr. Harker?

17 MR. HARKER: I have to get a copy of the  
18 agreement. I am assuming that there are copies  
19 floating around somewhere.

20 MR. DOWD: Well, if they're floating  
21 around, it can't be too confidential.

22 JUDGE LEVENTHAL: Now, wait a minute. All

1 right.

2 MR. HARKER: So, anyway, what do you have  
3 in mind?

4 MR. DOWD: I have in mind close of  
5 business Monday.

6 MR. HARKER: That's you'll have the  
7 document close of business Monday?

8 MR. DOWD: Right.

9 MR. HARKER: That's fine..

10 JUDGE LEVENTHAL: All right. So ordered.  
11 CSX is to produce the document with reasonable  
12 redactions by next Monday. All right?

13 Now, does that satisfy -- that moots your  
14 motion with respect to Canadian Pacific, does it not,  
15 Mr. Dowd?

16 MR. DOWD: Between your order and the NS  
17 agreement, yes, that takes care of our motion as to  
18 Canadian Pacific.

19 JUDGE LEVENTHAL: All right.

20 MR. DOWD: And Mr. Harker and I have an  
21 understanding as to New York and Atlantic. I'll let  
22 him put that on the record.

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1 JUDGE LEVENTHAL: All right. Mr. Harker?

2 MR. HARKER: Should I do that now? Okay.

3 MR. DOWD: Sure.

4 MR. HARKER: Mr. Dowd on behalf of New  
5 York State also propounded some interrogatories with  
6 respect to any agreement and document requests as well  
7 with respect to any agreement that we might have with  
8 New York and Atlantic Railroad.

9 I am informed by CSX that there is no  
10 agreement between CSX and New York and Atlantic  
11 Railroad which would preclude the exercise by New York  
12 and Atlantic Railroad of trackage rights granted to it  
13 by the Board should the Board conclude at the  
14 conclusion of this proceeding that that's what it  
15 wanted to do. And it was my understanding on the  
16 basis of that representation that Mr. Dowd was willing  
17 to withdraw the motion with respect to the New York  
18 and Atlantic.

19 In addition, let me go on to say that CSX  
20 also does not have an agreement -- that didn't quite  
21 come out right. Neither does CSX have an agreement  
22 with the Anacostia and Pacific, which is the New York

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1 and Atlantic Railroad's parent company, which would  
2 preclude the exercise by the New York and Atlantic  
3 Railroad of trackage rights granted to it by the Board  
4 pursuant to this proceeding.

5 In addition, the CSX does have a  
6 settlement agreement with the Chicago South Shore  
7 Railroad, which operates out in Chicago. They don't  
8 operate in New York.

9 I understand Mr. Dowd's concern was that  
10 there might be something in that settlement agreement  
11 since the Chicago railroad is an affiliate of the New  
12 York and Atlantic that might have precluded in some  
13 indirect or direct way New York and Atlantic from  
14 exercising trackage rights granted to it by the Board.

15 I have informed him that that is not the  
16 case. The settlement agreement with Chicago does not  
17 involve and does not mention the New York and Atlantic  
18 Railroad.

19 MR. DOWD: Just subject to the  
20 clarification that the trackage rights to which Mr.  
21 Harker refers are the rights requested by the state in  
22 its responsive application.

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1 MR. HARKER: I agree.

2 MR. DOWD: And with that clarification, we  
3 accept that stipulation and will withdraw the document  
4 request.

5 JUDGE LEVENTHAL: All right. Very well.  
6 Does this order now moot also the Philadelphia  
7 Beltline Railroad and New York Economic Development  
8 Corporation motions?

9 MR. SPITULNIK: Yes, Your Honor, it does.

10 JUDGE LEVENTHAL: All right. So that's  
11 disposed of. The reasons I am ordering discovery are  
12 that I find that the need to know outweighs all the  
13 other considerations argued by Mr. Harker in this  
14 matter. I find that the information sought is  
15 relevant or may lead to relevant information in this  
16 matter.

17 All right. That disposes of those  
18 motions.

19 MR. DOWD: Thank you, Your Honor.

20 MR. SPITULNIK: Thank you, Your Honor.

21 MR. HARKER: Your Honor, this is --

22 JUDGE LEVENTHAL: Now we have the

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1 remaining motions of CSX. There are two sets of  
2 motions, one that was filed earlier in the week that  
3 was noted CSX/NS-165. Let me interrupt myself at this  
4 time.

5 Do we need the gravamen of the motions in  
6 the record or does my order dispose of the matter?

7 MR. HARKER: You're talking about the  
8 previous motion?

9 JUDGE LEVENTHAL: Yes, the ones I just  
10 ruled on.

11 MR. HARKER: I think I'm comfortable where  
12 we are. We know.

13 JUDGE LEVENTHAL: All right. If you don't  
14 intend to appeal, then we don't need the motion itself  
15 in the record. I'm just trying to have a complete  
16 record in case you have some intention of appealing my  
17 order.

18 MR. DOWD: Your Honor, we can simply send  
19 a copy of the motion for attachment to the transcript  
20 if you think that would --

21 JUDGE LEVENTHAL: Well, I'm trying to save  
22 trouble, too. If we don't need it, we don't need it.

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1 If you want a complete record, we'll do that. We'll  
2 follow that course. Mr. Harker, it's your call.

3 MR. HARKER: I don't see a need, Your  
4 Honor.

5 JUDGE LEVENTHAL: All right. Very well.

6 MR. VON SALZEN: Your Honor, this is Eric  
7 Von Salzen for Canadian Pacific. I have no further  
8 involvement in the matters that are before you. May  
9 I be excused?

10 JUDGE LEVENTHAL: Yes, you may.

11 MR. VON SALZEN: Thank you, Your Honor.

12 MR. HARKER: Your Honor?

13 JUDGE LEVENTHAL: All right. Then we have  
14 remaining now the two motions by CSX. One is  
15 designated CSX/NS-165, and the other one is the one I  
16 received by fax last night. I understand there's some  
17 problem of notice with regard to the one I received  
18 last night. And the number of that is CSX-127.

19 Have you disposed of that matter, Mr.  
20 Harker?

21 MR. HARKER: Let's talk, if we could, Your  
22 Honor, about CSX/NS-165 because I think that one will

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1 be easy.

2 JUDGE LEVENTHAL: Okay. I like the easy  
3 ones.

4 MR. HARKER: I understand. I'm sorry.

5 MR. SPITULNIK: Your Honor, this is  
6 Spitulnik. To the extent that my motions were  
7 resolved by Mr. Dowd's eloquent presentation with  
8 respect to the issues that we raised in our motion, I  
9 have nothing further to add to this hearing. And I'd  
10 also ask if I could be excused, please.

11 JUDGE LEVENTHAL: Yes, certainly. You are  
12 excused.

13 MR. SPITULNIK: Thank you very much.

14 JUDGE LEVENTHAL: Anything further with  
15 respect to the first three motions?

16 MR. DOWD: Just Kelvin Dowd would like to  
17 be excused as well.

18 JUDGE LEVENTHAL: All right, Mr. Dowd.  
19 You're excused.

20 MR. DOWD: Thank you, Your Honor.

21 JUDGE LEVENTHAL: All right, Mr. Harker?

22 MR. HARKER: All right. With respect

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1 again to CSX/NS-165, it addressed objections that CSX  
2 had received to: CSX-99, which was discovery directed  
3 against Centerior Energy; CSX-101, discovery directed  
4 against Consumers Energy; CSX-93, which was discovery  
5 directed at Citizens Gas and Coke Utility; CSX/NS-137,  
6 discovery directed to New England Central Railroad;  
7 and NS-51, which was NS' discovery directed to the  
8 Institute of Scrap Recycling Industries.

9 And I can report to you, Your Honor, that,  
10 for a variety of reasons, all of these issues  
11 addressed in that motion have been satisfactorily  
12 resolved.

13 JUDGE LEVENTHAL: All right. Very well.  
14 Okay. So with respect to CSX/NS-165, that matter is  
15 now settled?

16 MR. HARKER: Right.

17 JUDGE LEVENTHAL: Very well.

18 MR. HARKER: And, if you like, we can talk  
19 about CSX-127 and at least get one preliminary matter  
20 I think out of the way as well.

21 JUDGE LEVENTHAL: All right.

22 MR. HARKER: That motion addressed

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1 objections by APL Limited to CSX-106 and also  
2 addressed objections by International Paper to CSX-54  
3 and then finally objections by Indianapolis Power and  
4 Light Company to CSX-120. And I can report with  
5 respect to the last item, Indianapolis Power and  
6 Light's objections to CSX-120, that that issue has  
7 also been resolved.

8 JUDGE LEVENTHAL: Very well.

9 MR. HARKER: So I believe unless one of my  
10 colleagues corrects me that the only two issues we've  
11 got are with respect to APL and International Paper.

