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DISCOVERY CONFERENCE

CSX CORPORATION AND CSX
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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. 33386

Friday,
September 19, 1997

Washington, D.C.

The above-entitled matter came on for a
oral argument in Hearing Room 3 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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On behalf of Niagara Mohawk Power Corporation, The National Industrial Transportation League, AK Steel Company, and Erie-Niagara Rail Steering Committee:

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

(9:31 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. We'll take appearances at this time.

For the movant?

MR. McBRIDE: Good morning, Your Honor. Michael S. McBride, LeBoew, Lamb, Green & MacRae, LLP for American Electric Power Company, Atlantic City Electric Company, Delmarva Power and Light Company, Indianapolis Power and Light Company, and the Ohio Valley Coal Company.

JUDGE LEVENTHAL: Very well. Further appearances?

MR. WOOD: Good morning, Your Honor. Frederick Wood with the law firm of Donelan, Cleary, Wood & Maser, appearing today on behalf of the National Industrial Transportation League, AK Steel Company, Niagara Mohawk Power Corporation and the Erie-Niagara Rail Steering Committee.

MR. O'HARA: Good morning, Your Honor, Chris O'Hara from Brickfield, Burchette and Ritts

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1 appearing today on behalf of Steel Dynamics, Inc.

2 MR. COBURN: Good morning, Your Honor.

3 David Coburn with Steptoe & Johnson for CSX.

4 MR. NORTON: Gerald Norton, Harkins

5 Cunningham for Conrail.

6 MR. HARKER: Drew Harker, Arnold 1& Porter

7 for CSX.

8 MR. EDWARDS: Good morning, Your Honor.

9 John Edwards with Zuckert, Scoutt & Rasenberger for

10 Norfolk Southern.

11 JUDGE LEVENTHAL: All right, before we go

12 to the ACE dispute, we had a problem with depositions.

13 Has that been resolved?

14 MR. COBURN: It has not, Your Honor.

15 MR. WOOD: Your Honor, we do have a

16 scheduling issue with respect to two depositions. It

17 has not been resolved in spite of some efforts

18 yesterday. I have not had an opportunity to discuss

19 it further this morning with applicant's counsel. I

20 don't know if there's any merit to doing that. They

21 can speak to that, but there has not -- it has not

22 been resolved, to answer your question, to my

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1 knowledge.

2 JUDGE LEVENTHAL: Do you want to take time
3 to resolve it amicably or do you want me to rule?

4 MR. COBURN: I'd be happy to spend two or
5 three minutes. I haven't had a chance to talk to Mr.
6 Wood about it.

7 JUDGE LEVENTHAL: All right, why don't we
8 do it then after the major dispute and I'll remain
9 available to dispose of any scheduling.

10 I don't know why you can't dispose of it
11 without my intervention, but if you can't, I'm here.

12 All right, when we left off on Wednesday,
13 I was supposed to hear if there was any great big
14 problem with what I was requiring you to do?

15 MR. NORTON: Your Honor, yes. I'm not
16 sure how to characterize where we stand on it, but let
17 me just report what I understand.

18 We are being asked to or required to, as
19 I understand it, compare the waybills that were --
20 that Conrail would have submitted to the ICC or the
21 SGB as far as the waybills sampling that included a
22 masking factor that applied to Mr. McBride's clients

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1 with the tape, traffic taped out of what we gave him
2 in response to Your Honor's orders and then provide
3 the difference between the revenue numbers that were
4 reflected.

5 This is something that -- it can be done.
6 It is not a small task. The number of waybills in the
7 tapes that were provided to Mr. McBride averaged, as
8 I understand it, 35,000 to 40,000 for each year. The
9 sample would obviously be less than that, but to the
10 extent that there are unit coal trains included,
11 that's a high percentage sample, so we're talking
12 about a large number of comparisons.

13 This, we understand, could be done by
14 computers. We're not going to have to do this
15 manually, but it will take several days to get it
16 done. As we understand it, it's feasible and it can
17 be done. The question that is raised though is
18 whether it is really worth having us do this, since
19 this is an exercise that Mr. McBride's consultants can
20 themselves do and indeed, as I understood at the
21 hearing the other day, they have done. So there's a
22 question whether under the circumstances this is

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1 something that is really necessary to do. If we have
2 to do it, we can and we will.

3 JUDGE LEVENTHAL: Just a minute. Has your
4 consultant been able to do this, Mr. McBride?

5 MR. McBRIDE: Not quite, Your Honor, and
6 that was why I explained the other day what I did.

7 JUDGE LEVENTHAL: All right, I thought I
8 understood you. But now is it possible to narrow it
9 down? You told me he found discrepancies. How about
10 if we just clear up those discrepancies?

11 MR. McBRIDE: We don't know that that's
12 the only discrepancy. They're working away as
13 feverishly as they can, but just because of the fact
14 that we've discovered one suggests to me there
15 probably are others and if Your Honor please, I think
16 what Mr. Norton is doing here in the nicest possible
17 way since he's such a good lawyer, is rearguing what
18 we did on Wednesday because I wrote down your ruling
19 and it wasn't just comparing the waybills. It was
20 providing me the masking factors and I suggest to Your
21 Honor the simple solution here is to give me those
22 masking factors as Your Honor required. I did not

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1 think we were to be allowed to reargue this morning.

2 JUDGE LEVENTHAL: All right.

3 MR. NORTON: Your Honor, there may be some
4 misunderstanding as to the scope of the ruling as to
5 whether the comparison was the only thing or an
6 alternative approach.

7 We don't have -- we have the current
8 masking factors, obviously. We don't have records, as
9 I understand it, of past years' masking factors so
10 that we couldn't do it. The only way we could do it
11 would be through the comparison.

12 JUDGE LEVENTHAL: Well, how far back do
13 you have the masking factors?

14 MR. NORTON: As I understand it, it's only
15 for the past year.

16 JUDGE LEVENTHAL: For the past year.

17 MR. NORTON: Yes.

18 JUDGE LEVENTHAL: Well, for the past year
19 there's no problem in giving him the masking factors?

20 MR. NORTON: There is -- it's feasible,
21 but I think we would still prefer to have the option
22 to do it by the comparison which was part of your

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1 ruling as we understood it.

2 JUDGE LEVENTHAL: Well, that's what we
3 were discussing about on Wednesday. They said if they
4 gave you the comparison you could easily see what the
5 factor was.

6 MR. McBRIDE: But that's not really quite
7 correct because of the things like the discrepancy
8 that I pointed out to you and what he's now saying is
9 it's going to also take him several days to do this
10 comparison and we, as Your Honor has previously
11 observed, are under an expedited schedule here whereas
12 they could simply give me the masking factors that
13 they have for the last year and I find it hard to
14 believe they don't know what masking factors they
15 provided to the Board and the Commission previously.
16 It's a lot faster and simpler to do that.

17 JUDGE LEVENTHAL: I don't think the
18 current year is a problem. He says he has the
19 factors. I'll require him to give it to you. As to
20 the previous years, all they can do is give you the
21 two figures and you can compute the masking --

22 MR. McBRIDE: Your Honor, I think this is

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1 because the other gentleman retired, as Mr. Norton
2 explained the other day, and they've got somebody new,
3 but they can't go back and ask somebody who retired?
4 They don't have in their files what they provided to
5 the STB or the ICC for the masking factors?

6 JUDGE LEVENTHAL: If Mr. Norton tells me
7 he doesn't have it, what do you want me to do, Mr.
8 McBride?

9 MR. McBRIDE: The current gentleman may
10 not have it, but I think he has some obligation to go
11 back to the retired gentleman and find out where he
12 put them.

13 MR. NORTON: There is a problem with at
14 least one of the people who would have been
15 knowledgeable because he's dead.

16 JUDGE LEVENTHAL: What do you have to say
17 about that, Mr. McBride?

18 MR. McBRIDE: This is a corporation. It's
19 a continuing separate legal entity. It has some
20 obligations here. This is a reporting function to the
21 Government.

22 MR. NORTON: Your Honor, we are talking

1 about next week. This is a matter that Mr. McBride
2 waited two months before he pursued. I don't think
3 that should be a big difference.

4 JUDGE LEVENTHAL: But time is getting
5 close.

6 MR. NORTON: Yes.

7 JUDGE LEVENTHAL: And you're going to use
8 your best efforts to get this material to him?

9 MR. NORTON: Yes.

10 JUDGE LEVENTHAL: You'll get him the
11 masking factors where they're obtainable and where
12 they're not obtainable, you'll give him the two
13 figures.

14 MR. NORTON: Yes. If that's Your Honor's
15 order, that's what we will do.

16 MR. McBRIDE: And under the guidelines,
17 the responses were due today. We served these
18 discovery requests on September 4th and I noted that
19 in my letter to Your Honor previously.

20 JUDGE LEVENTHAL: I know, but I can't make
21 him give it to you today if he hasn't got it.

22 MR. McBRIDE: But he does have them and he

1 can fax them down to me.

2 JUDGE LEVENTHAL: Do you have them, Mr.
3 Norton, and can you fax them down to him?

4 MR. McBRIDE: For the last year.

5 MR. NORTON: That brings --

6 JUDGE LEVENTHAL: Give them to him as you
7 produce them, as you find them on a rolling answer.

8 MR. NORTON: Let me -- before -- there is
9 a question which we started to raise the other day
10 about a stay, a free stay, if we wanted to pursue an
11 appeal because we think there's a very serious issue
12 here relating to the Board's program for waybill data.

13 JUDGE LEVENTHAL: The problem is we're
14 really getting down to the wire and I don't feel
15 comfortable in giving you stays and delaying the
16 production of material for a further period of time.
17 As it is, it's going to take you a few days to give
18 him the material, so as you give it to him rolling, at
19 least you can appeal to the Commission for a stay with
20 your appeal and they've been acting very promptly on
21 anything that parties here have been filing.

22 MR. NORTON: Can we have at least until

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1 Monday to file that appeal?

2 JUDGE LEVENTHAL: Well, all right, we'll
3 give you until Monday. You're not going to object to
4 that, Mr. McBride?

5 MR. McBRIDE: I do object for the record,
6 Your Honor, but I can tell from the look on your face
7 it wouldn't do me any good to push it any harder.

