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DISCOVERY CONFERENCE

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

Finance Docket
No. 33388

Thursday,
December 4, 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.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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

(9:33 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. This is the discovery conference in STB Finance Docket No. 33388. I'll take appearances at this time.

MS. BRUCE: Good morning, Your Honor. Patricia Bruce, Zuckert, Scoutt & Rasenberger representing Norfolk Southern.

MR. HARKER: Good morning. I'm Drew Harker with Arnold & Porter for CSX.

MR. NORTON: Gerald Norton, Harkins Cunningham, Conrail.

MR. HEFFNER: John Heffner, Rea, Cross & Auchincloss for New York Cross Harbor.

MR. KAHN: Fritz Kahn, Fritz R. Kahn, P.C. representing Martin Marietta Materials Corporation.

MR. McBRIDE: Michael F. McBride for Indianapolis Power & Light Company.

MR. McINTYRE: Good morning, Your Honor. Kevin McIntyre, Jones, Day, Reavis & Pogue here on behalf of National Lime and Stone Company.

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1 JUDGE LEVENTHAL: Further?

2 MR. DRIVER: Kenneth Driver also of Jones,
3 Day and also here on behalf of National Lime and Stone
4 Company.

5 JUDGE LEVENTHAL: All right, very well.
6 We have several motions before us this morning. The
7 first one is Norfolk Southern's Motion to Compel the
8 Ohio Steel Industry Advisory Commission and the West
9 Virginia Association for Economic Development to
10 respond to discovery requests.

11 Do you wish to address this?

12 MS. BRUCE: Yes, Your Honor. As to the
13 West Virginia Association for Economic Development, we
14 received responses yesterday, so that part of the
15 motion has been resolved and we're withdrawing it.

16 But as to the Ohio Steel Industry Advisory
17 Commission, Norfolk Southern has not received any
18 response from the Ohio Steel Industry, despite efforts
19 to contact them on the phone. They've come with
20 nothing and I see they're not represented here this
21 morning. So we would ask that you enter an order to
22 compel them to respond to the discovery. The

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1 discovery is simply three questions. They go to
2 issues raised in the October 21st agreement and they
3 haven't raised any objections to them. In the past
4 there have been no objections. They have raised
5 nothing and made no response.

6 JUDGE LEVENTHAL: All right, very well,
7 the Motion to Compel with respect to Ohio Steel
8 Industry is granted.

9 MS. BRUCE: Thank you, Your Honor.

10 JUDGE LEVENTHAL: The second, Conrail,
11 Motion to Set Aside Highly Confidential Designation.
12 Mr. Norton?

13 MR. NORTON: Your Honor, by way of
14 background here, the effective order entered in
15 decision 1 establishes a method in which parties can
16 designate discovery materials, including deposition
17 transcripts and responses as either highly
18 confidential or confidential and then other parties
19 are entitled to challenge those designations,
20 captivate them and get a ruling.

21 In this case, I don't know that we've had
22 many before, but what we have is essentially that

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1 issue. The practice in deposition has been in most of
2 them, I think, the transcript is initially treated as
3 highly confidential, often in its entirety, pending a
4 review and a voluntary declassification by the
5 witness, witness party, and then if there's any
6 remaining issue about what has been left highly
7 confidential, the parties will try to work it out, or
8 failing that, can seek a ruling.

9 In this case we have a variation of that
10 scenario, but in a more limited way. At the
11 deposition of Mr. Crawford, the President of New York
12 Cross Harbor Railroad on November 25th, only a portion
13 was designated highly confidential and without moving
14 -- ask that it be voluntarily declassified and Cross
15 Harbor disagreed to do so and we're now asking that
16 Your Honor declassify it either to confidential or to
17 public.

18 The place to start is the allegations that
19 give rise to the testimony in question. Now Your
20 Honor, if I might, I have a copy of the Cross Harbor
21 comments, NYCH 3, which was also marked as Exhibit 1
22 in the deposition and I'll provide you a copy.

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1 JUDGE LEVENTHAL: All right.

2 MR. NORTON: Your Honor, I have a number
3 of comments to make.

4 JUDGE LEVENTHAL: All right, Mr. Norton.

5 MR. NORTON: If Your Honor will turn to
6 page 4, at the bottom of the whole paragraph there,
7 the last --

8 MR. DRIVER: Pardon me, Your Honor, Ken
9 Driver. I have not actually signed the appropriate
10 nondisclosure forms. I just realized that we may be
11 --

12 MR. NORTON: I don't think that will be
13 problem during the argument.

14 MR. DRIVER: Okay.

15 MR. NORTON: So far this is --

16 JUDGE LEVENTHAL: This is not
17 confidential.

18 MR. DRIVER: Okay, I just didn't want to
19 --

20 MR. NORTON: I have that in mind and I
21 think we can proceed with the argument without getting
22 into that problem.

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1 JUDGE LEVENTHAL: All right, very well.

2 MR. NORTON: The last sentence in that
3 paragraph says "Finally, NYCH learned that certain
4 Conrail management officials had deliberately
5 misrepresented to others the condition of NYCH's
6 facilities, the nature of NYCH's ownership (that
7 NYCH's management had Mafia ties) and that NYCH was on
8 the verge of bankruptcy."