12 JUDGE LEVENTHAL: All right.

13 MR. HARKER: And I am prepared to proceed  
14 as you direct.

15 JUDGE LEVENTHAL: My law clerk advised me  
16 Mr. Greenberg objected on the grounds that he didn't  
17 have notice.

18 MR. AVITABILE: That's right, Your Honor.  
19 This is Gregg Avitabile on behalf of International  
20 Paper.

21 We do object to being required to respond  
22 at this time to CSX's motion to compel. Although we

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1 received notice yesterday that CSX intended to move to  
2 compel today, we were not notified at that time that  
3 CSX intended to notice the hearing for today, to  
4 include us on the docket for the hearing today.

5 We understand under your Decision Number  
6 20 that there is a 3-day notice provision. And that  
7 notice provision contemplates an opportunity for the  
8 parties to respond in writing. IP would like the  
9 opportunity to respond in writing, and it would like  
10 the opportunity to have the three days mandated under  
11 that opinion to respond to the motion.

12 In fact, Your Honor, if it had not been  
13 for counsel for Indianapolis Power and Light, Mike  
14 McBride's, calling Ed Greenberg this morning, we would  
15 not even have been aware that there was a hearing  
16 today on which docket we had been included because we  
17 never would have imagined that we could have been  
18 required to attend a hearing essentially 14 hours  
19 after being notified of a motion to compel.

20 JUDGE LEVENTHAL: Mr. Harker?

21 MR. HARKER: The --

22 JUDGE LEVENTHAL: I know we provided for

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1 a short notice in view of the fact that there is  
2 Thanksgiving this week.

3 MR. HARKER: Yes, Your Honor. The other  
4 thing -- yes, exactly right. My understanding of the  
5 proceeding this week was that we would have the  
6 hearing today and notices were to go out yesterday.  
7 We did put out a notice to the restricted service list  
8 on November 14th to that effect. So the restricted  
9 service list was on notice that this would be an  
10 unusual week based on the holiday. Nobody objected at  
11 that time.

12 The other thing I would point out, Your  
13 Honor, is with respect to International Paper, the  
14 substance of this is exactly identical, the substance  
15 of our motion is essentially the same, as the motion  
16 that we filed a week ago Monday with respect to  
17 International Paper. And this is CSX/NS-163 filed  
18 November 17th.

19 I reported at the hearing on Thursday,  
20 this past Thursday, that it looked like there was  
21 going to be a settlement of that. Basically what  
22 happened is -- and I did not participate in any of the

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1 discussions with Mr. Greenberg or his colleague, but  
2 my understanding is that last Wednesday, the 19th,  
3 CSX's lawyers read to Mr. Greenberg a proposed  
4 stipulation, which he agreed to.

5 Our lawyers then reduced it to writing on  
6 Thursday and sent it to him. On Friday, they sent a  
7 letter back to us, which is in your materials. I  
8 believe it's at Tab 3 in your materials. No. Pardon  
9 me. It's Tab 4 on the 21st. You can see down at the  
10 bottom it was about 4:00 o'clock in the afternoon.

11 They sent it back, saying that they had  
12 had an opportunity to consult with their client and  
13 that they have to make two changes in the statement.

14 And the next business day, Monday,  
15 yesterday, my colleagues talked to them. And it's my  
16 understanding that in the morning, they informed Mr.  
17 Greenberg that we would in light of -- that we gave  
18 them until noon to agree to our stipulation or a  
19 slight revision of it and that if they were unable to  
20 do so by noon, we would have to move for the hearing  
21 today. That's my understanding.

22 We have put forward the exact same motion

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1 that we did last week. They knew what the motion was  
2 last week.

3 JUDGE LEVENTHAL: Let me interrupt you.  
4 I think we have a problem. The fax I received is  
5 time-dated at 10:07 last night. And if they received  
6 it the same time, that is extremely short notice. Let  
7 me say this also: Suppose we give them until next  
8 week to reply.

9 Meanwhile let me tell IP&L counsel that I  
10 am very impressed by Mr. Harker's motion and argument.  
11 And I would tell you -- and I'm not considering the  
12 fact that you have entered into some settlement  
13 agreement with him which has not been finalized. I'm  
14 telling you that you will have a very steep uphill  
15 fight to have me deny this motion.

16 MR. HARKER: Your Honor, may I seek a  
17 clarification?

18 JUDGE LEVENTHAL: Yes.

19 MR. HARKER: Are we now talking about  
20 International Paper or are we talking about APL? I  
21 was addressing International Paper.

22 JUDGE LEVENTHAL: What did I say?

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1 MR. HARKER: You said --

2 JUDGE LEVENTHAL: I thought I said IPL.

3 MR. HARKER: Okay. I'm sorry. IPL is  
4 Indianapolis Power and Light also. And I just wanted  
5 -- we have APL.

6 JUDGE LEVENTHAL: No. I guess it's IP.  
7 I'm sorry.

8 MR. HARKER: Yes. We have --

9 JUDGE LEVENTHAL: I'm referring to  
10 International Paper.

11 MR. HARKER: Very good.

12 JUDGE LEVENTHAL: All right? I would  
13 strongly recommend that the parties dispose of this.

14 MR. HARKER: I appreciate that, Your  
15 Honor. Let me tell you my concern.

16 MR. GITOMER: Your Honor, this is Lou  
17 Gitomer on behalf of APL.

18 JUDGE LEVENTHAL: Yes.

19 MR. GITOMER: I agree that it is egregious  
20 that we were served at 10:00 o'clock last night the  
21 motion to compel. We were notified during the day  
22 yesterday that there would be a hearing, although we

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1 did not receive the motion to compel until, as your  
2 copy says, 10:07 p.m.

3 Our objections to CSX's discovery were  
4 filed on November 18th, one day before they were  
5 required to be filed, so that CSX would have time to  
6 appropriately file a motion to compel or negotiate  
7 with us. The motion to compel was not filed until  
8 November 24th.

9 Regardless of all of that, -- and I say  
10 that for the record -- regardless of that, APL is  
11 prepared and is willing to go ahead on the motion to  
12 compel today. We realize the short time frames that  
13 the applicants are working under. And we are willing  
14 to work with them.

15 JUDGE LEVENTHAL: All right. Very well.

16 MR. HARKER: And I appreciate that. Mr.  
17 Gitomer is a hard person to reach, and we played  
18 telephone tag last week trying to talk about this.  
19 But I take no exception to what he said.

20 I will say that with respect to the  
21 three-day notice, Your Honor -- and I didn't even  
22 raise this because I'm here. I'm ready to go. But,

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1 actually, Mr. Dowd's motion was filed in less than  
2 three days because we got Mr. Dowd's motion on Friday,  
3 the State of New York. But we were prepared and ready  
4 to go. And so I don't really know this idea of this  
5 three-day rule.

6 I think that the discovery guidelines talk  
7 about a Monday notice for a Thursday hearing. By Your  
8 Honor's order, he required this week a Tuesday hearing  
9 with what I thought was a Monday notice. And that was  
10 my understanding of the situation.

11 I think, quite honestly, with respect to  
12 International Paper, that they had been aware of the  
13 substance of the issue since at least last week and  
14 that we had already moved to compel once and that we  
15 couldn't reach agreement, that we were going to be  
16 right back here.

17 So the idea that there is any prejudice,  
18 I mean, they have had the motion for over a week. And  
19 I would point out, Your Honor, or I would just  
20 indicate, Your Honor -- and I know where you're going,  
21 but I'd at least like you to consider a couple of  
22 things.

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1 I am told by my colleagues that if we  
2 don't get the information from International Paper  
3 which you have indicated an inclination on by December  
4 5th, the information won't really be very helpful to  
5 us. And I lay my --

6 JUDGE LEVENTHAL: What date is next  
7 Wednesday?

8 MR. HARKER: Next Wednesday is December  
9 3rd, Your Honor.

10 JUDGE LEVENTHAL: Would that satisfy you?

11 MR. HARKER: But, Your Honor, December 3rd  
12 is the discovery conference, and we --

13 JUDGE LEVENTHAL: Suppose I were to rule  
14 in your favor on December 3rd and the material is  
15 produced on December 3rd. Would that satisfy you?

16 I have to tell you, Mr. Harker, with  
17 getting a motion to compel at 10:00 o'clock at night  
18 and if a party objects as insufficient notice, I'm  
19 very reluctant to knock them out.

20 MR. HARKER: All right, Your Honor. Let  
21 me ask you this, then. Would you be willing to order  
22 IP to bring the answers, have answers to these

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1 interrogatories, on December 3rd with them ready to  
2 produce to us if you granted the motion?

3 JUDGE LEVENTHAL: All right. Counselor?

4 MR. AVITABILE: Well, Gregg Avitabile  
5 again, Your Honor.

6 I think that would be an inappropriate  
7 order because one of our principal objections to this  
8 discovery is that it's grossly over-broad and  
9 burdensome. And for us to have to prepare all of the  
10 responses and to obtain all of the documents and bring  
11 them with us on Wednesday essentially defeats the  
12 purpose of our objections to begin with. That would  
13 be unreasonable.