8 JUDGE LEVENTHAL: All right. Monday,
9 close of business.

10 MR. NORTON: Your Honor, if you would
11 indulge me?

12 JUDGE LEVENTHAL: Sure.

13 (Pause.)

14 MR. NORTON: Your Honor, there's one other
15 point that I think should be just made clear. The way
16 the waybill sample works, it's the terminating
17 railroad that files the waybill, the waybill
18 information to the Board and it is therefore the
19 terminating railroad's masking factor that is
20 reflected in the sample information. Because we're
21 talking about Conrail served destinations, Conrail is
22 the terminating railroad. I think probably for all of

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1 the movements that we're talking about, so that it
2 will be Conrail's response that is essentially the
3 response that will be produced here.

4 JUDGE LEVENTHAL: You mean all the masking
5 factors involved here are yours?

6 MR. McBRIDE: We are working on the
7 waybill sample and we're not limited to our own
8 destinations when we do that. Your Honor's previous
9 ruling required them to give me all that other
10 information from traffic tapes and files and what have
11 you about our clients, but we are permitted by Board
12 precedent to use this waybill sample for all these
13 railroads to make our presentation and that's what we
14 intend to do so we're entitled to the masking factors
15 from all three of them. We never heard anything about
16 how NS and CSX weren't going to provide them even if
17 Your Honor ordered them to last Wednesday and you
18 ordered them to. And we're going to use this to
19 analyze the waybill samples for all three of these
20 applicants.

21 MR. NORTON: Your Honor, what Your Honor
22 ordered was the masking factors that were applied to

1 the waybill samples that included movements to his
2 clients.

3 JUDGE LEVENTHAL: I limited them to your
4 movements, Mr. McBride. I don't have the transcript
5 yet of our conference on Wednesday, but my
6 recollection is that I limited it to the information
7 they've already furnished you. I required them to
8 give you the masking factors with regard to those
9 shipments.

10 MR. McBRIDE: You started to say that and
11 I said for the years you ordered furnished and you
12 said yes, for the years ordered furnished and you see,
13 we have this pile of data called the waybill sample
14 that the Board requires them to file and we have
15 purchased from the Board, including for NS and CSX and
16 that we're analyzing. And the masking factors are
17 used by those railroads as well as Conrail to mask the
18 revenues on those waybill samples and as I understood
19 Your Honor's ruling which I didn't think we were here
20 to reargue, they were to provide the masking factors
21 used for the years that Your Honor ordered them to
22 provide us the data.

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1 MR. NORTON: Your Honor, you made the
2 point, I recall it quite clearly and I don't know
3 whether it was on the record part or off the record
4 part, but it would only be if his -- the waybills for
5 movements to his clients were included in the sample
6 that he was going to get the masking factors. It was
7 very clear.

8 JUDGE LEVENTHAL: That was my
9 recollection, Mr. McBride.

10 MR. McBRIDE: I wrote it down because you
11 may recall, Your Honor, I'll even show you my
12 handwriting. I stood up when you started to say
13 materials and I said do you mean the years you ordered
14 --

15 MR. EDWARDS: Can I see that?

16 MR. McBRIDE: Sure. Because I think we
17 were off the record and I brought down under the
18 heading ruling which Your Honor -- feel free, come on
19 up here and I crossed out material and I wrote years
20 and data already furnished. That's what Your Honor
21 said.

22 MR. EDWARDS: Your Honor, I probably have

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1 several notes throughout the entire hearing as well
2 and I'm not sure that this is probative of your
3 ruling.

4 MR. McBRIDE: That's what I wrote. That
5 day -- Your Honor will recognize the graph I was
6 working from that date.

7 JUDGE LEVENTHAL: I see the paper. That's
8 not my recollection though. Anybody have any
9 different recollection.

10 MR. COBURN: My very clear recollection,
11 Your Honor, was that you used the word "materials",
12 you said with respect to the materials previously
13 supplied to Mr. McBride which would include only the
14 materials relating to shipments on Conrail served
15 destinations, Conrail served destinations to the
16 plants of Mr. McBride's clients.

17 JUDGE LEVENTHAL: That's my recollection.

18 MR. McBRIDE: I said Your Honor used the
19 word "material" first and I stood up and asked if you
20 meant years and you said yes, years.

21 JUDGE LEVENTHAL: I understood you to be
22 repeating for the years I had previously ordered. The

1 original traffic information that I ordered produced,
2 was for certain specific years on Conrail destinations
3 served for your clients. And what I intended to rule,
4 if the record isn't clear on it was with respect to
5 those shipments, I thought you were telling me that an
6 examination of those shipments you found certain
7 discrepancies and you wanted them in, what you wanted
8 was masking factors for everything.

9 MR. McBRIDE: Yes.

10 JUDGE LEVENTHAL: But that's not what I
11 intended to give you. I intended to give you the
12 masking factors for the shipments that you, the
13 information on shipments you already had. With that,
14 I think you could project what masking factors we use
15 with respect to their entire traffic, but that's all
16 I intended to give you.

17 MR. McBRIDE: I couldn't project for NS
18 and CSX.

19 JUDGE LEVENTHAL: Well, they're not the
20 delivering railroads.

21 MR. McBRIDE: But they charge us rates.
22 They move our coal too and they are delivering

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1 railroads to my clients in some cases. Norfolk
2 Southern and CSX both delivered to American Electric
3 Power for example. CSX's subsidiary, Indiana
4 Railroad, delivers coal to Indianapolis Power and
5 Light Company, for example.

6 MR. NORTON: Now Mr. McBride is rearguing.

7 JUDGE LEVENTHAL: No, no. Isn't that
8 information you already received?

9 MR. McBRIDE: No, wait a minute. Yes.
10 American Electric Power, I got data from CSX and not
11 from Conrail. And for Indianapolis Power and Light
12 Company, I didn't get any data from CSX, even though
13 its subsidiary is Indiana Railroad.

14 MR. EDWARDS: Your Honor, the original ACE
15 limitation was to Conrail-served destinations and
16 while Norfolk Southern might have originated, for
17 example, coal to the Conrail destinations taken up in
18 the traffic and thus we would have produced some
19 information, that information was not masked. It's
20 not in the waybill sample. It's the terminating
21 period that provides the information. The information
22 on the waybill sample does not reflect for that

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1 movement, does not reflect any Norfolk Southern
2 masking factors.

3 MR. McBRIDE: Which movement are you
4 referring to?

5 MR. NORTON: Interline movement
6 terminating on Conrail.

7 MR. McBRIDE: Your Honor's ruling was not
8 strictly limited to destinations served by Conrail
9 because you may recall that I wrote you a letter on
10 the afternoon of the 16th and I said it's come to my
11 attention that AEP has some Conrail served origins
12 where the coal is delivered to the plant by barge, and
13 Your Honor included those in the ruling.

14 So it isn't just when Conrail goes into
15 the plant, but you see, for example, for Indianapolis
16 Power and Light Company, the Stout Plant, they're
17 served by the subsidiary of a subsidiary of CSX called
18 Indiana Railroad. And Conrail is not involved in the
19 movement on Indiana Railroad and I'm entitled to
20 present to the Board testimony about the waybill
21 sample as it pertains to that movement and I would not
22 have the masking factor applicable to that movement if

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1 Your Honor limited it only to the Conrail masking
2 factor. Conrail has nothing to do with that movement.

3 JUDGE LEVENTHAL: I thought my original
4 ruling was that Mr. McBride's client was to get the
5 traffic information from all of the three railroads
6 where any one of the three railroads was the
7 terminating railroad. We started out the argument
8 only with Conrail. But then, if you recall, Mr.
9 McBride wrote me a letter including Indianapolis --

10 MR. McBRIDE: Them later, yes, but I also
11 wrote the letter about the AEP destinations. That was
12 the one they complained about.

13 JUDGE LEVENTHAL: And I expanded the
14 ruling to include those two.

15 MR. NORTON: That's correct, but the
16 original ruling was movements to his facilities where
17 Conrail was the destination carrier and he was
18 perfectly clear because on his appeal to the Board he
19 described your ruling as limiting the production to
20 Conrail sole served destinations. There's no question
21 about it at that time and that's been the
22 understanding.

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1 MR. McBRIDE: May I respond?

2 JUDGE LEVENTHAL: That was the original
3 motion?

4 MR. NORTON: That's right.

5 MR. McBRIDE: Quite right and that's why
6 I need to clarify. Indianapolis Power and Light
7 joined in this discovery effort after the appeal was
8 decided and we're talking here about a power plant
9 that's served almost exclusively by a CSX subsidiary.

10 MR. EDWARDS: Your Honor, we would have
11 heard this before. I mean --

12 MR. McBRIDE: You did hear it before.

13 MR. EDWARDS: The documents have been
14 produced for a long time and if we were not providing
15 material before, I think that this would have come up.
16 This is revisionist. I mean he's had the data for a
17 very long time and if we were not providing him with
18 the data that he believed Your Honor was ruling on, I
19 believe we would have been in here in a second.

20 MR. McBRIDE: If I confused things, I
21 don't mean to. Frankly, standing here this morning
22 too tired to recall for sure, I am not absolutely sure

1 whether I got traffic tape data on Stout from CSX or
2 not. If I said otherwise, I didn't mean to. My only
3 point is Indianapolis joined in this after the whole
4 controversy about destination served by Conrail. They
5 have a plant served by a CSX subsidiary. And if Your
6 Honor only gives me the Conrail masking factor, I
7 won't be able to work with that data.

8 JUDGE LEVENTHAL: Tell me what it is now.
9 What are the other destination points involved here?

10 MR. McBRIDE: Well, we can go through --

11 JUDGE LEVENTHAL: The railroads. Which
12 railroads are destination carriers?

13 MR. McBRIDE: If I may, for purposes of
14 answering your question, include the AEP Conrail
15 served origins where the coal gets to the destination
16 by barge, treat those as Conrail.