9 Now those are comments submitted by Cross
10 Harbor to the Board in connection with its request for
11 certain conditions. Now in the -- in our discovery,
12 the deposition of Mr. Crawford, Mr. Cunningham had
13 asked Mr. Crawford about the source of those
14 allegations and Mr. Crawford had testified that by and
15 large he was the source of information that was
16 reflected in the comments that he submitted a
17 verifying statement that is attached to the comments.

18 At that time, Mr. Heffner indicated that
19 they would like answers to the questions requesting
20 that sentence put in a highly confidential basis and
21 that was done and I have a separate portion of the
22 transcript that contains the matters that are at

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1 issue.

2 While that's labeled confidential by the
3 reporter, it should be read as "highly confidential."

4 And there are a number of questions about
5 those allegations and there are certain of the
6 responses to which Mr. Crawford identifies by name or
7 position the people that he -- that Conrail, that he
8 was identifying as having sources of those
9 allegations.

10 And I don't think for the moment we need
11 to get into the particulars, but that's the general
12 gist of the testimony that goes on and names come up
13 and identifications come up on pages 135, 136, 137,
14 138 and 139 and 140. On those pages there is at least
15 one reference to the identification of such a person.

16 Now these are serious allegations and we
17 think that there is simply no basis for Cross Harbor's
18 attempts to thwart our ability to probe them by not
19 allowing them to propose to Conrail the people who
20 have been identified as the sources of those
21 allegations so that we can determine if there's any
22 foundation for this.

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1 In Mr. Heffner's letters, he says that the
2 concern about this information being in the public
3 record, now if that's a concern, there's an easy
4 solution to that. We can classify it as confidential,
5 the distinction being that we can then disclose it to
6 -- it wouldn't be on the public record, but we could
7 disclose it to Conrail so that we could work with it.
8 In that category, we would need a protective order.
9 The information can be used only for this proceeding
10 and not for any business purpose, so there is
11 protection against any speculative or theoretical use
12 of the information by Conrail for purposes other than
13 defending against the charges made.

14 There has been no basis proffered for the
15 concerns stated in Mr. Heffner's letter to Your Honor
16 yesterday, some concern about retaliation. No
17 suggestion of any threats or anything else other than
18 pure speculation that something like that might
19 happen.

20 It's not even clear, Your Honor, that the
21 information in question would fit within the terms of
22 the protective order as what constitutes information

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1 that concededly is not trade secrets, is not
2 proprietary in nature. There's no indication that it
3 was provided to Cross Harbor under any commitment of
4 confidentiality or any privilege of any kind.

5 So for all those reasons we think that the
6 reclassification is justified in terms of the
7 application of the protective order.

8 Now if the allegations in Cross Harbor's
9 comments and this is part of a broader allegation by
10 Cross Harbor about things they say Conrail has done,
11 or also at issue in a pending lawsuit, if those
12 allegations are relevant, then there can't be any
13 question that we need to be able to probe them. And
14 we would need to be able to disclose this information
15 to do so.

16 Mr. Heffner's letter suggested that the
17 information we were seeking was irrelevant. Well,
18 under the circumstances, that is really bizarre,
19 because they have made these allegations. You've read
20 them. They are serious. Either they're there for a
21 purpose -- in any case, we are certainly entitled to
22 probe them. Or they're not, they're there for

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1 legitimate purpose or they're not. There's a question
2 of whether they are there for a legitimate purpose.

3 If it is the position of Cross Harbor that
4 our question or effort to probe their allegations
5 seeks information that is irrelevant, then maybe
6 they're saying and maybe they are perceived as saying
7 that their comments are irrelevant, in which case they
8 ought to be stricken or withdrawn. That is true with
9 respect to not only those particulars, but Your Honor,
10 a series of statements made, 2 through 5 of their
11 comments.

12 But they can't wave the bloody rag of all
13 these allegations of things they say and then object
14 when we attempt to determine whether it's actual blood
15 or ketchup. It's a perfectly legitimate inquiry and
16 I think to be precluded is just wholly without merit.

17 On the question of whether these
18 allegations have any proper role here, Cross Harbor's
19 comments, I think, clearly suggest that one way to
20 read them is that the allegations of the matters that
21 are at issue in the lawsuit, including these
22 particular allegations about what was said or not

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1 said, are to give weight to their stated concern about
2 whether Conrail would be able to pay a judgment if it
3 were entered or a liability that might result from
4 that lawsuit and to suggest that there is substance to
5 the allegations.

6 The comments may also suggest that there
7 is a basis for concern about the routing, that CXS
8 might take over operations at the lines in question.
9 But these points would be ones that Cross Harbor could
10 make only if you give credence, some earlier weight to
11 what they're saying and that means making a judgment
12 that there is substance there.

13 Yet, in his deposition, Mr. Crawford
14 conceded that he was not asking the SPB to decide the
15 merits of the claims that they set forth there or
16 whether Cross Harbor was likely to prevail in the
17 litigation, transcripts pages 146 to 147. So the only
18 apparent possible basis for putting such allegations
19 before the Board are disavowed. So if the allegations
20 are there, it doesn't seem to have any proper purpose
21 and to the extent that Cross Harbor has some
22 conditions it is seeking, it can make those pitches

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1 without these allegations.

2 For example, it's sufficient to say that
3 they have a lawsuit and seeks \$100 million in damages.
4 It doesn't matter what the substance of the lawsuit
5 is, if the Board does not have to pass judgment on it.
6 On that point, it's significant to note that the
7 comments also say that one of the requests for
8 submissions is that the Board require CXS and NS to
9 commit to pay any judgment that is entered against
10 Conrail that it is unable to pay. That's paraphrased,
11 but that's the essence of it.