14 MR. HARKER: Well, you know, the other  
15 thing, Your Honor, is I am told today is November  
16 25th. This discovery was served on November 5th.  
17 Responses were due November 20th. It is my  
18 understanding that we don't have any responses yet  
19 from International Paper, even as to those  
20 interrogatories and document requests to which they  
21 did not object.

22 So I am very, very concerned that if we

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1 agree to a motion to compel on Wednesday, December  
2 3rd, unless they have the documents that are the  
3 subject of the motion in hand on December 3rd, we're  
4 not going to see them in time to do us any good.

5 MR. AVITABILE: Your Honor, this is Gregg  
6 Avitabile again.

7 I think Mr. Harker does raise an important  
8 point, and I should like to address that. When we  
9 were negotiating the stipulation and the agreement,  
10 narrowing these interrogatories and document requests  
11 to a reasonable point, we had agreed to produce  
12 responses to all of the interrogatories and  
13 correspondingly document requests save 12, save Number  
14 12, limited to the Loch Haven point and IP's Erie  
15 Mill.

16 It is IP's intent to respond to those  
17 interrogatories to which we objected with information  
18 and documents that are responsive limited to the Erie  
19 Mill and the Loch Haven yard.

20 And we do intend to produce that material  
21 by Monday at the absolute latest. So it is not our  
22 intent at all to stonewall CSX with what we concede

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1 are responsive materials. Our objection is to  
2 responding with respect to every point from which IP  
3 ships and every customer to which IP ships on all of  
4 the points without regard to the carrier and without  
5 regard to its relevance to IP's comments.

6 IP has thousands of customers and 30  
7 different points at a minimum from which it ships.  
8 And it would be really stunningly burdensome for us to  
9 obtain information in -- frankly, Your Honor, I don't  
10 know whether you've seen these specific  
11 interrogatories, document requests at issue here, but  
12 to expect us to provide all of that information on  
13 Wednesday and then potentially win our objections I  
14 think would be sort of an odd --

15 JUDGE LEVENTHAL: Well, do you have a  
16 proposal to narrow the inquiry?

17 MR. AVITABILE: Well, we did, Your Honor.  
18 In fact, it's -- I hate to backtrack again, but I  
19 think I need to point out on the record that we  
20 disagree and, in fact, deny the representations made  
21 by Mr. Harker with respect to the discussions had  
22 between IP and CSX.

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1           There was never any agreement with respect  
2   to the precise language of the stipulation.  
3   Stipulation language was discussed. And we informed  
4   CSX that we had to clear it with the client, which I  
5   think is understandable.

6           When we did discuss the precise language  
7   with representatives from International Paper, they  
8   were not agreeable to it. And we, therefore, made an  
9   effort we thought to narrowly change the language of  
10  the stipulation.

11           Notwithstanding that point, yes, we do  
12  feel more than comfortable responding to the  
13  interrogatories and document requests to which we  
14  objected provided they be limited to the Loch Haven,  
15  shipments to and from Loch Haven, and shipments to and  
16  from IP's Erie Mill.

17           And we have even agreed to respond fully  
18  to Interrogatory Number 12 without limitation. And  
19  that interrogatory, in my understanding from  
20  discussion with counsel, is essentially an effort to  
21  determine what current movements involving CSX-CR or  
22  NS-CR will become single line movements with either NS

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1 or CSX.

2 And, although we don't concede the  
3 relevance of that, that is not something that is so  
4 obtrusive that we couldn't obtain that information, at  
5 least informing them of what routes we are currently  
6 using that joint service.

7 That would be reasonable to us. And we'd  
8 be happy to provide that information.

9 JUDGE LEVENTHAL: Well, Mr. Harker, how  
10 about that?

11 MR. HARKER: The problem, Your Honor, is  
12 that in their comments and requests for conditions,  
13 they make a generalized attack on joint line service,  
14 which is basically the background here is that IP is  
15 a big shipper. And I concede that. And they have  
16 complained about one move, which is going to go from  
17 single line Conrail service to joint line CSX and NS  
18 service. They complained about that one move and  
19 pointed out that joint line service doesn't work out.

20 We understood their position to be during  
21 the course of our negotiations and propounded a  
22 stipulation to them that would have essentially had

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1       them stipulating that their complaint in the  
2       proceeding is not a generic complaint about joint line  
3       service but, rather, was limited to the specifics of  
4       this move he's talking about between Erie Mill and  
5       Loch Haven.

6               And they made two changes to that  
7       stipulation. One of them made it clear that, in fact,  
8       they do have a concern about joint line service  
9       generically. Their lack of concern is very narrow.

10              So, in other words, they do have a concern  
11       about joint line service generally and that they  
12       objected to the language about limiting, that their  
13       comments were limited to this one move because they  
14       made it clear that they had other concerns as well.

15              I think I would be willing to say in order  
16       to try to limit this that if there was a joint line  
17       move in California that didn't touch the particular  
18       transaction here, that would be information that would  
19       not have to be included. But I would say any joint  
20       line move on the system that is to be essentially  
21       created out of this acquisition and consolidation I  
22       would submit to you would be information relevant to

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1 our inquiry.

2 We want to know what their experience with  
3 joint line service is overall. They complain about it  
4 in one context, but we want to understand what their  
5 experience with joint line moves have been overall.

6 So I would say that I'm prepared to  
7 discuss narrowing it, narrowing these requests to a  
8 point that I assume will be much less of a concern to  
9 International Paper.

10 But what I am not willing to do is on  
11 November 25th, 20 days after our discovery was  
12 submitted and 5 days after it was due, agree that  
13 we're going to wait another week before seeing any  
14 answers. I mean, that's just unacceptable.

15 My understanding is that Judge Nelson in  
16 a prior case did something along the lines of what I'm  
17 suggesting. And Mr. Norton was just telling me about  
18 it. And I'd like him to explain what he was telling  
19 me.

20 JUDGE LEVENTHAL: But wait a minute. I'm  
21 willing to go along with your suggestion.

22 MR. HARKER: Okay.

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1 JUDGE LEVENTHAL: I'm having trouble  
2 pronouncing -- Mr. Avitabile, is that?

3 MR. AVITABILE: Avitabile, Your Honor.  
4 It's Avitabile, but don't concern yourself about it.

5 JUDGE LEVENTHAL: Avitabile. I'm very bad  
6 on pronunciation of names. Avitabile's objection is  
7 that your request is too broad.

8 We're only talking about limiting your  
9 request. I'm going to go along with what you're  
10 asking me to do.

11 MR. HARKER: Well, Your Honor, I would be  
12 willing to limit it on that basis. I would like to  
13 see the -- Monday is unacceptable for the things about  
14 which there has been no dispute. I don't understand  
15 that.

16 I don't understand given the proceeding  
17 that we're under here why we can't get anything from  
18 them before Monday. And, again, I would ask that they  
19 be ordered with respect to the limited production that  
20 we're talking about to have the information in hand on  
21 Wednesday if you're telling me that that is the  
22 earliest that you can be available.

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1           The other alternative -- and I'm not  
2           advocating this, but I am so concerned about the delay  
3           here that the other alternative if you're not  
4           available is to ask another judge if you don't mind to  
5           hear the motion just because --

6           JUDGE LEVENTHAL: I don't mind doing that.  
7           The problem then, Mr. Harker, is a new judge isn't  
8           going to be familiar with all of the proceedings that  
9           have gone on.

10          MR. HARKER: I understand, Your Honor,  
11          believe me.

12          JUDGE LEVENTHAL: To bring him up to date  
13          on it, you know, you're talking only a very few days  
14          here.

15          MR. HARKER: I understand, but --

16          JUDGE LEVENTHAL: It doesn't seem  
17          practicable to me.

18          MR. HARKER: But when you're working  
19          20-hour days, every day makes a difference when you're  
20          trying to put this together, let me tell you. But, as  
21          I said, if Your Honor was willing to go along with a  
22          narrowing of the discovery along the lines that I'd

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1 suggested, along with ordering IP to have the  
2 materials here on Wednesday assuming that you grant  
3 the order, then I would be willing to go with that.

4 JUDGE LEVENTHAL: All right.

5 MR. AVITABILE: Your Honor, may I respond  
6 for a moment, please?

7 JUDGE LEVENTHAL: Yes, yes, Mr. Avitabile.

8 MR. AVITABILE: I think there may be some  
9 confusion. My understanding was that you are amenable  
10 to the limitation proposed by IP, which would have  
11 limited the responses to the Loch Haven yard and IP's  
12 Erie Mill. Mr. Harker --

13 JUDGE LEVENTHAL: Isn't that what Mr.  
14 Harker said?

15 MR. AVITABILE: No. Mr. Harker has  
16 proposed limiting it only to all CR-NS or CSX  
17 movements of IP freight, not necessarily limited only  
18 to IP's Erie Mill or the Loch Haven yard. I think I  
19 need --

20 JUDGE LEVENTHAL: Let's clear that up.  
21 Mr. Harker, weren't you talking about the Loch Haven  
22 and the Erie Mill yards?