17 JUDGE LEVENTHAL: Yes.

18 MR. McBRIDE: That's, I believe, two
19 plants or so on the AEP system. The other 18 plants
20 are served mostly by CSX. I believe one or two by
21 Norfolk Southern and one of them by a short line
22 called Wheeling and Lake Erie which is a spinoff of

1 the Norfolk Southern.

2 JUDGE LEVENTHAL: Now did you get --

3 MR. McBRIDE: Which is also served by
4 Conrail via switch.

5 JUDGE LEVENTHAL: Did you get the
6 destination material with regard to CSX and NS on the
7 AEP?

8 MR. McBRIDE: No, because of your original
9 ruling that it was destination served by Conrail,
10 because AEP was in the original request and the ruling
11 of the 16th and which was appealed.

12 So Your Honor's original ruling was I
13 could only have the two AEP Conrail plants, you see?

14 MR. COBURN: Exactly, Your Honor. We
15 provided data only with respect to the Conrail served
16 --

17 MR. McBRIDE: That's what was in the rule.

18 MR. COBURN: -- that's what's involved in
19 this transaction.

20 MR. McBRIDE: But you see --

21 JUDGE LEVENTHAL: Wait, wait, I'm sorry.

22 MR. COBURN: I'm sorry, Mr. McBride. To

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1 the extent CSX is serving a facility entirely on its
2 own system, this transaction has nothing to do with it
3 and that's why Your Honor ruled, I believe the way you
4 ruled that only Conrail served destinations where the
5 freight is interchanged with CSX or NS.

6 JUDGE LEVENTHAL: That was my original
7 ruling and the Board affirmed me saying that I
8 tailored it appropriately. I don't know that we can
9 expand it at this stage of the game.

10 MR. McBRIDE: Well, I'm not asking you to
11 expand it, Your Honor. I told you before and I'll
12 tell you again I'm not asking you to revise the
13 ruling.

14 JUDGE LEVENTHAL: What do you want now?
15 You want the masking factors and what is it you want?

16 MR. McBRIDE: Well, here's the point, if
17 I may just say one preliminary thing.

18 JUDGE LEVENTHAL: Yes.

19 MR. McBRIDE: If Your Honor will recall,
20 your ruling was that the burden outweighed the need to
21 know on the original voluminous material that I
22 requested. You'll recall I conceded to you in open

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1 court on July 16th that it was a burdensome request
2 and Your Honor based his ruling in part on that. You
3 did not rule that anything else was irrelevant. And
4 now counsel for CSX says well, gee the Stout plant
5 served by CSX, so it's not affected by this
6 transaction. Well, you know what they told me in
7 discovery? It's a two to one plant that they're
8 treating it as such because Conrail serves it via
9 switch. So it is affected by this transaction.
10 Conrail can get to this plant via the switching
11 charge, so they're treating it as a two to one plant
12 in Indianapolis. They may not be putting that label
13 on because it's Indiana Railroad Company, but the
14 other Indianapolis Power and Light plant, they are
15 treating it as a two to one plant. And Stout is
16 served by Conrail and a CSX subsidiary today. So now
17 Indianapolis Power and Light Company after Your
18 Honor's ruling, after the appeal, after the Board
19 decision, joins in the discovery request and joins in
20 the request that's before you today, for the revenue
21 masking factors. That applied to the waybill sample.
22 And now we understand, which I didn't know before, I

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1 gather Your Honor didn't either, that the destination
2 carrier is the one that applies the masking factors.
3 Well, if that's the case, then I need the masking
4 factor for Indiana Railroad into the Stout Plant and
5 this is not confined by your original ruling because
6 they admitted on Wednesday there was no burden to
7 providing the masking factors.

8 MR. NORTON: Your Honor, the point about
9 the -- it's only the terminating railroad that files
10 the use of the masking factor, that was referred to in
11 our brief. What we pointed out that the waybill
12 sample data is filed with respect to movements that
13 terminate on that railroad's lines. It's always been
14 clear as to terminating carrier is the one who files
15 the sample with the Board.

16 MR. EDWARDS: Additionally, Your Honor,
17 I'm not sure I need to clarify for the record, are we
18 rearguing the ACE, the earlier rulings, or are we
19 rearguing the ruling Your Honor made on Wednesday?
20 I'm not sure which one we're rearguing.

21 JUDGE LEVENTHAL: I didn't intend this to
22 be a reargument, but evidently it is. It's reargument

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1 of Wednesday. We're not going back past -- we're not
2 going back to anything other than the masking factors,
3 the traffic tapes. It's too late in the game to
4 revisit any earlier rulings and now with the masking
5 factors on Wednesday, my ruling, my tentative ruling
6 at the time I gave you people an opportunity to tell
7 me what was involved today because you didn't seem to
8 have sufficient information on Wednesday. My
9 tentative ruling was that with the material already
10 furnished Mr. McBride, you would now give him the
11 masking factors. Now Mr. McBride says he understood
12 it to be for all three railroads for the years that I
13 had ordered on all traffic.

14 MR. McBRIDE: That's what I wrote down.

15 JUDGE LEVENTHAL: That hadn't been my
16 intent. But now at this stage of the game, Conrail is
17 giving you what -- the material that I ordered. Is
18 that right?

19 Are you giving him all the --

20 MR. NORTON: Unless the Board says
21 otherwise, yes.

22 JUDGE LEVENTHAL: All right. Now you

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1 want, from Conrail you want further material?

2 MR. McBRIDE: If they can get it.
3 Obviously, he can't produce something if he doesn't
4 have it.

5 JUDGE LEVENTHAL: He said he's going to
6 give you the masking factors that he has and then the
7 comparison between the two rates.

8 MR. McBRIDE: Including going back to the
9 earlier years, if they can find it, right? I assume
10 he's obliged to do that.

11 JUDGE LEVENTHAL: For the same years that
12 you have the material you already have.

13 MR. McBRIDE: Right. And I would like the
14 same thing from CSX and NS because we're working with
15 a waybill sample that he has plants served by.

16 JUDGE LEVENTHAL: But they haven't given
17 you anything.

18 Have they given you anything?

19 MR. McBRIDE: That's why I say standing
20 here, I don't, I didn't read the tapes. I had some
21 summaries provided to me by the consultants of what
22 was on earlier versions of the tapes. I did not read

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1 the tapes. That's what the experts are for. And if
2 they represent that they provided information about
3 the Stout Plant that CSX's subsidiary serves on those
4 tapes, I'll accept the representation.

5 MR. EDWARDS: Your Honor --

6 JUDGE LEVENTHAL: Mr. Edwards, the other
7 day you argued that if you gave them the -- that they
8 know what the rate was and if you gave them the rate
9 for figures without giving the masking factor, they
10 could compare the two and -- well, what were you
11 arguing about?

12 MR. EDWARDS: Your Honor, exactly what
13 we've got here is they have the rate information, the
14 actual rate information for the origin movement for
15 Norfolk Southern in the tapes that his consultants
16 have had and have presumably been processing for
17 several days, if not weeks. I don't know the date
18 that it was produced so I can't represent that.
19 They've got the actual revenue factor. They've got
20 the waybill sample. They've got the actual revenue
21 data for the Conrail part of the movement, so they've
22 got the actual revenue for the origin, actual revenue

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1 for the destination carrier and they've got the
2 waybill sample. They can compare the two. We are
3 giving them exactly what they already have. And while
4 we can have our consultants do exactly that work for
5 them and we can -- I mean, they're busy developing
6 evidence for ourselves, for us, but we'll take them
7 off that and start them working on this, if necessary,
8 if Your Honor orders that. But it's exactly something
9 that they've got in their own data bank and can do for
10 themselves and that's what we're arguing and it was
11 very clear, I believe.

12 JUDGE LEVENTHAL: All right, now does that
13 satisfy you?

14 MR. McBRIDE: No, they're trying to do
15 something entirely different.

16 JUDGE LEVENTHAL: If they give you the
17 masking factor now.

18 MR. McBRIDE: He didn't say he would do
19 that. He's talking about something entirely
20 different. He's talking about doing an analysis of
21 waybills and comparing waybills to waybill samples.
22 That's not what I asked for. The whole subject of

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1 this discovery conference is my one document request
2 and my one interrogatory for the masking factors. And
3 I want the masking factors which they could give me
4 today. He said it wasn't a burden and now he's trying
5 to go off and do some study of these waybills instead
6 of just giving me the masking factors and I need them
7 because there's at least one discrepancy on the tape.
8 God knows how many more --

9 MR. EDWARDS: Your Honor, we would have
10 the same discrepancy. That's a red herring, because
11 if we do the analysis we're going to --

12 JUDGE LEVENTHAL: I am not sure I
13 understand you. I understood you to say that if I
14 ordered you to do it, you can do it.

15 MR. EDWARDS: And he would have the
16 masking factors which are applicable to the traffic
17 which is - which has been produced to him --

18 JUDGE LEVENTHAL: But you're saying you'll
19 give him the masking factors?

20 MR. EDWARDS: Which would, in fact, be the
21 masking factors of the terminating carrier which is
22 Conrail. Because there is no masking factor applied

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1 -- Norfolk Southern masking factor applied to the
2 waybills that is involved in the waybills submitted
3 for the traffic that was produced for the earlier ACE.

4 MR. McBRIDE: For example, let's talk
5 about AEP's Cardinal Plan, I believe is the one in
6 question here which is served directly by the Wheeling
7 and Lake Erie. Conrail also gets there via switch.
8 Wheeling and Lake Erie was a spinoff from the Norfolk
9 Southern. Norfolk Southern still connects to it, as
10 I understand.

11 Is it the representation of counsel for
12 Norfolk Southern that Wheeling and Lake Erie provides
13 the masking factor to the Board for that movement or
14 Norfolk Southern? My guess is it's Norfolk Southern,
15 but I don't know because I don't think the short lines
16 control this data process.

17 MR. EDWARDS: Your Honor, I think the
18 Wheeling and Lake Erie is not controlled by Norfolk
19 Southern.

20 MR. McBRIDE: I didn't say it was.

21 MR. EDWARDS: And in fact, have filed a
22 description of response of an inconsistent application

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1 that says that we're asking for inclusion. I mean
2 they're a third party to this proceeding. If he wants
3 to bring in the Wheeling and Lake Erie and have them
4 produce data, that's fine.