12 Normally, and that would be a very unusual
13 condition unless there was something making it likely
14 that that situation might come to pass. You don't
15 normally ask special conditions be imposed to say a
16 company in CSX's or NS's position is going to have to
17 pay liabilities of Conrail and is there anything
18 special about these allegations? No.

19 Possibly the amount is a large number, but
20 on that score the comments also say that they expect
21 the lawsuit might be settled for what they call a
22 substantial amount and in Mr. Crawford's deposition he

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1 said that this means a range of something of \$100
2 million. Well, if you're talking about \$1 million
3 mudslide, certainly that is not a basis for some
4 extraordinary condition requiring other companies to
5 back up Conrail in event of the liability. So there
6 is no need to get into the particulars of the lawsuit
7 in order for Cross Harbor to make the allegations
8 about backup liability, nor is there any need to do
9 that with the second request for conditions which is
10 that they want CSX to follow certain prescribed ruling :
11 practices with respect to traffic moving from the
12 South or Southeast to certain parts of the North and
13 Northeast. They can make that pitch without having to
14 go into various things about what Conrail did or
15 didn't do in the past. So that if -- what it comes
16 down to is if Cross Harbor wants to continue with
17 these allegations, they have to allow us to probe
18 these allegations and they have to be declassified.
19 If they don't, if one were to allow that to happen,
20 then they shouldn't be allowed to make these
21 allegations in their comments.

22 JUDGE LEVENTHAL: Mr. Norton, specifically

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1 which allegations in the comments are you talking
2 about? You called my attention to page 4, the final
3 sentence in the full paragraph on page 4. Is there
4 any other allegation to which your request pertains?

5 MR. NORTON: Well, the request for
6 declassification is focused on that sentence.

7 JUDGE LEVENTHAL: Well, if they remove
8 that from their comments would that satisfy you?
9 Would that dispose of this issue?

10 Suppose they were to strike that last
11 sentence, would that dispose of the issue before me?

12 MR. NORTON: Your Honor, I think --

13 JUDGE LEVENTHAL: Do you want some time to
14 think about it?

15 MR. NORTON: I'm hesitant to make a
16 commitment without consulting. I'm not sure that I
17 have -- and that's a particular variation that --

18 JUDGE LEVENTHAL: Why don't we see if Mr.
19 Heffner is willing to do that?

20 MR. NORTON: That would make sense and
21 then I could make a call to see whether that is
22 satisfactory.

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1 JUDGE LEVENTHAL: All right, Mr. Heffner?

2 MR. HEFFNER: If I can address this point?

3 Let me begin by saying that yesterday, late afternoon,
4 Mr. Norton and I had a conversation about both this
5 issue and the other issue where it's not an issue of
6 declassification, but rather a continued deposition
7 and basically what I said to him is I'd be willing to
8 meet you folks part of the way.

9 And as regards the specific issue we're
10 now talking about, I continue to take that position. :
11 While just like Mr. Norton, I too need to consult my
12 client before I say yes, let's strike it. It's
13 certainly something that just speaking me to you, in
14 other words, without the client in consultation, it's
15 something that would be on the table.

16 I said to Mr. Norton, there are a number
17 of issues. I would be delighted to meet you tomorrow
18 morning for coffee at 8:30 and go over them and make
19 certain commitments. There were certain things that
20 I am in a position to make some commitments on. And
21 maybe we can go to the Judge and say Your Honor, we
22 have some issues that we're working out. Thursday's

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1 hearing is a little bit premature. If we cannot work
2 them out we will come back to you either in person or
3 perhaps by phone, let's give it a try. And he said
4 basically, I can't get a hold of the people, the
5 decision makers and I'm not in a position to agree to
6 what you say.

7 I am telling you, Your Honor, that I am
8 willing to consider striking the sentence that begins
9 "Finally" as a possibility, perhaps even a distinct
10 possibility. I can't do it without consulting the
11 client.

12 JUDGE LEVENTHAL: Why don't we do this?
13 I can't give you any time tomorrow, but why don't you
14 consult tomorrow and if you still have a dispute, come
15 before me on Monday?

16 MR. NORTON: Your Honor --

17 JUDGE LEVENTHAL: On this particular
18 issue, on this last sentence that we're talking about,
19 it seems to me if they strike that there certainly is
20 no need for you to get this further information. If
21 they don't strike it, then of course I'll have to make
22 a ruling.

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1 If you're willing to entertain that,
2 perhaps it's an easy way of resolving the issue.

3 MR. NORTON: I'd certainly be glad to call
4 and see whether that makes sense and I can do that
5 right now. I don't know that we have to -- we may be
6 able to get the answer this morning, without having to
7 --

8 JUDGE LEVENTHAL: Well, Mr. Heffner
9 doesn't know if his people --

10 MR. NORTON: He can make the same phone
11 call I am going to have to make.

12 JUDGE LEVENTHAL: Can you make this phone
13 call?

14 MR. HEFFNER: Of course, I can.

15 JUDGE LEVENTHAL: All right, then why
16 don't we do that? We have two other items before us.
17 Are you involved in the other two, the deposition of
18 Donald Knight?

19 MR. NORTON: Only by character.

20 JUDGE LEVENTHAL: Martin Marietta National
21 Line dispute?

22 MR. HEFFNER: We are not involved in

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1 those.