1 MR. HARKER: No, Your Honor, it wasn't  
2 limited to that because their comments aren't limited  
3 to that. Their comments make a generalized complaint  
4 about joint line service. And what we are trying to  
5 do is understand what use International Paper makes of  
6 joint line service. They say it can't work and it  
7 doesn't work. And their paper goes on about that.  
8 And we --

9 MR. AVITABILE: Your Honor, I have to  
10 interrupt. I have to --

11 MR. HARKER: May I just finish, please?

12 JUDGE LEVENTHAL: Let Mr. Harker finish.

13 MR. AVITABILE: I'm sorry. I'm sorry.

14 MR. HARKER: And when we sought a  
15 stipulation from International Paper saying that no,  
16 their comments were limited to -- or they had no  
17 complaints generally with joint line service, they  
18 objected. The agreement that they took back to  
19 International Paper was unacceptable to International  
20 Paper.

21 So what we're trying to do is we're  
22 limiting -- again, we're narrowing the scope of the

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1 discovery that we propounded. The scope of the  
2 discovery was: Tell us about all of your joint line  
3 moves.

4 I'm now proposing that, instead of that,  
5 which would encompass moves, say, on the West Coast,  
6 which I don't think we have any interest in, we would  
7 be interested in any information on their joint line  
8 moves basically on the East Coast, on the CR-NS/CSX  
9 system. That's a much narrower request than we had  
10 initially made.

11 JUDGE LEVENTHAL: The stipulation that's  
12 referred to in the letter of November 21, 1997, was  
13 that limited to the Eric Mill and the Loch Haven  
14 yards?

15 MR. HARKER: Was it? No. What we were  
16 trying to do was take issues out of the case. And we  
17 recognized that that particular move is a move that is  
18 in the case. What we were trying to do was basically  
19 scope down the extent of what International Paper's  
20 complaint was.

21 And so we propounded. We drafted. We  
22 prepared a stipulation that, as I said, is the last

1 Page of Exhibit 4 of your materials. Actually, let me  
2 be accurate. What is the last page of Tab 4 is  
3 International Paper's redraft of our proposed  
4 stipulation, which we found unacceptable. And, in  
5 particular, it's the second sentence, where the  
6 changes were made.

7 Our initial draft had said IP's complaint  
8 in this proceeding is not a generic complaint about  
9 joint line service. They have added single car. So,  
10 in other words, they are complaining about all joint  
11 line service but single car. And that means that  
12 their complaints generally about joint line service  
13 other than single car, at least according to  
14 International Paper, are in the case.

15 And so what we were trying to do is  
16 understand what use they have made of joint line  
17 service. And that's the purpose of the  
18 interrogatories to which International Paper objected.

19 MR. AVITABILE: May I respond now, Your  
20 Honor?

21 JUDGE LEVENTHAL: Yes. All right.

22 MR. AVITABILE: And I apologize for

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1 interrupting. The reason I interrupted is because Mr.  
2 Harker during his most recent statement for the second  
3 time referred to IP's comment as a general objection  
4 to joint line service. And that is just blatantly  
5 false and inconsistent with IP's comment.

6 IP's comment is, first of all, limited by  
7 its terms to the specific movement from IP's Eric Mill  
8 to Loch Haven. And, moreover, we specifically state  
9 in the comment some joint line operations can be and  
10 often are more efficient than a single line service  
11 because, frankly, IP recognizes that there are times  
12 when joint line service can be better than single line  
13 service.

14 And the point of our comment is when you  
15 have a unit train operation that has a very narrow  
16 window of opportunity to run due to the conditions  
17 imposed with respect to trackage rights used over that  
18 movement, single line service is essential. And that  
19 is the only thing being said in this comment.

20 And what Mr. Harker has done through his  
21 stipulation, first of all, has tried to condition our  
22 accession to -- he has tried to condition his

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1 accession to narrowing his interrogatories and other  
2 discovery requests to a reasonable point upon our  
3 agreement essentially to go on record as agreeing that  
4 this transaction is appropriate and in the best  
5 interest generally of the public.

6 He's creating an issue with respect to our  
7 objection to joint line service that never existed in  
8 the first place. And the only change we made to the  
9 stipulation was to focus on single car joint line  
10 service not being an issue because our issue is with  
11 respect to unit train service.

12 And I think the addition in the  
13 stipulation of the reference to single car joint line  
14 service really makes only that distinction. And it  
15 still is quite a concession I think for IP to put into  
16 writing an agreement of that sort when: first of all,  
17 it shouldn't be necessary given the fact that the  
18 discovery is not appropriate to begin with; and,  
19 second of all, is reasonable in light of what IP has  
20 objected to in this case, which is that very specific  
21 and narrow movement.

22 MR. HARKER: Your Honor, either --

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1 JUDGE LEVENTHAL: Don't you have a  
2 stipulation right there, Mr. Harker? He's saying that  
3 their objection is limited to the movement from Erie  
4 to Loch Haven.

5 MR. HARKER: The problem with the  
6 stipulation, Your Honor, is the addition of the words  
7 "single car." Their comments can be read to be a  
8 concern. I mean, I don't think and I'm sure that  
9 counsel will correct me if I'm wrong if in their  
10 comments, which talk generally about joint line  
11 service being a problem, I don't think they reference  
12 single car.

13 I think the problem with their comments is  
14 they could be interpreted to mean to be a general  
15 attack on all joint line service. And this doesn't  
16 help. The stipulation --

17 JUDGE LEVENTHAL: But he just said that it  
18 isn't.

19 MR. HARKER: No, no, no. What --

20 JUDGE LEVENTHAL: What he said at this  
21 conference?

22 MR. HARKER: No. Well, I'm not sure about

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1 that, Your Honor. As I said, I understand his  
2 stipulation, what he was willing to agree to, that he  
3 would agree to stipulate that single car joint line  
4 service is -- that they are not complaining  
5 generically about single car joint line service.

6 And on the basis of that addition, I don't  
7 understand why the stipulation needed to be changed to  
8 single car if, in fact, he's not complaining about  
9 unit train, for instance, unit train joint line  
10 service. I mean, if it's not a generic complaint  
11 about unit train joint line service, then why the  
12 addition of single car?

13 Our thinking is that it must be because he  
14 does have a generic complaint about unit train joint  
15 line service. And that's what we're concerned about.  
16 And so we're trying to figure out what has been their  
17 experience.

18 As I said, we're willing to narrow the  
19 interrogatory to only address news affected by this  
20 transaction. So, anyway, that's --

21 JUDGE LEVENTHAL: I mean, your concern is  
22 that he has an objection to unit car joint line

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1 service. Is that correct?

2 MR. HARKER: As stated in the comments,  
3 the comments are broad enough that I wouldn't say  
4 single car or unit train. It's a generic concern  
5 about joint line service. That's the way the comments  
6 read.

7 We were trying to get an issue out of the  
8 case, which I understand based on counsel's reputation  
9 shouldn't be in the case, but, nevertheless, they  
10 limited it.

11 So, in other words, the way I read their  
12 stipulation, they're saying they do have a generic  
13 complaint about joint line service if it involves a  
14 unit train. And that's what we're trying to get at.

15 Now, in addition, I would be willing to  
16 limit the interrogatories to only focus on unit car  
17 joint line service complaints -- I'm sorry -- unit  
18 line --

19 JUDGE LEVENTHAL: On unit train joint line  
20 service.

21 MR. HARKER: Unit train joint line, right,  
22 in the East. I mean, I would be willing to take it

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1 that far as well.

2 JUDGE LEVENTHAL: All right, Mr.  
3 Avitabile. That sounds reasonable, doesn't it?

4 MR. AVITABILE: The limitation to unit  
5 train or his position with regard to what the  
6 complaint in the comments is?

7 JUDGE LEVENTHAL: No. His interrogatory  
8 is limited to unit train joint line movements.

9 MR. HARKER: In the East.

10 MR. AVITABILE: In the East.  
11 Unfortunately, because I don't know off the top of my  
12 head the extent to which IP utilizes unit train  
13 service throughout the East, -- I think I already  
14 mentioned that it's got thousands of customers and  
15 numerous points from which it ships -- it could very  
16 well be --

17 JUDGE LEVENTHAL: But wait. You have a  
18 simpler solution. If you have no complaint about  
19 that, then what's the problem? Why don't you say, "We  
20 have no complaint about the joint line unit train  
21 movements"? And then it's out of the case.

22 And if it is in the case, then you respond

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1 to the interrogatory as limited in this conference.

2 MR. AVITABILE: I guess my concern, Your  
3 Honor, is that our comments really are the basis of  
4 our complaint in this case. And they --

5 JUDGE LEVENTHAL: He's entitled to get  
6 your comments clarified. And that's what it seems to  
7 me he is seeking. And if, in fact, it does not refer  
8 to unit train joint line movement, I don't see what  
9 the problem is in saying so. However, if you don't  
10 want to say so, then I think he's entitled to an  
11 answer to his interrogatory.