5 MR. McBRIDE: No, it was a simple
6 question. Who, Wheeling, Lake Erie or somebody else
7 applies the masking factor on the waybill sample for
8 that movement because that's an example of what I need
9 here. CSX, subsidiary Indiana Railroad serves the
10 Stout Plant. Whose masking factor is that? It's not
11 Conrail's. The movement on the Indiana Railroad,
12 Conrail is not involved in. But Conrail also serves
13 that plant via switching. So both of those plants are
14 served by Conrail within the scope of your original
15 ruling, and yet the movements largely occur on another
16 railroad because they're served by two. Most of the
17 coal that goes to the Stout Plant, as I understand it,
18 if not all of it, today moves on the Indiana Railroad,
19 but it could move on Conrail and some of it may.

20 The same is true at the AEP Plant, as I
21 gave you that example. Now I can go through the list.
22 Delmarva, the two plants are served at destination

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1 only by Conrail, but they get origin coal from all
2 three of these applicants. Now if they're
3 representing that only the Conrail masking factors are
4 applied to those movements, so be it. Then I would
5 get it from Mr. Norton, but in the earlier examples I
6 gave you, Conrail has nothing to do with them so far
7 as I understand it.

8 JUDGE LEVENTHAL: If that's so is it only
9 the Conrail masking factor that's applied?

10 MR. NORTON: Your Honor, I'm looking at
11 the ICC pronouncements concerning this. It states that
12 it's the Commission -- the Commission requires that
13 railroads submit waybill sample information for
14 traffic terminating on their lines and it's the
15 terminating carrier who does file.

16 Now in this case, Conrail is the
17 terminating carrier, I believe for all the movements
18 that were covered by the traffic data that were
19 provided. That was your earlier ruling.

20 MR. COBURN: If I may just supplement
21 that, those comments, Your Honor. As far as I know,
22 Wheeling and Lake Erie and Indiana Railroad were not

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1 asked to and did not supply any data to Mr. McBride.
2 They are not our railroads. They are independent
3 companies. And we never asked them and they never
4 supplied data that Mr. McBride, through us, maybe
5 through some independent source, I don't know. I
6 certainly can't speak to their masking factors. We
7 have nothing to do with those.

8 JUDGE LEVENTHAL: I don't think they're
9 involved in this argument. Mr. McBride was using them
10 as --

11 MR. EDWARDS: But Your Honor, it is
12 important to this argument and for the following
13 reason. If the terminating carrier is the Wheeling
14 and Lake Erie and it's the terminating carrier that
15 supplies the masking factor of any, then the origin
16 carrier, Norfolk Southern, for example, would not be
17 putting any masking factor on that traffic. If it is
18 supplied, it would be supplied by the Wheeling and
19 Lake Erie, otherwise, the revenue that would be
20 supplied would be actual revenue which has no need for
21 a masking factor.

22 MR. McBRIDE: Mr. Wood over here informs

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1 me that when the delivering carrier is providing a
2 switching service, it is the terminating line haul
3 carrier that would provide the data on the waybill
4 sampling. It's not always the terminating carrier,
5 depending on the nature of the service that's provided
6 at the destination. So it very well could be that
7 Norfolk Southern's masking factor is what's applied to
8 the movement to the Cardinal Plant, the one served by
9 Wheeling and Lake Erie. I had certainly intended CSX
10 to include its subsidiary, Indiana Railroad, which --
11 has this individual signed a highly confidential
12 undertaking?

13 MR. O'HARA: Yes.

14 MR. McBRIDE: Which its vice president for
15 coal marketing, Mr. Sharp, testified is subject to the
16 financial control of CSX.

17 JUDGE LEVENTHAL: You are bringing other
18 matters into this that I think are just confusing the
19 argument.

20 What I intended to rule in our last
21 session was that on destinations served for Mr.
22 McBride's clients by all three railroads, he was to

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1 get the masking factors on the tapes, on the one
2 percent waybill samples. All right? Is there
3 anything that's not clear about that?

4 MR. COBURN: If I may, Your Honor?

5 JUDGE LEVENTHAL: Yes.

6 MR. COBURN: I thought your ruling was
7 with respect to materials previously provided to Mr.
8 McBride. If we provided traffic data --

9 JUDGE LEVENTHAL: I had thought that all
10 three railroads had given him traffic data with
11 respect to shipments where each of the three railroads
12 were destination carriers. If CSX was the destination
13 carrier, I had thought that CSX had given him the
14 traffic information.

15 MR. MCBRIDE: Yes, they did give me
16 traffic information.

17 MR. COBURN: Not with respect to each of
18 his client's facilities that CSX serves as a
19 destination carrier, we did not.

20 JUDGE LEVENTHAL: The shipments where they
21 were the destination carrier.

22 MR. COBURN: No, I think there are some

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1 facilities of Mr. McBride's clients that are CSX
2 served entirely which CSX is the destination carrier
3 and we did not supply and Mr. McBride has not
4 complained that we did not supply materials with
5 respect to those facilities.

6 JUDGE LEVENTHAL: You mean it was a one
7 line haul?

8 MR. COBURN: Where it's a single line
9 haul, entirely within the South, for example.

10 JUDGE LEVENTHAL: We were talking about a
11 connecting carrier where there is a destination
12 carrier on a connecting movement.

13 MR. COBURN: Right and in those cases it
14 was always Conrail as the destination carrier.

15 MR. McBRIDE: But the Stout Plant, for
16 example, at Indianapolis Power and Light is served by
17 Indiana Railroad, with CSX further down at
18 interchanging and is served by Conrail via switching
19 and the same is true with the AEP plant I just
20 described to you. Conrail can get there via
21 switching, so they're a destination served by Conrail,
22 most of the coal may go over a different railroad,

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1 because that's a matter of commercial negotiation.
2 But they are a destination served by Conrail.

3 MR. EDWARDS: Your Honor, may I ask a
4 clarification? Is Mr. McBride representing in
5 response to the earlier interrogatories we have
6 supplied this information or is he simply describing
7 the condition of a plant that was not involved in the
8 earlier ruling?

9 MR. McBRIDE: The answer is I got the
10 tapes and I gave them to my experts. I said I didn't
11 read them. Mr. Coburn made the representation which
12 I accept, that CSX, which I learned for the first time
13 here today, did not provide the information on the
14 Stout Plant, on those tapes, which I didn't read. I'm
15 relying on Mr. Coburn's representation.

16 MR. EDWARDS: Your Honor, with all due
17 respect, I believe that counsel and his consultants'
18 actions in this case speak volumes with regard to what
19 their understanding of the ruling was. And it's far
20 to late to reargue this.

21 MR. HARKER: Your Honor, if I might jump
22 in here as well. I thought it was pretty clear the

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1 other day what you were interested in. You had a
2 notion that we gave them certain traffic tapes and
3 information. At the same time, they have access to a
4 waybill. That may or may not -- because it's a
5 sample, may or may not include the same movements as
6 on the traffic tape and what you basically wanted him
7 to be able to do as I understood your ruling was for
8 a particular movement that was covered in the waybill,
9 if we also provided traffic tape information on that
10 particular movement, you wanted him to be able to have
11 the appropriate masking factor for that particular
12 movement. And what we're basically telling you is
13 that in the case where -- let's assume there is such
14 a match, so that a comparison can be done between the
15 two, it is only the terminating carrier's masking
16 factor that will essentially allow him to unlock the
17 door of the waybill sample to get in and do his
18 comparisons. If we are, if CSX is, in fact, the
19 terminating carrier, as I understood your ruling from
20 Wednesday, such that our masking factor would allow
21 him to unlock the door to see what's beyond the mask,
22 then we would be obligated to provide our masking

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1 factor. But if, in fact, it was Conrail's masking
2 factor that would allow him to unlock the door and see
3 what was behind -- to unmask that particular movement,
4 then it would be Conrail who would be supplying the
5 data on the masking factor, not us, because our
6 information isn't going to help him do what you think
7 he should be -- what you thought Wednesday he should
8 be permitted to do.

9 MR. McBRIDE: May I respond?

10 JUDGE LEVENTHAL: Wait.

11 MR. HARKER: And so basically, if you
12 require in a blanket ruling now CSX and NS to give
13 masking information to the particular years in bulk,
14 irrespective of whether or not our masking factor is
15 going to allow him to unlock the door to do this
16 comparison that we talked about on Wednesday, then
17 you've gone well beyond where you were on Wednesday,
18 Your Honor.

19 MR. McBRIDE: If I may, I can make a
20 representation about something. On the original
21 production from CSX, Mr. Harker and Mr. Coburn's
22 client, I was furnished data on AEP's Cardinal Plant

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1 and it's in the summary that I was provided by my
2 consultant weeks ago. CSX provided that data,
3 apparently because it understood that plant to be
4 within the scope of your ruling. Now if CSX provided
5 that data, I presume CSX's masking factor was applied
6 to those movements. If they know otherwise, they can
7 correct me. But this is the problem we're having
8 here. These masking factors apply to all these
9 movements, as I understand on the waybill samples for
10 these various carriers because they're all involved in
11 my client's movements.

12 JUDGE LEVENTHAL: All right, let's go off
13 the record.

14 (Off the record.)

15 JUDGE LEVENTHAL: In our off the record
16 discussion, we were trying to clarify exactly what it
17 is that the party, Mr. McBride, was seeking and what
18 the parties understood my ruling to be.

19 All right, Mr. Edwards, I think,
20 enunciated a fair resolution of the proffer. All
21 right, Mr. Edwards?

22 MR. EDWARDS: Your Honor, I understand the

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1 ruling to be subject to our appeal rights that if
2 Norfolk Southern filed a waybill with the waybill
3 sample for movements that have been previously
4 reported to Mr. McBride in response to his earlier
5 discovery requests as limited by Your Honor, we, in
6 fact, could do one of two things. We could either do
7 the comparison of the revenues or we could provide the
8 revenue, the masking factors, if any, for those
9 movements.

10 MR. McBRIDE: That wasn't quite what you
11 said when we were off the record or what I understood.

12 What Your Honor said while we were still
13 on the record was for the destination served by all
14 three of these applicants, I was to get the masking
15 factors. It wasn't this either/or business that he's
16 now introduced.