2 JUDGE LEVENTHAL: All right, why don't you
3 two then excuse yourselves and go out and see if you
4 can reach some accommodation.

5 MR. NORTON: Okay.

6 JUDGE LEVENTHAL: Or if it's a
7 possibility. As I say I can't give you time tomorrow
8 and I can't give you Monday morning because I have
9 another STB argument on Monday morning, but I can
10 certainly meet with you in the afternoon. All right.
11 Then we'll reserve on the Conrail motion.

12 MR. HEFFNER: Your Honor, if I can add one
13 other thing and that is we do have one other discovery
14 related issue which I told Mr. Norton I'd be pleased
15 to try to work out a kind of informal accommodation
16 and if you're going to give us this additional time,
17 however modest, I'd be happy to make a stab at working
18 that out with him too and with the clients. There I
19 have a little more leeway to make commitments than I
20 do on this issue, even though I think I may be able to
21 get --

22 JUDGE LEVENTHAL: Why don't you see if you

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1 can reach an accommodation? I'm here all day.

2 MR. HEFFNER: Thank you.

3 JUDGE LEVENTHAL: I took these in my own
4 order. There's no significance to the order in which
5 we're treating them. I have Indianapolis Power and
6 Light next. Anybody have a problem?

7 MR. McBRIDE: If they have a scheduling
8 problem, I'll accommodate them.

9 I have a deposition this afternoon. My
10 witness is in my office, so if they could, I'd like to
11 go, an Indianapolis Power & Light witness.

12 JUDGE LEVENTHAL: All right, any problems?

13 MR. KAHN: No sir.

14 JUDGE LEVENTHAL: All right.

15 MR. McBRIDE: Thank you, Your Honor. I'm
16 in the unusual position of not knowing what CSX's
17 response to my motion is. I think we finally found
18 them in a position just not being able to quite keep
19 up. You have my motion, I gather.

20 JUDGE LEVENTHAL: I have your motion. I
21 don't have any reply.

22 MR. McBRIDE: Right, neither do I. Just

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1 basically, if you have a question, I'm happy to stop,
2 but I'll just tell you where we stand.

3 JUDGE LEVENTHAL: Wait, let me get the
4 papers first.

5 (Pause.)

6 Let's see if we can have a resolution of
7 this before I hear argument.

8 (Off the record.)

9 JUDGE LEVENTHAL: Let's go back on the
10 record. In our off the record discussion, we
11 endeavored to see whether or not an amicable
12 resolution of this dispute could be reached. I
13 gathered from comments of counsel that there's a
14 possibility, however, Mr. McBride, you had some other
15 conditions. Do you want to put them on the record?

16 MR. McBRIDE: Yes, please. Thank you,
17 Your Honor. We made a motion to quash. Your Honor
18 has asked me if we can accommodate by having Mr.
19 Knight available and we've said that we would, but if
20 we're not going to quash the deposition in its
21 entirety, I'm raising a subsidiary issue which I hope
22 is a nonissue and that is whether CSX, which is the

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1 party that noticed this deposition, would make the
2 representation as to what it is that it feels it needs
3 to inquire of Mr. Knight about that caused it to issue
4 this notice, that it cannot inquire of Mr. Weaver of
5 that since Mr. Weaver is number two in the fuel
6 department. Mr. Knight's number one and Mr. Weaver
7 had responsibility for this matter. I just don't --
8 I'm frankly at a loss as to how to prepare the witness
9 for the deposition and I think I'm entitled to some
10 notice in that.

11 JUDGE LEVENTHAL: All right, Mr. Harker?

12 MR. HARKER: Your Honor, I -- for the
13 record, I am, even though as I said I will not be
14 taking Mr. Weaver's deposition or Mr. Knight's
15 deposition for that matter, I am authorized to accept
16 your proposed counter offer, if you will.

17 With respect to what we're going to talk
18 to Mr. Knight about, first of all, I'll say that this
19 notice of deposition of Mr. Knight is no less detailed
20 than any of the notices of deposition that we received
21 during the course of the proceeding, so there's no
22 infirmity with this notice. And with respect to the

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1 discovery guidelines, the discovery guidelines require
2 that we provide 24 hours or one business day,
3 whichever is greater, prior to scheduling deposition,
4 the documents about which the witness will be
5 questioned.

6 We will do that. If the deposition is
7 scheduled for 2 o'clock on Monday, that means that Mr.
8 McBride's going to get his documents tomorrow for this
9 Knight deposition. Is that your understanding as
10 well? :

11 MR. McBRIDE: No. I thought it was two
12 days' notice and I religiously followed that with
13 their witnesses providing them my documents.

14 MR. HARKER: I'm doing this from memory.
15 If I'm wrong, I'm wrong.

16 MR. McBRIDE: Paragraph 13 of the
17 discovery guidelines, "to the extent reasonably
18 practicable, at least 24 hours or one business day,
19 whichever is greater, prior to the schedule of
20 deposition. The party deposition -- the party shall
21 advise the counsel of party with whom the witness is
22 affiliated the identity of the documents from which

1 the witness will be questioned."