12 MR. AVITABILE: Well, we certainly are  
13 complaining only about this specific change, the  
14 potential for this transaction resulting in the change  
15 from single line unit train service over that  
16 particular movement to a joint line service. That is  
17 the entirety of IP's complaint in this proceeding  
18 under this comment.

19 Our concern is that IP also is concerned  
20 about the effect of the transaction on CP, Wisconsin  
21 Central, and Illinois Central Railroads. And it's  
22 possible that IP may submit additional statements

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1 expressing those reservations on behalf of WC and IC.  
2 We haven't done so at this point.

3 So at this point in the proceeding,  
4 there's no question that this comment and IP's  
5 position are limited to that one movement. The reason  
6 we didn't want to stipulate more broadly is because of  
7 that potential at a later date to take a position  
8 consistently with the positions taken by the other two  
9 carriers that I mentioned.

10 MR. HARKER: Your Honor, my point exactly.  
11 Now, what we have going on here this afternoon is  
12 issue creep. It's one issue now, and then suddenly  
13 it's going to be another issue later.

14 If International Paper is not prepared to  
15 enter into a very straightforward stipulation about  
16 what the limit of the issues is, then we are hardly in  
17 a position to agree to limiting our discovery. And if  
18 they're not in a position to agree that they're not  
19 complaining generically about unit joint line service,  
20 then we're entitled to discovery that gets into the  
21 extent to which they made use of unit train joint line  
22 service. And that's all we're asking for.



1           As I said, now I've limited the  
2 interrogatories in two significant ways. One is we've  
3 now limited them geographically. Two is we've now  
4 limited them to unit trains.

5           JUDGE LEVENTHAL: All right.

6           MR. HARKER: And, on the other hand, all  
7 we have is issue creep. Now we have a new issue in  
8 the case.

9           JUDGE LEVENTHAL: All right. It's not in  
10 the case yet. All right.

11           My ruling is this. I'm going to defer  
12 arguments on this to your choice of next Wednesday or  
13 next Thursday. You wanted next Wednesday, I take it,  
14 Mr. Harker?

15           MR. HARKER: Yes, Your Honor.

16           JUDGE LEVENTHAL: All right. And I'm  
17 going to rule that on next Wednesday; that's, December  
18 3rd, that IP be prepared to furnish the interrogatory  
19 as limited by Mr. Harker in this conference on  
20 December 3rd if I rule in the favor of the -- if I  
21 grant the motion to compel.

22           MR. AVITABILE: Can we be more specific?

1 We've talked about so many limitations here. What  
2 specific limitation are we referring to?

3 JUDGE LEVENTHAL: I'm going to have Mr.  
4 Harker repeat the limitation and listen carefully.

5 MR. HARKER: Sure. The interrogatories  
6 would be limited to only focus on movements on the  
7 current Conrail, Norfolk Southern, CSX systems which  
8 involve unit train joint line service.

9 MR. AVITABILE: All right.. And now can I  
10 just add one thing, Your Honor?

11 JUDGE LEVENTHAL: Yes.

12 MR. AVITABILE: If IP is willing to  
13 stipulate after a discussion with representatives of  
14 the company that we do not complain about unit thrown  
15 service that we -- let me understand.

16 Your concern is that we're complaining  
17 about losing unit train single line service generally  
18 and having it be replaced by joint line service.  
19 That's your concern?

20 MR. HARKER: My concern is we gave you a  
21 stipulation which said that IP's complaint in this  
22 proceeding is not a generic complaint about joint line

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1 service. You've come back and limited that to single  
2 car. So my assumption is that you are complaining  
3 generically about unit train joint line service.

4 If we can get out single car and, so it  
5 says, is not a generic complaint about joint line  
6 service, which I understood you talked to my  
7 colleagues about and were unwilling to do less than 24  
8 hours ago, I think we may have the room for a deal.

9 But I think, Your Honor, you have made  
10 your ruling. I think it's a fair ruling. And what I  
11 would suggest is that if counsel for International  
12 Paper after consulting with International Paper wants  
13 to come back and propose something that would do away  
14 with the need for the discovery, I would welcome that.  
15 I would entertain it. I am not interested in posing  
16 undue burden on people or any burden at all. And so  
17 if we can resolve it, I think that's great.

18 We thought we had last Wednesday, but I  
19 would say that now is not the time to delay a ruling.  
20 Now is not the time to delay having a hearing given  
21 the fact that we've been here, and we've done that.  
22 We did that last week. And look where we are. It got

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1 us nowhere except another week of delay.

2 MR. AVITABILE: Okay. So this information  
3 just with respect to just the unit train movements and  
4 with respect to the CR-CSX and NS system will be due  
5 to be provided on Wednesday at the date of the  
6 hearing. That's correct?

7 JUDGE LEVENTHAL: Yes. That's the ruling.

8 MR. AVITABILE: Okay. Thank you, Your  
9 Honor.

10 JUDGE LEVENTHAL: All right.

11 MR. AVITABILE: May I be excused, Your  
12 Honor?

13 JUDGE LEVENTHAL: Yes, you may.

14 MR. AVITABILE: Thank you.

15 JUDGE LEVENTHAL: All right. Then we have  
16 the APL.

17 MR. HARKER: Yes. It's my motion. So I  
18 guess I have the floor.

19 JUDGE LEVENTHAL: All right.

20 MR. HARKER: Is that okay?

21 MR. GITOMER: That's fine.

22 MR. HARKER: And I appreciate Mr.

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1 Gitomer's willingness to go forward. The basis for  
2 the motion to compel, Your Honor, is that there is an  
3 article, which we will refer to as Article 2.2(C) of  
4 the transaction agreement between CSX and NS, which is  
5 a very important provision of the transaction  
6 agreement.

7 Basically what it provides is that all of  
8 the agreements that Conrail currently has, all of the  
9 contracts, rail transportation contracts that Conrail  
10 currently has, will remain in effect through their  
11 natural term and that CSX and NS will basically carry  
12 out Conrail's obligations under those contracts.

13 And CSX and NS in the application sought  
14 authorization essentially for Article 2.2(C) to  
15 essentially override any anti-assignment clause that  
16 might exist in a Conrail contract such that would  
17 prevent transfer of the rail transportation contracts.

18 So basically the Board is being asked to  
19 override any of the anti-assignment provisions that  
20 would essentially block implementation of Section 2.2,  
21 Article 2.2 of the transaction agreement.

22 APL in its comments indicated concern

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1 about Article 2.2(C) and the request by CSX and NS of  
2 the Board to essentially authorize a carrying out of  
3 2.2(C).

4 And APL essentially is seeking one of  
5 three forms of relief from the Board. First, APL is  
6 seeking from the Board an order that would essentially  
7 exempt APL from the implementation of 2.2(C). In  
8 other words, the anti-assignment clause would still  
9 apply, preventing assignment.

10 Alternatively, APL asks for an order from  
11 the Board exempting intermodal contracts from  
12 operation of Article 2.2(C). And then, third, I  
13 believe that they request essentially that the Board  
14 disapprove in its entirety Article 2.2(C).

15 So, anyway, APL gave the Board sort of a  
16 menu of possible options which, to my way of  
17 understanding, APL is sort of neutral on. Any one of  
18 the three I think would satisfy APL.

19 Now, in addition to a -- and basically  
20 what APL says in their paper is that -- and I'm sure  
21 that Mr. Gitomer will correct me if I'm wrong and  
22 he'll characterize it his way. But basically what APL

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1 wants the opportunity to do is to sit down and  
2 negotiate separately with CSX and NS and come up with  
3 new contracts.

4 Now, in addition, I should say that APL  
5 and Conrail, in addition to having this rail  
6 transportation agreement, also have a lease agreement,  
7 which is referred to in the comments by APL.

8 Although APL does not indicate in their  
9 comments to what extent any of the relief that would  
10 be granting assuming that the Board granted any of the  
11 relief to APL, APL does not indicate to what extent  
12 APL is seeking any change to the lease agreement.

13 And I should say that, you know, quite  
14 honestly, it's my understanding that the lease  
15 agreement has -- well, strike that. I don't want to  
16 go there unless I have to.

17 So, in any event, APL and Conrail have a  
18 rail transportation agreement, and they have a lease  
19 agreement. And basically CSX and NS would plan on  
20 having the Board approve the transaction and that  
21 these particular assets of Conrail would essentially  
22 transfer to CSX or NS as the case may be and that that

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1 would be the way it would go.

2 APL, on the other hand, has said that the  
3 transportation agreement basically should be not  
4 terminated, but basically they want to escape Article  
5 2.2(C).

6 Now, the problem that we've got is that  
7 the lease agreement contains a provision that  
8 indicates that --

9 MR. GITOMER: Mr. Harker, may I interrupt  
10 you for a moment?

11 MR. HARKER: Yes.

12 MR. GITOMER: The lease agreement and the  
13 transportation contract between APL and Conrail have  
14 been provided to the applicants on an informal basis  
15 and are to be treated as highly confidential  
16 materials.

17 Therefore, Your Honor, I would prefer that  
18 any references to specific portions of either of the  
19 agreements not be made or, else, we will have to  
20 perhaps classify this portion of the transcript as  
21 highly confidential.