17 JUDGE LEVENTHAL: Leaving out the
18 either/or, are you satisfied with what he said? If he
19 gives you the masking factors for the waybills that
20 they have filed, that will satisfy you?

21 MR. McBRIDE: For the waybills that they
22 have filed as part of the waybill sample, this ruling

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1 would apply to all three of the applicants. Is that
2 correct?

3 JUDGE LEVENTHAL: With the traffic
4 information they've already given you.

5 MR. McBRIDE: If those waybills are on the
6 waybill sample and those carriers provided the waybill
7 data, then they would provide me with the masking
8 factors.

9 Is that right?

10 MR. EDWARDS: Is he revising or agreeing
11 to my resolution?

12 JUDGE LEVENTHAL: As I understand it, he's
13 objecting to your either/or. He wants you to give him
14 the masking factors period.

15 MR. EDWARDS: But otherwise --

16 JUDGE LEVENTHAL: Otherwise, he's agreeing
17 with what you said.

18 MR. McBRIDE: As I stated it and as I
19 understand it. I'm trying to make sure there's
20 nothing misleading going on here.

21 JUDGE LEVENTHAL: Each time it's restated,
22 there's a little change put in that knocks it off.

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1 I thought parties were in agreement,
2 leaving out the either/or, Mr. Edwards will give you
3 or all the applicants will give you the masking factor
4 on any waybill sample and on any of the traffic
5 already given you where that carrier has included it
6 in their waybill sample.

7 MR. EDWARDS: I think Your Honor has now
8 stated it and I just have to ask one question to
9 determine how this applies. Neither Mr. Coburn nor I
10 are absolutely sure, as it now transpires, whether
11 this Stout Plant which is served by Conrail via switch
12 and also by a subsidiary of a subsidiary of CSX was
13 included in the materials they furnished. I would
14 think and I did think and I assumed because they're
15 men of good faith, that they had included that data in
16 the tapes I was provided that I immediately gave over
17 to my experts. If they did, we're fine. If they did
18 not, do I understand your earlier rulings to say that
19 I'm entitled to that?

20 MR. COBURN: Your Honor, I am not prepared
21 to argue this morning about the Stout Plant. I have
22 not reviewed the facts this morning. They're not

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1 fresh in my mind. I don't frankly recall whether the
2 Stout Plant was embraced in the previous orders or not
3 and I would be doing a disservice to my client to make
4 a -- to get into an argument about it this morning.
5 We'd be happy to take a look at it and report to Mr.
6 Mr. McBride and if we can't work it out, we'll see.

7 JUDGE LEVENTHAL: All right, well, why
8 don't we leave it at that? If you have a problem, we
9 can take it up next Thursday. If you want an earlier
10 conference, I'm available. I'll give you whatever
11 time you want.

12 MR. McBRIDE: I appreciate that. Thursday
13 is the 25th. We have Mr. McClellan. You're going to
14 hear about that in a minute, but since it starts at 10
15 o'clock, we could come down here earlier, presumably
16 and I find Mr. Coburn to be a pretty agreeable guy.
17 We're going to hope to dispense with this, but
18 otherwise perhaps we could be down here at 8:30 or
19 9:00 o'clock and try to get it resolved in time for
20 the McLellan deposition.

21 JUDGE LEVENTHAL: I can give you a hearing
22 at any time starting at 7:30. That's when I get to my

1 office. If you want to come in that early --

2 MR. McBRIDE: And you know what I was
3 hoping to tell you at the end of this morning? I was
4 hoping to tell you that this has been an honor and a
5 privilege even though I've lost at least as much as
6 I've won before you and I was hoping I didn't have to
7 come down and bother you any more. But maybe I'll be
8 here next Thursday.

9 JUDGE LEVENTHAL: We'll get to be real
10 good friends by the time we're done.

11 MR. McBRIDE: We're friends right now.

12 JUDGE LEVENTHAL: I mean all of us. I
13 didn't mean you and me. I meant all of us.

14 MR. McBRIDE: No, they're fine guys.

15 JUDGE LEVENTHAL: Yes, they are. I find
16 most lawyers are.

17 All right, do we have a clear
18 understanding of where we stand on this?

19 MR. McBRIDE: And apparently they intend
20 to appeal by Monday, but I understand that I'm
21 entitled to appeal by Wednesday because I'm not
22 seeking a stay and they may.

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1 JUDGE LEVENTHAL: All right.

2 MR. EDWARDS: Your Honor, do we have the
3 either/or or not, just clarification?

4 JUDGE LEVENTHAL: No, no. Give them the
5 masking factors.

6 MR. EDWARDS: And --

7 MR. NORTON: Your Honor, that's for
8 Norfolk Southern and CSX. That's not changing the
9 Conrail --

10 JUDGE LEVENTHAL: No, no. If you haven't
11 got it, you can't give it to them.

12 MR. EDWARDS: And with regard to the
13 appeal rights?

14 JUDGE LEVENTHAL: If you want to stay, you
15 -- I can't stop you from doing anything you want with
16 the Board.

17 MR. EDWARDS: I understand.

18 JUDGE LEVENTHAL: I decline to give you a
19 stay past Monday. If you want to do anything else,
20 you go ahead and do it.

21 MR. McBRIDE: So for clarity, you are
22 giving them a stay until what, 5 o'clock Monday?

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1 JUDGE LEVENTHAL: Monday, right.

2 MR. McBRIDE: I understand. And the
3 appeal rights are whatever they are.

4 JUDGE LEVENTHAL: Whatever they are.

5 MR. McBRIDE: And your ruling is effective
6 today, so my appeal would be to timely file it by
7 Wednesday.

8 JUDGE LEVENTHAL: My ruling is effective
9 today. That's the rules we're proceeding under.

10 MR. McBRIDE: I understand. I thank you,
11 Your Honor.

12 JUDGE LEVENTHAL: Is there anything else
13 before us?

14 Now we have this, why don't we recess for
15 10 minutes.

16 MR. COBURN: Perhaps we could adjourn to
17 one of the caucus rooms?

18 JUDGE LEVENTHAL: All right, we'll stand
19 in recess.

20 (Off the record.)

21 JUDGE LEVENTHAL: The discovery conference
22 will come back to order. All right, what is the --

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1 the parties have advised me they could not resolve
2 their differences. Tell me what the problem is.

3 MR. WOOD: If I may, Your Honor, just
4 briefly indicate the nature of the problem and perhaps
5 touch on some of our off the record discussions.

6 There are two witnesses whose statements
7 are included in the application on behalf of the
8 Applicants, Mr. William Hart for CSX and Mr. James
9 McClellan for Norfolk Southern. The schedule that the
10 Applicants put out for deposition schedules had them
11 scheduled presently for Mr. Hart on September 24th and
12 Mr. McClellan on September 25th. During the course --
13 and let me just say that it was even when the
14 application was filed it appeared that they had
15 considerable involvement in developing the specific
16 transaction that involved the division of Conrail's
17 assets which routes, which markets and so forth which
18 were going to be allocated between Norfolk Southern
19 and CSX.

20 But as the depositions have proceeded and
21 talking to, conducting inquiry with other witnesses,
22 the marketing witnesses of Mr. Anderson, Mr. Seale and

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1 others, the operating witnesses and even yesterday
2 with Mr. Snow, the Chief Executive Officer of CSX, it
3 has become more and more apparent how critical and
4 important the depositions of both Mr. Hart and Mr.
5 McClellan will be in understanding the how and the why
6 of the competitive impact of the transaction and the
7 nature of the transaction and the reasons that the
8 Applicants have agreed to do certain things.

9 As a result of that and as discussion with
10 other counsel for non-Applicants, it became apparent
11 to me last week that there would be a very high
12 likelihood of a need for a second day of deposition
13 for both Mr. Hart and Mr. McClellan, so for that
14 reason I sent a letter last Friday to the restricted
15 service list requesting the Applicants to schedule a
16 second day of deposition for both of those witnesses,
17 and more importantly, scheduling that second day for
18 a day that did not conflict with other significant
19 witnesses which there still is some remaining. Mr.
20 Klick, a witness on CSX on cost and benefits, savings;
21 Mr. Goode, the Chairman and CEO, I believe, of CSX is
22 scheduled for the 30th of September. And there are

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1 several others. Excuse me, Norfolk Southern, my
2 apologies.

3 The response, unfortunately, from the
4 Applicants was exactly what I had asked not be done
5 which was to schedule the second day for these
6 witnesses or proposed scheduling the second day of
7 these two witnesses in conflict and I think the most
8 significant conflict was to schedule a second day of
9 Mr. Hart on the same day as the first day of Mr.
10 McClellan. And they scheduled a second day for Mr.
11 McClellan for the same day as Mr. Klick.

12 Now I think the second day of Mr.
13 McClellan is probably not a significant problem. I
14 think we can probably, at least speaking for myself,
15 I hope -- I don't want to represent that I have a
16 clear understanding of what problems that might cause
17 for others who are interested in Mr. Klick, but I
18 think I might be able to work that out. But frankly,
19 Your Honor, the conflict in the schedule of the second
20 day of Mr. Hart, with the first day of Mr. McClellan
21 is very troublesome to us. We have anticipated and I
22 know others are in the same position. Mr. O'Hara is

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1 here to speak to this and Mr. McBride also has an
2 interest in this scheduling matter. These two
3 witnesses were -- there are counterparts on either
4 side of the negotiation of the transaction. People,
5 lawyers representing their clients, have been assigned
6 and are participating in those depositions and since
7 those two witnesses cover the same subject matter, it
8 would be important to have an opportunity to
9 participate in both depositions, be present at both
10 depositions during the entire time they're being
11 conducted to have clear understanding and knowledge of
12 what questions, lines of inquiry have been asked, what
13 responses have been received and have a clear
14 understanding of the issues that need to be discussed
15 with them.

16 For that reason and because we have not
17 been able, partly because I think Mr. Hart may not be
18 reachable at the moment, but also because I understand
19 from the applicants that they both have very busy
20 schedules, which I certainly understand, we have not
21 been able to reach a resolution of a day other than
22 the 25th for the second day of Mr. Hart.