2 MR. HARKER: I gave you an extra day's
3 notice at all times.

4 JUDGE LEVENTHAL: Wait, wait.

5 MR. McBRIDE: I hope to get this by 2
6 o'clock tomorrow.

7 MR. HARKER: He will get his documents
8 tomorrow and there are a number of documents that Mr.
9 Knight signed, letters to CSX involving this
10 proceeding, as well as indications that Mr. Knight
11 attended meetings that Mr. Weaver didn't attend.
12 Those are -- these are related to this transaction.
13 Those are all perfectly legitimate areas of inquiry
14 and those will include the areas that we're going to
15 look at. I don't want to limit it though just to
16 meetings and to letters, but those will be the sorts
17 of things that we'll be getting into, things that Mr.
18 Weaver won't know anything about. And I think that's
19 the representation that Mr. McBride is looking for.
20 I've made it. I'm prepared to go forward on the basis
21 of your proposal.

22 JUDGE LEVENTHAL: All right, Mr. McBride?

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1 MR. McBRIDE: Well, the last part of that
2 I'm not sure how he could have a basis for when he
3 said that Mr. Weaver wouldn't have any knowledge about
4 these matters. But I accept the rest of the
5 representation. He's made one now and he says he's
6 going to give me documents. So we'll proceed on that
7 basis and we'll have Mr. Knight here and if Your Honor
8 would accept a phone call from us, perhaps late
9 morning, early afternoon on Monday, if we can't work
10 it out, I may be calling.

11 JUDGE LEVENTHAL: All right, then I'll
12 order that arrangement.

13 MR. HARKER: Your Honor, may I?

14 JUDGE LEVENTHAL: Yes.

15 MR. HARKER: I suspect that there will be
16 a need to show you some of these letters.

17 JUDGE LEVENTHAL: Why don't we do this?
18 Let me finish.

19 MR. HARKER: I apologize.

20 JUDGE LEVENTHAL: If you people have an
21 argument on Monday morning, why don't you come before
22 me. I'll recess my argument in this other matter. I

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1 don't assume you'll take up too much of my time. I'll
2 give you say a half hour.

3 MR. McBRIDE: My guess though is with a
4 20-page verified statement, just for Your Honor's
5 planning purposes, I would assume we'll probably be at
6 it with Mr. Weaver for at least two or three hours.

7 MR. HARKER: I think that's fair.

8 JUDGE LEVENTHAL: In the afternoon, I'm
9 sure I'll be available all afternoon. I can't imagine
10 that the discovery conference will last more than a
11 couple of hours. We start at 10, so after 12, I don't
12 mind giving you my lunch hour. I gave you six hours
13 of my vacation last week.

14 (Laughter.)

15 I don't mind giving you my lunch hour. So
16 I'll be available if you need me.

17 MR. HARKER: I think I ended up not
18 imposing on your vacation.

19 JUDGE LEVENTHAL: No, you did not impose
20 on my vacation.

21 MR. McBRIDE: I appreciate that, Your
22 Honor, and I'm sure Mr. Harker and his colleagues will

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1 accommodate me if we can't find you the moment we call
2 and we can wait to get a ruling if need be before we
3 start the Knight deposition because he will be
4 available overnight. In other words, you're not going
5 to insist on starting at 2 o'clock if I haven't been
6 able to get a ruling from the Judge by that time?

7 JUDGE LEVENTHAL: That won't be a problem.
8 I'm sure. I told you, if you come, I'll recess my
9 other argument at a reasonable point. I mean I'm not
10 going to break counsel off in the middle of a
11 statement, but I'll recess for a short period and
12 listen to your argument. Actually, we'll have the
13 same report available, so there will be no logistics
14 problem. All right?

15 MR. MCBRIDE: Thank you.

16 JUDGE LEVENTHAL: All right. That's
17 resolved. Then we have to hear from Mr. Kahn. All
18 right, I'm ready to hear the argument on the motion of
19 Martin Marietta.

20 MR. KAHN: Good morning, Your Honor, my
21 name is Fritz R. Kahn, I'm counsel for Martin Marietta
22 Materials, Inc. and I'm in the private law practice

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1 here in Washington, D.C. I'm not in-house counsel for
2 Martin Marietta. I have not heretofore represented
3 Martin Marietta. And my colleague, Mr. John Heffner
4 has done so and he was kind enough to recommend me to
5 the company because he ran into a conflict situation.

6 I have absolute anticipation that after
7 the conclusion of the Conrail case that I will be
8 representing Martin Marietta Materials.

9 I give you this background, Your Honor,
10 because it does bear upon the motion to compel that
11 Martin Marietta has filed. I respectfully submit,
12 Your Honor, that counsel for National Lime
13 misapprehends in what Martin Marietta seeks. We do
14 not seek the production of commercially sensitive or
15 highly confidential data. That has already been done.
16 National Lime, in its letter of November 21, served
17 upon CSXT in response to CSXT's discovery request all
18 of the commercially sensitive and highly confidential
19 data. Additionally, a copy of these responses and it
20 says counsel for the National Lime, has been placed in
21 National's discovery depository.

22 Presumably, everyone who signed a highly

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1 confidential undertaking and whose name appears on the
2 restricted service list can have access to these
3 commercially sensitive, highly confidential data.
4 Everyone that is except me. I signed the highly
5 confidential undertaking. I am on the restricted
6 service list and yet counsel for National Lime will
7 not make available to me commercially sensitive,
8 highly confidential data.

9 The Surface Transportation Board addressed
10 the concerns of companies like National Lime in its
11 protective order or decision providing for the two-
12 tier protective orders. And only recently in the
13 decision served December in the Grain Land Co-op case
14 and I trust Your Honor was served with a copy of it.