22 That's all I wanted to say at this point.

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1 MR. HARKER: That's helpful.

2 JUDGE LEVENTHAL: Mr. Harker?

3 MR. HARKER: On Page 6 of our motion, we  
4 have reproduced a provision from the lease agreement,  
5 which gives rise to the inquiry that we have made.  
6 And rather than my reading it into the record, I would  
7 just ask you at this point to perhaps refer to Page 6  
8 if that's appropriate.

9 And so basically this provision --

10 JUDGE LEVENTHAL: Wait a minute. Would  
11 that satisfy Mr. Gitomer?

12 MR. GITOMER: Your Honor, if you would  
13 care to read that portion of the agreement, that's  
14 perfectly fine with me.

15 JUDGE LEVENTHAL: And it won't be referred  
16 to in the transcript.

17 MR. GITOMER: That's fine.

18 JUDGE LEVENTHAL: All right. Fine. Go  
19 ahead.

20 MR. HARKER: In any event, there is  
21 linkage obviously between the two. And what we have  
22 tried to determine by asking this one interrogatory

1 and one document request is essentially to determine  
2 whether or not it is APL's contention that the lease  
3 agreement will terminate if the transportation  
4 agreement were materially modified at APL's request in  
5 conjunction with this transaction.

6 And indeed it would seem apparent that it  
7 would be or, alternatively, if -- not alternatively,  
8 but in addition, state whether or not it is APL's  
9 contention that the lease agreement would terminate if  
10 the Board were to grant relief to APL, any of the  
11 three forms of relief that APL requested.

12 I know that Mr. Gitomer is concerned that  
13 we are seeking their legal opinion and that was the  
14 basis for the objection, among others. And I'll let  
15 him speak to his view.

16 Our view is that essentially what we have  
17 done is what parties do all the time, which is to  
18 propound an interrogatory which is designed to get at  
19 a fact. And that fact is: What position are you  
20 going to take in this proceeding as to a particular  
21 situation? What will be the consequence if the Board  
22 grants -- will you contend that something will be the

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1 case if the Board grants you relief? And we're trying  
2 to understand: Is this an issue in the case or not?

3 And, as we argue in our paper, Rule 33(B)  
4 of the -- actually, now it's old Rule 33(B). It's new  
5 Rule 33(C) of the Federal Rules of Civil Procedure,  
6 which I do believe that the Board does look to in this  
7 proceeding, makes it clear that these types of  
8 contention interrogatories are appropriate. And, in  
9 fact, even ones that apply law to fact are  
10 appropriate.

11 And that is exactly what we are doing.  
12 We're saying: If the Board does something, is it your  
13 contention that something will result? If it's not,  
14 then -- or I should say if it is, then there are  
15 issues that don't need to be disposed of in the case.

16 And if it isn't their contention that the  
17 lease agreement terminates; in other words, that, in  
18 spite of this provision I'd asked you to read before,  
19 the lease agreement goes on, then that is something  
20 that is an issue, would have to be discussed in the  
21 context of the case.

22 So we're just trying to figure out: Is it

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1 in or is it out of the case? And that's the purpose.  
2 Again, I would submit that 33(C) authorizes that kind  
3 of discovery. And we've given you I think ample  
4 authority to indicate that these kinds of  
5 interrogatories are permissible.

6 And I think with that, I'll conclude  
7 unless you have any questions.

8 JUDGE LEVENTHAL: No. Mr. Gitomer?

9 MR. GITOMER: Your Honor, preliminarily I  
10 have a great deal of problem with this motion to  
11 compel. If you look at Page 12, you will note that  
12 not only are outside counsel on this motion, but so  
13 are counsel for CSX Corporation and CSX  
14 Transportation, Inc., parties who are not permitted to  
15 see highly confidential information, which has been  
16 quoted in this motion.

17 MR. HARKER: Can I address that?

18 MR. GITOMER: Yes, you may.

19 JUDGE LEVENTHAL: All right.

20 MR. HARKER: The signature lines on these  
21 briefs, as on all the briefs that I've seen, are  
22 basically boilerplate. I mean, these are the



1 signature lines that we have that we use.

2 It indicates that Mark Aron and Peter  
3 Shvdtz and Mike Giftos and Paul Hitchcock on behalf of  
4 their clients are sponsoring this brief, but there's  
5 no indication in here that they saw the brief.

6 And I will represent to you that they did  
7 not see this brief other than in a redacted form,  
8 which I provided to Mr. Hitchcock last night to  
9 approve it. But the particular provision that you're  
10 talking about was redacted from the letter in order to  
11 get client approval to submit it.

12 MR. GITOMER: With that representation  
13 from Mr. Harker, I will accept that.

14 MR. HARKER: And let me also go on to say  
15 that if you notice the certificate of service, it does  
16 indicate that we only serve parties on the highly  
17 confidential, restricted list.

18 We did not serve -- there is also, Your  
19 Honor, a confidential restricted service list, which  
20 does include in-house people. Those folks did not get  
21 a copy of the paper.

22 JUDGE LEVENTHAL: All right.

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1 MR. GITOMER: Your Honor?

2 MR. HARKER: I apologize for any confusion  
3 about that, but I'm glad to offer that clarification.

4 MR. GITOMER: Your Honor, first off, I  
5 believe in the motion, CSX has mischaracterized APL's  
6 position. One of the centerpieces of the CSX motion  
7 is on Page 5, where they intimate that APL is seeking  
8 to have the Surface Transportation Board order APL's  
9 transportation contract with Conrail terminated.

10 That is absolutely not true, Your Honor.  
11 In fact, APL is of the position that the Board has no  
12 power whatsoever to take any action with respect to  
13 this contract.

14 Let me go back to Section 2.2(C) of the  
15 transaction agreement between CSX, Norfolk Southern,  
16 and Conrail. Mr. Harker represented a part of that  
17 section correctly. However, he left out some very  
18 important parts of that section to APL.

19 That section not only asks the Board to  
20 override the anti-sign-in provisions, but it also sets  
21 up a provision for dividing transportation contracts  
22 between CSX and Norfolk Southern, regardless of any

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1 input from the other party to that contract. APL  
2 greatly objects to that.

3 APL's contract with Conrail is somewhat  
4 different than a number of other contracts where you  
5 have a contract for shipment from Point A to B. APL's  
6 contract with Conrail essentially involves shipments  
7 all over Conrail's service territory between numerous  
8 points in the East.

9 The division of that contract under the  
10 terms of Section 2.2(C) is far from clear. And, in  
11 fact, to this date, for discovery which we propounded  
12 in the beginning of October, Norfolk Southern has not  
13 responded with how they believe the contract could be  
14 divided. So we think it's a very unclear provision as  
15 far as who will end up serving APL in the end.

16 As far as the representation that Mr.  
17 Harker made as to APL's requested relief, that is  
18 correct. We have requested the Board to either  
19 disapprove Section 2.2 in toto or as to just  
20 intermodal companies or, finally, as to APL because of  
21 our unique contract with Conrail.

22 We have not asked the Board to terminate

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1 that contract. As I have already said, the Board  
2 doesn't have that power. And it is not something that  
3 APL wants the Board to do.

4 APL essentially wants to be able to  
5 negotiate with CSX and Norfolk Southern the division  
6 of the contract or perhaps the awarding of the  
7 contract to one of the two parties.

8 And certainly APL understands that neither  
9 Norfolk Southern nor CSX wants to give up the  
10 substantial revenues that each would gain from the  
11 contract.

12 APL has not raised the issue of  
13 terminating its lease with Conrail. APL has merely  
14 mentioned that it does have a lease with Conrail,  
15 which is a part of the special relationship between  
16 Conrail and APL.

17 CSX now has filed its interrogatory, which  
18 asks APL to state its contention and the reasons  
19 supporting that contention as to whether the lease  
20 would terminate or not.

21 Again, the issue of lease termination has  
22 never been raised by APL in this proceeding.

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1 Moreover, in order to contend that the lease will or  
2 will not terminate and the reasons supporting it, APL  
3 will have to review the transportation contract and  
4 the lease agreement with Conrail, will have to make a  
5 legal analysis of all of the provisions relevant to  
6 this question, and then provide that to CSX.

7 As I said earlier, APL on a highly  
8 confidential basis has provided the transportation  
9 contract and the lease to CSX. In fact, APL could not  
10 have provided the lease to CSX unless Conrail had  
11 waived the confidentiality provisions, which Conrail  
12 did.

13 Therefore, CSX also has these two  
14 documents, which it can analyze and draw its own legal  
15 conclusions. Therefore, APL feels that it does not  
16 need to analyze these agreements for CSX, especially  
17 since the issue CSX is raising has never been part of  
18 the case.

19 Thank you, Your Honor.

20 JUDGE LEVENTHAL: Well, Mr. Harker, do you  
21 have a response to that? If they say they have no  
22 contention with regard to the lease and contract, why

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1 do you need a response to the interrogatory?