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1 It seems to me that in that regard
2 although I appreciate that Mr. Hart is very busy, as
3 are we all, but nonetheless this is probably the most
4 important thing that the Applicants have in their
5 business activities at this point. They've invested
6 \$9.5 billion in acquiring Conrail stock which would
7 seem to me that they would bend every effort to
8 accommodate and allow a fair opportunity for the non-
9 Applicants to complete this record in reasonable
10 fashion, to present it to the STB for decision.

11 At this point, I guess I'm not asking for
12 you to direct that Mr. Hart be scheduled on any
13 specific day, but I ask that it be scheduled for a day
14 that specifically does not conflict with the first day
15 of Mr. McClellan and does not conflict with a day
16 scheduled for other significant witnesses. The
17 deposition schedule is coming to a close. After next
18 week there really, on the 29th, as I understand it,
19 the schedule we have witnesses on the 29th and the
20 30th, it's not clear whether Mr. Levy on the 1st where
21 anyone is going to inquire of him. I believe that Dr.
22 Kalt is still scheduled on the 2nd although there's

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1 some uncertainty about that. And then after that
2 there are just two more days of depositions scheduled.

3 It seems to me that bearing in mind that
4 we have to file comments with the STB on the 21st of
5 October, we don't want to push too far past the end of
6 the currently scheduled conclusion of the depositions,
7 but I think that given the significance of these two
8 witnesses and the importance of adequate participation
9 by all interested counsel for all of the parties who
10 at least so far indicated an interest in these two
11 witnesses and I should mention, Your Honor, just so
12 you understand, under the guidelines, as long as one
13 party has noticed, given a two week notice of a
14 deposition of an intent to participate in the
15 deposition that's scheduled, other parties can
16 indicate their intent to participate in the deposition
17 as late as two business days before the scheduled
18 date. So there may well be other parties who may,
19 beyond those that we're already aware of, indicate
20 their intent to participate in the deposition of both
21 Mr. Hart and Mr. McClellan and I think it would be --
22 it's not just a matter of personal convenience to me.

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1 I think it's a matter that would be of great
2 importance to a number of other parties to not have
3 Mr. Hart's and Mr. McClellan's scheduled depositions
4 conflict. I request a ruling for that relief.

5 JUDGE LEVENTHAL: Mr. Coburn?

6 MR. COBURN: Thank you, Your Honor. If I
7 may, I'd like to show you a copy of the July 7
8 deposition calendar that was submitted to all parties
9 on the restricted service list and on August 1
10 amendment to it and if you don't have copies, I'd be
11 happy --

12 JUDGE LEVENTHAL: I have the August 7th
13 one.

14 MR. COBURN: Okay, here's the July 7 one.
15 This July 7 calendar which was sent to all parties on
16 the restricted service list including the three
17 attorneys sitting at the other table set out a
18 calendar for all of the 41 Norfolk Southern and CSX
19 witnesses. And these were the days that were chosen
20 for these witnesses based on the availability of the
21 witnesses at the time and I must say it was no easy
22 task. I think Mr. Harker and Mr. Edwards spent the

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1 better part of one or two days trying to work with
2 complex calendars that we had received from each of
3 these witnesses to try and put it all together. It
4 was a game of dominoes.

5 It also had -- the schedule also had to
6 take into account the availability, of course, of the
7 attorneys who might be defending these witnesses to
8 make sure that there was no conflict there.

9 It was a difficult task, but it was done
10 successfully and now only at the eleventh hour are we
11 hearing a complaint about a specific -- two
12 depositions, the Hart and McClellan deposition which
13 you'll see, as of July 7th, were fixed for the days
14 September 24 and September 25.

15 We've heard this morning that there is a
16 recognition on Mr. Wood's part that these are two very
17 important witnesses. We're not suggesting otherwise.
18 We think all of the witnesses are important.
19 Certainly, I'm not going to tell you that Mr. Hart and
20 Mr. McClellan are unimportant witnesses. They're very
21 important witnesses. But that was clear, I think,
22 from the application, that they were important

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1 witnesses. The application which was, of course,
2 available to them as of June 23, indicated very
3 clearly what their roles were.

4 So we have a situation again where at the
5 eleventh hour we're being asked to change the schedule
6 which means also accommodating not only these
7 witnesses who have very many things to do over the
8 next several weeks. What Mr. Hart is doing, as I
9 think Mr. Wood understands, is traveling around trying
10 to settle, negotiate with parties who have raised
11 concerns about the application. That is what he does
12 and to divert him from that task where he has fixed
13 these two days as two days that he's free for his
14 deposition would be a great burden on him and on --
15 well, certainly a great burden on him and on CSX as
16 well.

17 Mr. Wood has several colleagues in his
18 firm who are working at least -- I know at least one
19 other who is working on this case, Mr. Maser. You've
20 seen him here. He has other colleagues who are well
21 experienced in rail matters, who have participated in
22 other merger cases. We litigated against several of

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1 them, the BN-Santa Fe case. They could certainly
2 cover one of these depositions or the second day of
3 one of these depositions. Basically, Mr. Wood is
4 arguing that he needs to be there for the second day
5 of the Hart deposition and I suggest to you that there
6 are others who could serve that role for his clients.

7 JUDGE LEVENTHAL: Let me ask you a
8 question. Is it possible, Mr. McClellan. I take it
9 would be available not only on the 25th, but on the
10 26th, as well?

11 MR. COBURN: That's correct, Your Honor.

12 JUDGE LEVENTHAL: Why can't we move Mr.
13 McClellan back so that his first day is the 26th and
14 give him the second day of -- what is the 26th date?

15 MR. COBURN: That's a Friday.

16 JUDGE LEVENTHAL: And give him the
17 following Monday.

18 MR. COBURN: Well, I'll let Mr. Edwards
19 speak to Mr. McClellan's schedule.

20 MR. EDWARDS: Your Honor, we have -- we
21 put together the schedule with the idea that in fact
22 we could have Mr. McClellan's first day where he was

1 and his second day for that Friday -- I have no idea
2 about his availability on the next Monday, but to say
3 that Mr. McClellan has any less of a busy schedule
4 than Mr. Hart would be an understatement. It just
5 doesn't happen there. I can't speak to it because
6 that's never even been suggested to us.

7 Back in July when we were trying to put
8 these witnesses in a schedule that would work, it was
9 difficult then. Where we are now, again, on September
10 19th, I haven't the foggiest idea where we are because
11 once that schedule was set, then it gets filled up.
12 Anything else is filed. I don't know what he's doing
13 that day.

14 MR. HARKER: Your Honor, may I just
15 consult with Mr. Edwards just for a second?

16 (Pause.)

17 MR. EDWARDS: As Mr. Harker is pointing
18 out to me, Mr. McClellan is being defended by Mr.
19 Allen who is the lead partner for the -- this case for
20 Norfolk Southern. And following soon thereafter is
21 Mr. Goode who is the CEO for Norfolk Southern who is
22 also being defended by Mr. Allen. Again, as we've

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1 heard, we need to accommodate both of the witnesses as
2 well as the attorneys and we've got Mr. McClellan who
3 is al very important witness and then Mr. Goode who is
4 the CEO of Norfolk Southern.

5 MR. WOOD: If I may, Your Honor, I'm
6 sorry, did you finish?

7 MR. COBURN: Just to add one other point,
8 Your Honor, which is that I think what this shows is
9 that we really do have a dominoes problem here. Once
10 we start changing days, days that have been fixed for
11 over two months, we're going to run into a problem.
12 We're going to inconvenience somebody. That is
13 basically unavoidable. In a case of this nature,
14 somebody is going to be inconvenienced. I think we
15 start from that proposition, that all of these days
16 are not perfect for any of us. It was not perfect for
17 me to be here this morning. I have lots of other
18 obligations as I'm sure all of the other attorneys do.
19 There is a measure of inconvenience in a litigation
20 of this nature.

21 To pick up on the point about moving Mr.
22 McClellan, well that would move Mr. McClellan's first

1 date to the first date of Mr. Klick. Mr. Klick is an
2 important witness and somebody is going to come to you
3 next week and say we can't start Mr. McClellan on the
4 day that we start Mr. Klick because I have to be at
5 both depositions. It's unavoidable that there are
6 these problems. But we're not solo practitioners. We
7 all have partners, we all have associates. Mr. Wood
8 has plenty of them. That's what they're there for.

9 JUDGE LEVENTHAL: Your point of the fact
10 that this schedule has been in existence for along
11 time, we're going to get to that.

12 MR. O'HARA: I'd like to be heard, Your
13 Honor, if I may.

14 If you look at the schedule, you'll note
15 that for the most part there is only one witness on
16 one day with a couple very minor exceptions. The
17 first notice that I received that there would be a
18 possible overlap, I think this should go into the
19 record too, was this notice from the Applicants dated
20 September 16th, but actually faxed to me on the 17th.
21 That says they anticipate Mr. Hart's deposition going
22 over and interfering with Mr. McClellan's deposition.

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1 And I would like to go one step further than Mr. Wood
2 and I would just like Your Honor to pick a day in
3 October that no deposition is scheduled for and order
4 any deposition that is not completed within a
5 reasonable time on that date to carry over on a
6 nonoverlapping manner. I don't feel that there should
7 be a need to have, except for where it was explicitly
8 provided for on the deposition schedule, I don't think
9 there should be a need to have two depositions
10 overlap, especially in this case where these two
11 witnesses and I actually brought along the testimony
12 so I can go through and show you, these two witnesses
13 are testifying on very similar points. I won't say
14 exactly the same, but the sum and substance of these
15 two witnesses, they address a lot of the same points
16 and to have them over lap would be very burdensome, I
17 think, on anybody who has -- except for the
18 applicants, of course, who are participating in this,
19 in these depositions who are concerned about these
20 issues, because the two witnesses address very similar
21 issues.