15 JUDGE LEVENTHAL: It was my case.

16 MR. KAHN: Yes, but I didn't know whether
17 the Board was nice enough to serve you with copies of
18 the decision.

19 JUDGE LEVENTHAL: I have a copy.

20 MR. KAHN: In that the Board again
21 emphasized even in situations where rail carriers
22 object to a complainant's access to unredacted

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1 material, due to its extraordinary commercial
2 sensitivity, we have found that protective orders
3 provide adequate safeguards for unauthorized or
4 unintended disclosures. I am committed by virtue of
5 the highly confidential undertaking to maintain the
6 confidentiality of the data. I cannot turn it over to
7 Martin Marietta and in that regard, in setting up the
8 two-tier level of protection, the practice of the
9 board coincides with that of the courts.

10 In response to the filing yesterday -
11 afternoon by National Lime, of its reply and its
12 reference to a decision in the Federal Circuit which
13 is altogether irrelevant, all it says is that highly
14 confidential can be withheld. That's not the point.
15 They produced the highly confidential data. But as I
16 started to say, Your Honor, with just a few minutes of
17 research yesterday afternoon, I came across at least
18 three decisions in which two-tier protective orders
19 that were deemed to be altogether adequate to
20 protecting confidential data. In each of these
21 decisions, if I may approach the bench, I'll provide
22 you with copies of them.

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1 In each of these, Your Honor --

2 JUDGE LEVENTHAL: Have you shown them to

3 --

4 MR. KAHN: Yes, Your Honor. Each of them,
5 the arrangement whereby the commercially sensitive
6 data were not made available to in-house counsel, but
7 were made available to outside attorneys, outside
8 consultants and were deemed to be sufficient and
9 protected the interest of the company.

10 Accordingly, I respectfully ask, Your
11 Honor, that you enter an order to National Lime to
12 make available to me the complete interrogatory
13 responses.

14 Thank you, Your Honor.

15 JUDGE LEVENTHAL: Mr. Kahn, let me know
16 for the record, I have the motion filed by Martin
17 Marietta and I have the response of National Lime and
18 Stone Company. National Lime says that this
19 information is specific to National's own shipping
20 history. Disclosure of such information would provide
21 no support for MMM's, that's the abbreviation for
22 Martin Marietta's claims.

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1 In other words, they're saying it's not
2 relevant. You don't need this information.

3 MR. KAHN: I need that information. I
4 need that for purposes of this case. And I have an
5 obligation on behalf of Martin Marietta to get the
6 relief that we ask and for the Board to prescribe and
7 in doing so I need to distinguish the situation of
8 Martin Marietta from National Lime and from that of
9 another competitor, incidentally, Weindock Dolomite
10 which didn't hesitate at all to serve upon its highly
11 confidential interrogatory responses. So I dispute
12 that. The very first question which National Lime
13 refused to answer is what is the current Conrail
14 routing for those origins to those destinations for
15 which you seek relief from the Board? That's
16 relevant. I need that.

17 JUDGE LEVENTHAL: All right, Mr. McIntyre?

18 MR. MCINTYRE: Thank you, Your Honor.
19 Kevin McIntyre, on behalf of National Lime and Stone
20 Company. Your Honor, I appreciate Mr. Kahn's bringing
21 up case law which supports the use of two-tier
22 procedure he described and lest it be unclear, we do

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1 not dispute that there are indeed numerous instances
2 where the standard procedures designated for treatment
3 of highly confidential material are completely
4 sufficient.

5 But Your Honor, it seems to me that the
6 argument made by Martin Marietta Materials is grounded
7 on two flawed assumptions. First, the assumption that
8 production of highly confidential material to one
9 party is necessarily the same as production of highly
10 confidential material to another party. That simply
11 isn't the case and I think here it's important to
12 recall who is who in this case. As everyone knows,
13 Your Honor, this case is about the application of CSX
14 and Norfolk Southern to acquire control of and divide
15 the assets of Conrail.

16 Were that transaction to be approved
17 without conditions, the result to National Lime and
18 Stone would be that transportation service that has
19 constituted single line service would be transformed
20 into two line service and we don't need to address now
21 the many reasons why two line service is more costly
22 and less desirable than single line service.

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1 It so happens, Your Honor, that that very
2 same result would apply to Martin Marietta Materials,
3 Inc. In other words, with regard to both of these
4 shippers, National Lime and Stone and Martin Marietta
5 Materials, what formerly was enjoyed as single line
6 service would be transformed into two line service at
7 a substantial additional cost to each of those two
8 shippers.

9 It's not surprising then that both
10 National Lime and Martin Marietta Materials protested
11 the application and in fact, in both of their
12 protests, the companies, National Lime and Martin
13 Marietta opposed expressly on the grounds that they
14 would suffer economic harm, substantial economic harm
15 as a result of the transformation of single line
16 service into two-line service.

17 For that reason, each of the two companies
18 proposed conditions to the application to resolve or
19 mitigate that economic harm and in fact, each of the
20 protests also included evidentiary showings as to how
21 the change from single line to two line service would
22 harm the respective companies.

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1 So it's understandable that CSX would, so
2 it did, proffer data requests to National Lime to
3 probe legitimacy of National Lime's claim that it
4 would suffer economic harm as a result of this change.