2 MR. HARKER: Because, Your Honor, the  
3 relief that they are requesting; that is to say, the  
4 transportation contract and the lease, are, as I say,  
5 interlinked.

6 With respect to the need for a legal  
7 opinion, we're not looking for a legal opinion. We're  
8 just asking them what their position is. And if their  
9 position is that a consequence of the Board's action,  
10 a consequence of the Board granting the relief sought,  
11 is that the lease agreement would be terminated.

12 They have no need to provide each and  
13 every reason why the lease agreement would not  
14 terminate. I mean, that's only in the event that they  
15 conclude no, that they say no, that, in fact, the  
16 lease agreement will basically outlive the  
17 transportation contract.

18 The reason why we need it, even if APL  
19 hasn't put the lease agreement at issue, at least not  
20 directly, is that it would be -- this is part of the  
21 bundle of rights and obligations, the lease agreement  
22 and the transportation agreement are part of the

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1 bundle of rights and obligations that Conrail and APL  
2 have agreed to.

3 I mean, as Mr. Gitomer said, the lease  
4 agreement is part of the, quote, unquote, "special  
5 arrangements with Conrail." And they go -- Mr.  
6 Timothy Rhein, the President of APL, goes into a great  
7 deal of length about the nature of the special  
8 relationship between Conrail and APL and how this  
9 transaction will obviously disrupt that and expresses  
10 concern that such a special relationship may not be  
11 possible with either one of the applicants; in  
12 particular, CSX.

13 So this is part of the -- basically the  
14 transportation services agreement is one part of the  
15 special partnership. And, as indicated in that  
16 provision I gave you before, the lease agreement is  
17 the other part. And the two are interlinked. The two  
18 are interbound.

19 And so basically what CSX and NS are  
20 trying to understand with respect to the APL position  
21 is: What is APL's contention if you take one part of  
22 that special relationship, one part of it, away? What

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1 happens to the other part?

2 And indeed it would be CSX's view that if  
3 APL says yes in light of the fact that there is this  
4 special relationship and that the two agreements are  
5 linked in the way, in the very tight way, indicated in  
6 that agreement, in that provision that I showed you,  
7 that the lease agreement would terminate. That would  
8 be our position. Then at that point, that's not an  
9 issue that we need to bring before the Board.

10 But if APL were essentially to argue that  
11 yeah, you can open up one-half of the special  
12 relationship that Conrail and APL have and that's  
13 one-half of an asset that CSX and NS are getting but  
14 the other half is not to be opened up and not to be  
15 renegotiated, then that would be obviously a situation  
16 that we would have to bring to the Board's attention.  
17 And we would have to indicate to the Board that this  
18 is the situation.

19 And just if you are inclined to grant the  
20 relief requested, we would also ask that you  
21 essentially open up, if you will, for negotiation the  
22 lease agreement because the two are linked, as

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1 indicated in the agreement.

2 So it's a question of the two applicants  
3 are purchasing assets. And in this particular case,  
4 the two agreements are linked. And APL has a view on  
5 the effect on one of those assets of what's going on.  
6 And we're trying to understand what their position is  
7 with respect to the second one.

8 This is not a situation where we're asking  
9 them, "Well, if the Board grants the relief requested,  
10 what effect is that going to have on your operations  
11 on the West Coast?" or some other sort of disconnected  
12 item. No. The two items --

13 JUDGE LEVENTHAL: But, Mr. Harker, let me  
14 interrupt you. What difference does it make what  
15 their contention is? Aren't they bound by the  
16 agreement? Suppose they contend that there is no  
17 interdependence and suppose the agreement says that  
18 there is. Aren't they bound by the agreement, no  
19 matter what they think?

20 MR. HARKER: Well, it is true, Your Honor.  
21 They are bound by the agreement. They are bound by  
22 the agreement. I agree with that. But remember here

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1 the Board has super powers in this particular case.  
2 And maybe we disagree with Mr. Gitomer on that point.

3 But the Board when you read the statute  
4 does have the -- I mean, when the Board approves the  
5 transaction, they're essentially overriding any other  
6 law.

7 JUDGE LEVENTHAL: Now, that's very true.  
8 But I think what you're asking here for is a legal  
9 opinion because it seems to me it doesn't matter what  
10 they contend. They're bound by the agreement,  
11 whatever the agreement says.

12 And if you wish to argue to the Board that  
13 the Board should do something else, the Board may very  
14 well have that power to do it, but it doesn't affect  
15 whatever the contention is --

16 MR. HARKER: But, Your Honor --

17 JUDGE LEVENTHAL: -- of AP&L.

18 MR. HARKER: But, Your Honor, I think  
19 you're overlooking what one of the principal purposes  
20 of contention interrogatories is. And that is to  
21 determine what is in the case and what isn't.

22 I mean, if, in fact, an issue isn't in the

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1 case, why require us in a short period of time to  
2 basically put together a brief, to research and then  
3 put together a brief, on an issue and then make the  
4 Board consider it on an issue that may or may not be  
5 in the case?

6 I mean, parties all the time in the  
7 context of discovery try and frame discovery and  
8 interrogatories, including contention interrogatories,  
9 to figure out what's in the case and what isn't. And  
10 33(C) clearly authorizes that, encourages it.

11 And, in fact, when you read the advisory  
12 committee notes, they say the purpose of it is to see  
13 if the issues in the case can be narrowed. That's  
14 exactly what we're trying to do.

15 If you don't ask interrogatories like this  
16 that get responses, you don't know what's in the case  
17 and what isn't. Sure, I mean, we could -- you know,  
18 this issue would be possible of arguing to the Board,  
19 but the purpose of discovery is to identify what  
20 issues are still at play and what issues aren't.

21 And the current thinking, the modern  
22 thinking, as represented in Rule 33(C) is that you can

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1 ask the ese kinds of interrogatories that apply law to  
2 fact.

3 JUDGE LEVENTHAL: Mr. Gitomer, do you have  
4 a position on this? Are you making a contention?

5 MR. GITOMER: Your Honor, we did not raise  
6 the issue of whether the lease would continue or would  
7 not continue. In fact, Mr. Harker in his argument  
8 essentially makes APL's case for this entire  
9 proceeding and turns the issue completely on its head.

10 If APL prevails before the Board and has  
11 the Board strike Section 2.2(C) as to just APL, then  
12 the applicants will not be able to unilaterally assign  
13 APL's transportation contract with Conrail.

14 In fact, I'm sure you're aware that after  
15 approval of this transaction, assuming it is approved,  
16 that the entity Conrail will continue to exist. That  
17 contract will still be held by Conrail.

18 Conrail may have some problem providing  
19 service. And that's what APL wants to do. We want to  
20 find out who's going to be providing service. And the  
21 easiest way to do it is to negotiate with the parties.  
22 But they're not willing to negotiate.

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1 But if Section 2.2(C) is approved and CSX  
2 and Norfolk Southern then go ahead and say, "Well, we  
3 will take 20 percent of this traffic and CSX will take  
4 15 percent of some other traffic and Norfolk Southern  
5 will take 85 percent of a third type of traffic,"  
6 then, all of a sudden, the transportation contract  
7 between Conrail and APL will be totally distorted.  
8 And the question arises: What happens to the lease  
9 between APL and Conrail based on actions taken by CSX  
10 and Norfolk Southern?

11 Now, if APL prevails and Section 2.2(C) is  
12 stricken, APL then has a contract with Conrail. But  
13 what's actually going to happen is we will sit down  
14 with CSX, we will sit down with Norfolk Southern, and  
15 we will partition the contract and anything that goes  
16 with the contract.

17 But right now we haven't put the lease  
18 question in issue before the Board. If CSX is so  
19 concerned about it, they have the lease. They can  
20 take a look at the lease. They can take a look at the  
21 contract. And they can see what they say. They say  
22 what they say.

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1 MR. HARKER: I mean, obviously they say  
2 what they say, but that's not the point. I mean, the  
3 question is: If -- and, quite honestly, I think, at  
4 least insofar as I'm concerned, you know, the issue of  
5 what CSX and NS do with the transportation services  
6 agreement and the like, I mean, I think that's really,  
7 as I said, to my way of thinking, a separate issue.

8 The question is: If the Board essentially  
9 grants the relief and says that no, 2.2(C) is not  
10 going to take effect here such that CSX and NS have to  
11 negotiate a new contract with APL, again, it's very  
12 simple. Is it your contention, is it your contention  
13 at that point, then, that the agreement, the lease  
14 agreement, would terminate under operation of that  
15 particular section?

16 As I said, I mean, I -- and I don't want  
17 to repeat myself. I'll just say that the purpose of  
18 this interrogatory is not to get a legal opinion. CSX  
19 and NS can hire their own lawyers to provide a legal  
20 opinion. It's to figure out whether or not an issue  
21 is in the case.

22 And, of course, APL hasn't raised this

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1 issue. No matter what happens, they like the lease  
2 agreement. The lease agreement is very favorable. I  
3 won't go into any more details. It is a very  
4 favorable agreement. So they haven't raised it.