22 MR. McBRIDE: If Your Honor will hear me

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1 for just one more moment, I want to explain to you
2 that this is the first time any non-Applicant lawyers,
3 I understand, have asked for any change in this. They
4 proposed a schedule. We've all tried to live with it.
5 They had to make a few changes because of a classroom
6 schedule and a medical problem, but you see, we all
7 got together, those of us who had an interest in these
8 depositions to try to figure out who was going to do
9 what. Back on August 20th, there was only five of us
10 who exhibited any interest in talking to Mr. Hart and
11 so at that time we thought we could get him down in a
12 day, but as late as yesterday when I deposed Mr. Snow,
13 as Mr. Wood did as well, Mr. Snow, the CEO, didn't
14 know some things, quite a number of things. He told
15 us to ask Mr. Hart, that he was the key person. Mr.
16 Hart and Mr. McClellan essentially divided Conrail's
17 assets between them after Mr. Snow and Mr. Goode made
18 the financial arrangements that they made. These may
19 be the two central witnesses in the whole proceeding.
20 And because people are now being added to the list
21 beyond the original five, now it's apparent to us, for
22 example, the Ohio Attorney General just this week

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1 indicated a desire to depose Mssrs. Hart and McClellan
2 and to come here for it that we're going to have to go
3 over a day when we didn't know that before. That's
4 why we didn't know we had a problem before.

5 MR. WOOD: If I may, two points. One, I
6 think that the deposition schedule, particularly the
7 one that was not put out until the 7th, excuse me, the
8 1st of August, had a note at the bottom and I don't
9 know that you have a copy of this, Your Honor.

10 Did you provide him with the August 1
11 schedule? I'm sorry, there's a note at the bottom
12 that I would just call your attention to. It says
13 "all deposition start at 10 a.m. unless other
14 otherwise noted. If a deposition rolls over to a
15 second day, the parties will determine the start time
16 for the second day at the end of the first day's
17 activities." Now that certainly suggested to me when
18 I got that there was going to be a degree of
19 flexibility in scheduling a second day, if it was
20 necessary. I didn't know until this morning when I
21 was told by Applicants' counsel that what they had, in
22 fact, done had already blocked out a second day for

1 Mr. Hart on the 25th and a second day for Mr.
2 McClellan on the 26th and no other days and that note
3 suggested to me that there would be a greater degree
4 of flexibility. And in reliance on that, I did not
5 wait until the eleventh hour. I wrote my letter on
6 the 12th, the day we finished -- or the second day of
7 Mr. Orrison's deposition and it became very clear when
8 we finished that day, Mr. Orrison's deposition, as
9 well as other witnesses that had gone immediately
10 before him, just how important Mr. Hart and Mr.
11 McClellan were going to be as -- just how important
12 their depositions were going to be.

13 Now let me just address the point that Mr.
14 Coburn raised about other people being involved. I
15 don't think it should be for the Applicants and their
16 counsel to dictate how we litigate, what our
17 litigation strategy is, how we commit our resources
18 and our client's resources to developing our side of
19 this case.

20 Mr. Hart and Mr. McClellan covered the
21 same subject matter. Its the most efficient and
22 productive way for us to prepare and present our case

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1 to have the same lawyers involved in both depositions
2 to the fullest extent possible. Certainly, Mr.
3 Edwards wants to have Mr. Allen involved in both Mr.
4 McClellan and Mr. Goode's deposition. To defend that
5 I can certainly appreciate that. That's the same
6 rationale that indicates to us that I should be
7 involved in Mr. Hart and Mr. McClellan to the fullest
8 extent possible and certainly that's true for Mr.
9 O'Hara and I think for a number of others that I have
10 spoken to, who are not here, so I can't say for
11 certain, but I know that others have the same concern
12 and have expressed them to me.

13 Again, as to Mr. O'Hara's request for
14 relief, that certainly is an alternative. It's really
15 not that much different from what I'm asking for. I'm
16 not asking for a specific date. I recognize Mr. Hart
17 is apparently not reachable at the moment. We can't
18 direct a specific date, but I think we can try to find
19 a date. If Your Honor directs that it be done, and
20 does not conflict with someone else and I think Mr.
21 Hart, given the significance of this transaction to
22 his company, will certainly be made available.

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1 JUDGE LEVENTHAL: All right, Mr. Coburn?

2 MR. COBURN: Your Honor, just a few more
3 points, if I may. Mr. Wood will be able to ask his
4 questions of both witnesses. He can be there on the
5 first day of deposition and he can ask his questions
6 so if the concern is that he wants to do it because he
7 feels he's the most competent person at his end of the
8 table to do it, fine. He can do it. Nobody is
9 stopping him from doing it. All I was suggesting is
10 that he has colleagues who could cover the second day
11 and listen, simply listen, while others are
12 questioning these witnesses. Nobody is trying to
13 deprive Mr. Wood or any of these counsel of their
14 opportunity to ask their questions of both of these
15 witnesses. They will have that opportunity.

16 Second, the practice has been from the
17 beginning of this case and there have been several
18 depositions on this list where there's been a second
19 day. The practice has always been not only in this
20 case, but in all of the other cases that these counsel
21 have been involved in, that the second day is the next
22 day and that's because none of these witnesses are

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1 from this area. They like to fly into Washington, get
2 their deposition done with and go back to work, to
3 Jacksonville, to Norfolk or wherever.

4 So that's the reality of it is that the
5 second day is the next day and I think that's been
6 clear certainly since August when we started to have
7 some two-day depositions.

8 So I think again it's a matter of personal
9 convenience and I appreciate -- if the world worked
10 perfectly there might not be this overlap, but it
11 doesn't. We have to live with the schedules of our
12 clients. They're very busy people. The schedules of
13 all of the other attorneys and all of the other
14 witnesses, this has been on paper since July 7th and
15 here we are at September 19 and we're first hearing
16 about it. I'm sorry, we first heard about it two or
17 three days ago, but still, it's late in the game.

18 JUDGE LEVENTHAL: Mr. O'Hara had a
19 suggestion that we have the second day some time after
20 the last deposition taken. Suppose we have both days
21 after the -- I think you have depositions scheduled
22 through October 8th. Would it be possible to -- what

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1 I'm trying to do, of course, is to accommodate the
2 needs of everybody.

3 Is it possible to have Mr. Hart go over to
4 the 25th and use Mr. McClellan say October 9th?

5 MR. COBURN: You mean to have Mr.
6 McClellan start on October 9th?

7 JUDGE LEVENTHAL: Right.

8 MR. McBRIDE: We don't want that because
9 we want -- he is scheduled for the 26th as a carryover
10 day and if you push the most important witnesses to
11 the very end of the schedule before we even start with
12 them, we have got a problem.

13 There's no reason to move him off the
14 26th. We've got Hart as they've proposed for the
15 25th, 24th and 25th. The sticky point is the 25th,
16 not the 26th. There's no reason to relieve him of the
17 26th. It's the issue of the second date, not both
18 dates. You see the point?

19 JUDGE LEVENTHAL: Wait a moment, how about
20 McClellan? If McClellan goes over to the 26th is
21 there a problem?

22 MR. McBRIDE: No, to start on the 26th.

1 No, I thought you were saying start him after October
2 8th.

3 JUDGE LEVENTHAL: That's what I was
4 saying. I'm trying to find out now, the only problem
5 involves the conflict between Hart and McClellan, is
6 that it?

7 MR. McBRIDE: On the 25th, that's correct.

8 JUDGE LEVENTHAL: ON the 25th.

9 MR. McBRIDE: Yes, the 26th is not an
10 issue.

11 MR. COBURN: The 25th being the second day
12 of Hart and the first day of McClellan.

13 JUDGE LEVENTHAL: Right, then McClellan
14 then isn't an issue as to his second day.

15 MR. WOOD: I don't believe so, Your Honor.
16 I think the point being is there is enough difference
17 between the issues and the subject matter that Mr.
18 McClellan and Mr. Klick covers that I don't think
19 there will be a problem.

20 JUDGE LEVENTHAL: How about Mr. Coburn's
21 statement that you can get your deposition in first
22 and then have somebody else listen in on the other

1 deposition?

2 I guess that would apply --

3 MR. WOOD: That certainly would
4 accommodate, might perhaps accommodate me and my
5 clients, but frankly if they do that for me, it would
6 then inconvenience someone else who might be in the
7 same position because they would not be able to get in
8 the first day.

9 JUDGE LEVENTHAL: But I can only handle
10 those people who come here. If we can accommodate Mr.
11 O'Hara and Mr. Woods and Mr. McBride, then we don't
12 have a problem because nobody else is here telling me
13 about a problem.

14 MR. COBURN: And there are several other
15 parties that have indicated an interest in deposing
16 these witnesses and they're not here.

17 JUDGE LEVENTHAL: Right. Your suggestion
18 is the schedule of these three gentlemen?

19 MR. COBURN: Yes, I think they can work it
20 out amongst themselves. That's the way -- it always
21 happens in these cases that the Intervenors and I
22 think Mr. McBride indicated that it's happened here,

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1 cooperate with one another in terms of who is going to
2 go first and who has a conflict and let's work it out
3 and it's always been cooperative. I haven't certainly
4 heard from our round that the Intervenors are having
5 problems working these thing out up until today.
6 Things have been worked out.

7 MR. WOOD: Certainly we can accommodate
8 that, if we can. I just -- I appreciate the fact that
9 there are people who are not here today because
10 they're at Mr. Prillaman's deposition. I tried to
11 give adequate notice that this issue was going to be
12 here today. We didn't get the Applicants' response
13 until the 16th, to my request.

14 I would be prepared to accept that, you
15 know with the understanding that there maybe would be
16 someone else that might come back and to say that you
17 caused a problem for me because I won't be able to
18 participate in the first day of Hart and then be at
19 the McClellan deposition.

20 JUDGE LEVENTHAL: How much time do each of
21 you take in a deposition?

22 Mr. Woods, how much time would you take,

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1 can you project, the length of your questioning of the
2 deposition?

3 MR. WOOD: My best estimate, Your Honor,
4 to be frank, just so there's no claim of surprise, it
5 could go as long as three hours.

6 JUDGE LEVENTHAL: Mr. McBride?

7 MR. McBRIDE: Yesterday, I spent about
8 three hours with Mr. Snow, but we got him done in one
9 day. Other people that I've deposed I've taken
10 somewhere between an hour and two hours. I think I've
11 deposed four people so far. Some of my colleagues
12 have taken some of the other depositions and some of
13 them, if I may say it without offending counsel,
14 lesser witnesses, and I told them what to go and ask
15 and they've done it in maybe a half an hour. It
16 depends on the witness.