5 Here's where it's important to recall
6 exactly what the nature of the relationship is between
7 National Lime and Martin Marietta Materials. Your
8 Honor, they are formidable competitors to one another.
9 They are not simply shippers that happen to be
10 affected in the same way by the application at hand.

11 As Burger King is to McDonald's, as Pepsi
12 Cola is to Coca Cola, so is Martin Marietta Materials
13 to National Lime and Stone. Indeed, they are the
14 number one and number two producers of stone and
15 aggregate products in the markets that they serve,
16 Your Honor.

17 So when Martin Marietta Materials asks
18 National Lime and Stone to produce highly confidential
19 information about National Lime and Stone's cost
20 structure and pricing and markets, it's an entirely
21 different thing than from when that request comes from
22 CSX.

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1 The second flawed assumption that Martin
2 Marietta Materials' motion is grounded upon is the
3 assumption that the standard procedures for treatment
4 of highly confidential material that are set forth in
5 the protective order and the discovery guidelines
6 necessarily should apply to every situation. Your
7 Honor, if that were the case, then there would be no
8 need for provisions in the discovery guidelines and
9 the protective order for the presiding Administrative
10 Law Judge to have the discretion to grant a waiver of
11 any particular requirement where good cause has been
12 shown.

13 In this instance, Your Honor, I think it's
14 important to recall the balancing that is required by
15 many Board decisions in this sort of sensitive
16 discovery matter. There must be balancing of the
17 requesting party's need for the information against
18 the competitive harm that would result to the party
19 from which production has been requested. Stated
20 differently, the higher the potential for competitive
21 harm, the higher must be the showing of the requesting
22 party's need for the information.

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1 Well, I've already addressed the need of
2 CSX or the relevance of CSX's position in this case of
3 the material that CSX has requested. However, there's
4 been no showing of Martin Marietta Materials of its
5 needs or of the relevance to its position in this case
6 of the highly confidential material it is seeking from
7 National Lime and Stone.

8 The closest thing we have to a showing in
9 that regard, Your Honor, is Martin Marietta's claim
10 that it must distinguish itself from National Lime and
11 Stone. There simply has been no demonstration of any
12 need for any distinguishing between the two companies,
13 Your Honor. Indeed, if one were to review the two
14 protests it's immediately evident as to the strong
15 similarity between those two companies' positions.
16 And given the nature of the two companies as strong
17 competitors to each other, I think it's particularly
18 critical to see that the need for Martin Marietta is
19 not a need based on the position that it has in this
20 case.

21 Rather, the only possible result of
22 National Lime and Stone turning over this highly

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1 confidential information to Martin Marietta would be
2 the potential for serious competitive harm to National
3 Lime and Stone.

4 We certainly do not question Mr. Kahn's
5 ability to abide by your requirements of the
6 undertaking he referenced, but in this case given the
7 competitive nature of the two companies' positions,
8 vis-a-vis each other, even the potential for
9 inadvertent disclosure carries with it such a threat
10 of serious competitive harm to National Lime and Stone
11 that we think it's important that National Lime and
12 Stone not be required to turn over this highly
13 confidential information to its number one competitor.

14 JUDGE LEVENTHAL: What does this highly
15 confidential information consist of? You're talking
16 about rate information?

17 It's not cost of manufacture, is it?

18 MR. McINTYRE: Your Honor, will you permit
19 me one moment to consult with my colleague?

20 JUDGE LEVENTHAL: Sure.

21 (Pause.)

22 MR. McINTYRE: Thank you, Your Honor. The

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1 information that has been produced to CSX consists of
2 very specific customer by customer data showing the
3 specific markets and locations served and the revenues
4 at stake, the amounts of tonnage of stone and
5 aggregate product that are involved and other
6 extremely sensitive matters.

7 JUDGE LEVENTHAL: All right. Mr. Kahn?

8 MR. KAHN: May I respond briefly?

9 JUDGE LEVENTHAL: Yes, sure.

10 MR. KAHN: First of all, counsel for
11 National Lime obviously has not practiced extensively
12 before the Surface Transportation Board, otherwise he
13 would know that, for example, in the last merger
14 proceeding the Union Pacific/Southern Pacific merger
15 proceeding, the document depository contained highly
16 sensitive contracts, rate agreements between Dow
17 Chemical Company and Union Pacific, between Formosa
18 and Union Pacific. I represented Syntec, another
19 chemical company, and I was able to go through the
20 Formosa contracts. I was able to go through the Dow
21 Chemical contracts, the companies' competitors and I
22 was assumed to have sufficient integrity that I would

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1 not divulge the content of those contracts to my
2 client, Syntec.

3 It is not Martin Marietta that wants this
4 highly confidential data. It is I, as counsel for
5 Martin Marietta. And I'm entitled to it under the
6 provisions of Rule 15 of the discovery guidelines.
7 The discovery guidelines make perfectly clear that
8 discovery sponsors shall be served on any party
9 requesting copies of such. It does not permit a party
10 to pick and choose as to which ones it wants to serve.
11 Finally, I wish to note that I'm very offended that
12 counsel for National Lime would disclose something
13 revealed in confidential settlement discussions and
14 use that against me in this proceeding.

15 The whole notion that I sought this data
16 to distinguish Martin Marietta from National Lime was
17 disclosed in confidential discussions in trying to
18 arrive at a settlement. You'll find that nowhere in
19 our pleadings.

20 With that, I repeat, Your Honor, under the
21 discovery guidelines, I'm entitled to these data and
22 I respectfully ask that you order their production.