5 But our ox is getting gored here if the  
6 position is that the rail transportation agreement is  
7 subject to renegotiation and the lease agreement ain't  
8 and because these two agreements were linked when they  
9 were negotiated. And they are essentially a package  
10 deal.

11 APL has only raised the part of the  
12 package that they don't like. They like the current  
13 part of the package dealing with the lease agreement.  
14 And we are trying to figure out: Okay. If the part  
15 of the agreement dealing with transportation services  
16 agreement goes away, is APL going to take the position  
17 that also the lease goes away and also has to be  
18 renegotiated?

19 If Mr. Gitomer can make a representation  
20 to me on the record here, then that may go towards  
21 taking care of our interrogatories, but I've heard him  
22 dancing around that.

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1                   And that's what we're trying to figure  
2 out: What is their position?

3                   JUDGE LEVENTHAL: All right. Mr. Gitomer,  
4 last chance. Mr. Harker makes a very strong argument  
5 here.

6                   MR. GITOMER: Your Honor, I think that APL  
7 may be willing to tell the applicants what our  
8 contention is, but to go beyond that and give them our  
9 reasons for it, which would require us going into and  
10 citing chapter and verse of both of the agreements --

11                   JUDGE LEVENTHAL: All right. Let me  
12 interrupt you.

13                   Are you satisfied with that, Mr. Harker?  
14 You get what their contention is. They don't want to  
15 give you the legal reasoning behind it at this time,  
16 whatever it is. It seems to me to be fair.

17                   MR. HARKER: Well, Your Honor, if you're  
18 signaling to me that that's the best I'm going to do,  
19 I'll take it.

20                   JUDGE LEVENTHAL: Okay. All right. So  
21 ordered. You'll answer the interrogatory to that  
22 degree.

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1 MR. HARKER: And, just to be clear, let's  
2 just --

3 MR. GITOMER: Your Honor, this is Mr.  
4 Gitomer.

5 My reading would be that we would answer  
6 1A of the interrogatory.

7 JUDGE LEVENTHAL: Let me get that. What  
8 page would that be on?

9 MR. GITOMER: That is on Page 4.

10 JUDGE LEVENTHAL: Page 4? Just a second.  
11 Page 4 of which document now?

12 MR. GITOMER: Of CSX-106. I don't know  
13 which tab it is.

14 MR. HARKER: It's Tab 1.

15 JUDGE LEVENTHAL: That would be Exhibit 1,  
16 Mr. Harker?

17 MR. HARKER: Yes, sir.

18 JUDGE LEVENTHAL: And what are you saying,  
19 Mr. Gitomer? I have it now.

20 MR. GITOMER: Okay. On Page 4, Your  
21 Honor, --

22 JUDGE LEVENTHAL: Yes.

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1 MR. GITOMER: -- we would then answer  
2 Interrogatory 1A and Interrogatory 1C, Parts i, ii,  
3 and iii.

4 MR. HARKER: And how about as well E  
5 obviously exempting anything that's privileged? I  
6 wouldn't imagine you'd have very much, but --

7 MR. GITOMER: Again, Your Honor, I would  
8 think that the documents would probably be the  
9 transportation agreement, the lease agreement, and any  
10 legal opinions that we have had prepared or will have  
11 prepared.

12 MR. HARKER: And obviously, I mean, the  
13 lease agreement we've got, Your Honor, the  
14 transportation services agreement we've got, Your  
15 Honor, opinions would be privileged I assume unless  
16 there were some reason to think that there was no  
17 privilege to them. But there could be other documents  
18 that I think wouldn't go to a, quote, unquote, "legal  
19 opinion," which seems to be what you're concerned  
20 about with respect to answering B and D, which is  
21 requiring a statement of reasons.

22 There could be no non-privileged

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1 communications between Conrail and APL which relate to  
2 that. And I would ask that those also be produced.

3 MR. GITOMER: Your Honor, I think that Mr.  
4 Harker is now expanding the scope of his discovery.  
5 Originally he came in here and asked for APL's  
6 contentions. Now he's asking for communications  
7 between APL and Conrail. I think that's a much  
8 broader request.

9 Well, I mean, the request is "Identify all  
10 documents that in any way relate to the subject matter  
11 of and the responses to." You know, it's up to you to  
12 decide what those are.

13 You had mentioned before the  
14 transportation services agreement and the lease  
15 agreement. And all I'm suggesting is that to the  
16 extent that there were communications between the two  
17 addressing the subject matter of the contention, I  
18 think that's fair game.

19 It is otherwise not a legal opinion. I  
20 mean, the parties could have been talking during the  
21 course of negotiations -- I'm sorry -- not talking but  
22 corresponding during the course of negotiations or

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1 there could have been correspondence during the course  
2 of performance in which the issue of the termination  
3 of the lease agreement assuming the material  
4 modification of the transportation agreement came up.

5 So I did not intend to expand the scope of  
6 the request. I think, though, those kinds of  
7 documents fit within E. And I would submit to you  
8 that they don't run afoul of your concern about  
9 Subparts B and D requiring the production of a legal  
10 opinion, again because that's privileged and wouldn't  
11 be required to be submitted.

12 JUDGE LEVENTHAL: What do you say to that,  
13 Mr. Gitomer?

14 MR. GITOMER: Your Honor, I believe that  
15 any documents that may have been involved in  
16 negotiation prior to the signing of the agreements  
17 probably are either memorialized in the agreements or  
18 were rejected as part of the agreements and,  
19 therefore, would not be relevant.

20 I think that perhaps documents between  
21 Conrail and APL would perhaps go to APL's contention,  
22 although I seriously doubt that a statement from

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1 Conrail would provide anything as far as APL's  
2 contentions.

3 And, moreover, APL is an applicant in this  
4 case and can well-provide those documents and any  
5 documents it received from APL.

6 JUDGE LEVENTHAL: All right. I'll deny as  
7 to E. All right. So is my ruling clear?

8 MR. HARKER: Yes.

9 MR. GITOMER: Yes, Your Honor. Thank you  
10 very much.

11 JUDGE LEVENTHAL: All right. Very well.

12 MR. GITOMER: We appreciate you taking  
13 your time from your vacation.

14 JUDGE LEVENTHAL: Sure. Anything else,  
15 then, before us?

16 MR. HARKER: So, Your Honor, as I  
17 understand it, then, we've agreed today that there  
18 will be a discovery conference next Wednesday to take  
19 up International Paper. Would you like us to issue a  
20 notice to that effect?

21 JUDGE LEVENTHAL: No. I believe I've  
22 ordered a discovery conference next Wednesday to start

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1 at 9:30.

2 MR. HARKER: Right. And would you like us  
3 to issue a notice to that effect?

4 JUDGE LEVENTHAL: I think you might as  
5 well so everybody else knows.

6 MR. HARKER: Very good.

7 JUDGE LEVENTHAL: And let me say this:  
8 If, by any chance, you settle this before next  
9 Wednesday, -- and that's Wednesday, December 3rd, 1997  
10 -- if you settle it before then, you will advise me  
11 that the conference can be canceled.

12 MR. HARKER: Very fine.

13 JUDGE LEVENTHAL: All right.

14 MR. HARKER: And let's see. Next  
15 Thursday, that's open; right?

16 JUDGE LEVENTHAL: You can advise us on  
17 Monday whether or not you need a conference on  
18 Thursday. But, of course, if you wish to -- well, no.  
19 Let's leave it. If you need a conference on Thursday,  
20 you'll advise us on Monday is the ruling.

21 MR. HARKER: Your Honor?

22 JUDGE LEVENTHAL: Yes?

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1 MR. HARKER: Do I hear, do I detect in  
2 that last statement or should I interpret that last  
3 statement to mean that you would not be agreeable to  
4 hearing any other issues on Wednesday, other than --

5 JUDGE LEVENTHAL: I'd be agreeable to hear  
6 any issues the parties want me to hear on Wednesday.  
7 If the parties agree that everybody wants to come in  
8 on Wednesday, that's fine.

9 MR. HARKER: Okay.

10 JUDGE LEVENTHAL: The rules provide for  
11 Thursday. But if you want to change it, you know I've  
12 gone along with the mutual agreement by the parties  
13 all along.

14 MR. HARKER: Right.

15 JUDGE LEVENTHAL: So if there are other  
16 issues to be heard and the parties agree to have it on  
17 Wednesday, rather than Thursday, so far as I'm  
18 concerned, that's fine.

19 MR. HARKER: Okay.

20 JUDGE LEVENTHAL: All right?

21 MR. HARKER: Thank you, Your Honor.

22 JUDGE LEVENTHAL: All right. Anything

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1 else, then, before us?

2 (No response.)

3 JUDGE LEVENTHAL: All right. I'm going to  
4 close the hearing.

5 (Whereupon, the foregoing matter was  
6 concluded at 3:15 p.m.)

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Before: SURFACE TRANSPORTATION BOARD

Date: NOVEMBER 25, 1997

Place: WASHINGTON, D.C.

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

  
CORBETT RINER