17 Mr. Hart is so important that I suspect
18 that I may spend two hours with him. I'm supposed to
19 lead off and then you've got Mr. Woods' three and I
20 don't know about Mr. O'Hara.

21 JUDGE LEVENTHAL: We're going to find out
22 in a minute.

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1 MR. O'HARA: Yes, Your Honor, I wish I
2 could tell you. We have not participated in any
3 depositions to date. These are the two depositions
4 that we would like to participate in and we are still
5 preparing our testimony so I in all honesty cannot
6 give you a fair estimate of our time, but the fact
7 that there are other parties here speaking out I don't
8 think should be dispositive.

9 If I could just show you the letter that
10 I got from Mr. Wood yesterday. This didn't come in on
11 our fax machine until 6:30 yesterday evening,
12 indicating that this would be an issue today. For
13 instance, there's nobody here from Slover & Loftus and
14 I know that they're representing four cities in
15 Indiana that are -- and they would have a very sincere
16 interest in these two depositions. And I received on
17 September 16th their notice of intent to question Mr.
18 Hart and Mr. McClellan and I'm sure that they would
19 have a tremendous concern about the overlap.

20 JUDGE LEVENTHAL: That was September 18th.
21 I guess I received a fax. I don't know if I received
22 the original or not, but I received a copy.

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1 MR. COBURN: Your Honor, the issue quote
2 unquote that we're discussing this morning has not
3 been out there since last night. It's been out there
4 since July 7th and Mr. Woods' letter that initiated
5 the discussion we're having this morning was dated
6 September 12th.

7 JUDGE LEVENTHAL: I see your depositions
8 start at 10:00. Can you start them a little bit
9 earlier and finish them a little later?

10 MR. EDWARDS: Your Honor, Your Honor.

11 MR. McBRIDE: We can do one other thing to
12 speed them up. I resisted complaining about this
13 yesterday to waste paper, but we're getting a lot of
14 speaking objections. If Your Honor would indicate
15 that a party, if he objects to a question and is
16 calling for speculation and just says that and then
17 doesn't tell Mr. Snow what to say, then we could speed
18 these things up.

19 JUDGE LEVENTHAL: I think that's a very
20 good suggestion.

21 MR. COBURN: Your Honor, many of the
22 depositions have, in fact, been going as late as 7 and

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1 in one case 8 o'clock at night. It's bit of a
2 hardship on the stenographer, as much as on the
3 witness, certainly but we're happy to -- and I know
4 for a fact that Mr. Hart is going to want to get his
5 deposition done in those two days because of the
6 schedule and I'm sure they will be long days.

7 MR. McBRIDE: Why don't we start Hart at
8 9? Are we in agreement that we want to try to extend
9 it somewhat?

10 JUDGE LEVENTHAL: All right.

11 MR. McBRIDE: Does that work?

12 MR. COBURN: I'm mindful of the court
13 reporter. I do think that's a legitimate issue.

14 JUDGE LEVENTHAL: The court reporter issue
15 can be easily resolved. They can have two reporters.
16 One can relieve the other. That's been done. I don't
17 know for this case, but it's been done in my
18 experience.

19 MR. McBRIDE: I think that's probably
20 right, but they haven't been sending two to any other
21 that I've seen. I may be wrong, but --

22 MR. EDWARDS: We can look into that. We

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1 can arrange for a second court reporter to be
2 available that would be just fine and we could start
3 both depositions at 9. I know that in the case of Mr.
4 Mohan, we went until after 9 o'clock at night having
5 started at 9 in the morning. So we do make
6 extraordinary efforts to accommodate the deponents or
7 the questioners.

8 JUDGE LEVENTHAL: All right, wouldn't that
9 help resolve the problem if you start early and finish
10 a little bit later?

11 MR. McBRIDE: And no speaking objection.

12 JUDGE LEVENTHAL: I can't make a ruling on
13 that. I suggest you follow that.

14 Would that resolve the problem?

15 MR. WOOD: Well, Your Honor, I'm not sure
16 that it does. I think we're probably going to have to
17 live with that. I think that Mr. Mohan was not
18 brought back the next day. Mr. Mohan was brought back
19 more than a week later for a second day. It's not
20 beyond the realm of possibility that Mr. Hart can be
21 brought back the second day other than the 25th. I
22 would request that given the fact that Mr. Hart has

1 not been contacted about this that efforts be made to
2 contact him and see if the second day can be scheduled
3 other than the 25th, if you're not prepared to direct
4 that that be done.

5 MR. COBURN: This was raised with him,
6 Your Honor. He was in our offices for deposition
7 preparation the other day and the reaction was that he
8 doesn't see how he could accommodate any day. He had
9 blocked these days out months ago and to change his
10 incredibly busy schedule --

11 MR. WOOD: My only observation is that
12 that fact was not made known to us until this morning.

13 JUDGE LEVENTHAL: You see the strong point
14 they make is that this schedule has been in existence
15 for a long time and the schedule itself says that if
16 a second day is necessary, it will be following day.
17 And --

18 MR. WOOD: It doesn't say that.

19 JUDGE LEVENTHAL: Obviously, you people
20 accepted that. I'm sorry?

21 MR. WOOD: With all respect, Your Honor,
22 it does not say that and that has not been the

1 practice. It says "the parties will determine the
2 start times of the second day at the end of the first
3 day's activities" and the practice has been when it
4 appears we're not going to finish at the end of the
5 first day that counsel consult and come to an
6 agreement of what that second day will be. That's why
7 Mr. Mohan did not come back until the second day.

8 MR. COBURN: I stand corrected on Mohan.
9 That may have been a special circumstance, but that
10 was very much the exception to the rule. With that
11 exception, I think I'm correct. Correct me if I'm
12 wrong, but the second days have always been the next
13 day and again that's just the way it is in these
14 proceedings. This is nothing new.

15 JUDGE LEVENTHAL: Your schedule doesn't
16 say that though.

17 MR. COBURN: It doesn't specifically say
18 it will be the next day.

19 JUDGE LEVENTHAL: I misread it.

20 MR. COBURN: It doesn't.

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

22 (Off the record.)

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1 JUDGE LEVENTHAL: In our off the record
2 discussion, I believe the parties have reached an
3 agreement that would resolve the problem. It doesn't
4 necessarily mean that they are pleased with the
5 resolution, but at the urging of the Judge, they have
6 gone along with it.

7 Mr. McBride, would you state the agreement
8 for the record?

9 MR. McBRIDE: Yes, my understanding is
10 that what we have agreed is that the three of us, or
11 our representatives will proceed --

12 JUDGE LEVENTHAL: The three of you is Mr.
13 Wood, Mr. McBride and Mr. O'Hara.

14 MR. McBRIDE: Correct, excuse me. We or
15 our representatives will conduct our cross examination
16 of Mr. Hart on September 24th. To the maximum extent
17 possible we're going to go as long as we can go, I
18 understand, beginning at 9 o'clock and going until
19 whenever. And then any redirect conducted by
20 Applicant's counsel will be done at the end of that
21 day or at the end of the three of our examinations.
22 I'm not sure it matters which, so that we can recross

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1 that day and we would be done that so, so that we
2 would be accommodated in going to the McClellan
3 deposition the next day.

4 JUDGE LEVENTHAL: All right. That's the
5 agreement?

6 MR. COBURN: Yes, Your Honor.

7 JUDGE LEVENTHAL: Then it is so ordered.
8 For the record, let me say that the parties have
9 furnished me with a letter dated July 7, 1997 to all
10 the parties on the restricted service list signed by
11 Richard A. Allen, setting forth the schedule of
12 depositions; and a memorandum to all persons on the
13 restricted service list from Patricia E. Bruce, Drew
14 A. Harker, David H. Coburn and Gerald B. Norton which
15 amended the schedule to some degree. And the third
16 document is a memorandum via facsimile to all parties
17 on the restricted service list from Richard A. Allen
18 and Dennis G. Lyons, dealing with deposition of
19 William M. Hart and James W. McClellan.

20 I'm now returning the documents to Mr.
21 Coburn.

22 MR. COBURN: Thank you, Your Honor.

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1 JUDGE LEVENTHAL: Mr. Norton?

2 MR. NORTON: Your Honor, I just want to
3 raise a scheduling question. There has been a Conrail
4 witness has been noticed for deposition and this is a
5 person who did not provide any testimony or verified
6 statement in the application and one of the parties
7 has noticed the deposition for the 29th.

8 We are pursuing whether the deposition
9 will be necessary or whether there are some other ways
10 that we can respond to it, but there may be a question
11 both as to the -- as to whether that deposition is
12 necessary, its length and its location that we may
13 need to have a ruling on. If that's necessary, I was
14 wondering whether we could bring that to your
15 attention on a shorter notice than the usual
16 procedure?

17 JUDGE LEVENTHAL: I am willing to
18 accommodate you, if you speak to my law clerk,
19 Jennifer Schmidt, I'll accommodate you in every way I
20 can.

21 MR. NORTON: Okay, that's fine.

22 JUDGE LEVENTHAL: If I'm available for the

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1 next, if that's what you want or whatever date you
2 pick, I'll be glad to take you in. If not, I'm sure
3 we can work it out.

4 MR. NORTON: Fine. Thank you, Your Honor.

5 JUDGE LEVENTHAL: All right, is there
6 anything else?

7 We left one thing over -- off the record.

8 (Off the record.)

9 JUDGE LEVENTHAL: The one final thing we
10 had to take care of this morning is the schedule for
11 the conference next Thursday, if needed, at the
12 request of the parties. That conference will be
13 scheduled at 9 o'clock instead of 9:30 next Thursday.
14 If the conference isn't needed, parties will advise my
15 law clerk in the usual manner that a conference isn't
16 needed.

17 All right? Does that dispose of
18 everything we have to do this morning? All right,
19 thank you.

20 (Whereupon, at 11:53 a.m., discovery the
21 conference was concluded.)
22