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1 MR. MCINTYRE: Your Honor, if I may
2 briefly?

3 JUDGE LEVENTHAL: Yes, Mr. McIntyre

4 MR. MCINTYRE: First to correct the
5 record. I'm looking at page 3 of the Motion to Compel
6 of Martin Marietta Materials, Your Honor, which is not
7 a confidential document. Obviously, it's a publicly
8 filed, publicly available document.

9 On page 3, a statement is made "the
10 requested data are sought so as to permit MMM fully to
11 protect its interests herein and to distinguish its
12 situation from that of National." So clearly, Your
13 Honor, I have not divulged any confidential statement
14 made by Martin Marietta.

15 Further, with regard to Mr. Kahn's
16 statements about other proceedings where highly
17 confidential materials are available, as I stated at
18 the outset of my presentation, Your Honor, we do not
19 dispute that there are numerous instances where that
20 two-tier procedure adequately protects the parties'
21 interests, but for the reasons I have already stated
22 we submit that given the competitive nature of the two

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1 companies' positions, vis-a-vis, each other, those
2 procedures are inadequate in this case.

3 And by way of further clarification, Your
4 Honor, I thought I would make this clear as well at
5 the outset. We do not in any way question Mr. Kahn's
6 integrity or his ability to abide by the rulings of
7 the Board or of Your Honor.

8 JUDGE LEVENTHAL: What's your response to
9 Mr. Kahn's citation to the discovery rules? Paragraph
10 15.

11 MR. MCINTYRE: Your Honor, paragraph 15
12 that he cites is under the standard service provision.
13 If you will notice, Your Honor, it's under Part D of
14 the discovery rules. Clearly, this sets forth the
15 standard provision for service of materials. This
16 does not purport to address questions regarding the
17 production of highly confidential material. This
18 portion of the rules applies to standard routine
19 situations where service is to be made and it sets
20 forth the procedures for making that service.

21 The discovery rules, of course, also set
22 forth procedures of the resolution of disputes and in

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1 fact, a protective order in this case, Your Honor,
2 similarly sets forth procedures for determining when
3 good cause has been shown warranting treatment that
4 differs from the routine procedures set forth in a
5 protective order and this, I submit, Your Honor, is
6 precisely the sort of situation that's before you now.

7 JUDGE LEVENTHAL: All right, anything
8 further, Mr. Kahn?

9 MR. KAHN: No thank you, Your Honor.

10 JUDGE LEVENTHAL: All right. I'm going to
11 deny the motion to compel. I find that with respect
12 to the citation of the Grain Land Co-op v. Canadian
13 Pacific Limited, an order of the Board, in STB Docket
14 No. 41687, which was served December 1. In that case,
15 and as I noted earlier, I was, I am the discovery
16 Judge in that proceeding. In that proceeding I made
17 a specific finding that the information sought by
18 Grain Land was essential to the making out of their
19 case and the Board in reversing my ruling that
20 material could be redacted, I did allow discovery.

21 I ordered the redaction of commercially,
22 but highly sensitive material, and the Board reversed

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1 my ruling in that respect, but in doing so they cited
2 my specific finding that the information sought
3 appeared to be reasonably necessary for Grain Land to
4 establish the premise of their complaint. I don't
5 find that the movant has shown the same need to know
6 in this case and I agree with the standard set forth
7 by National Lime that disclosure of extraordinarily
8 sensitive information should not be required without
9 a careful balancing of the seeking party's need for
10 the information and its ability to generate comparable
11 information from other sources against a likelihood of
12 harm to the disclosing party. I find that this
13 particular motion does not meet that standard and of
14 course, this has nothing to do with the integrity of
15 Mr. Kahn.

16 Mr. Kahn is a very highly regarded
17 counsel. He was General Counsel to the Interstate
18 Commerce Commission at the time when I was a Judge at
19 the Interstate Commerce commission. I know Mr. Kahn's
20 reputation very well and my finding has no reflection
21 whatsoever upon his integrity. We should all have the
22 same reputation Mr. Kahn has.

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1 All right, how about Mr. Heffner or Mr.
2 Norton?

3 MR. NORTON: Your Honor, as to the matter
4 we discussed earlier, I understand we're both in
5 agreement that with striking that sentence that that
6 will resolve the matter.

7 JUDGE LEVENTHAL: All right, and your
8 other dispute is likewise settled?

9 MR. NORTON: The other dispute is not, but
10 before we proceed to that, I wonder if I might address
11 --

12 JUDGE LEVENTHAL: Yes, yes.

13 MR. McBRIDE: May I be excused?

14 JUDGE LEVENTHAL: Yes, you may, Mr.
15 McBride, and Mr. Kahn.

16 You have me one other thing, Mr. Norton.

17 MR. NORTON: I can pick it back up. It
18 doesn't matter. That was a copy of their comments.

19 JUDGE LEVENTHAL: I have to find it. This
20 is it, okay.

21 MR. MCINTYRE: Your Honor, may National
22 Lime be excused?

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1 JUDGE LEVENTHAL: Yes, you may.

2 MR. MCINTYRE: Thank you very much.

3 JUDGE LEVENTHAL: Do you want to recess,
4 Mr. Reporter? Are you all right?

5 (Pause.)

6 MR. NORTON: Your Honor, actually, if we
7 might take a very short break?

8 JUDGE LEVENTHAL: Sure.

9 (Off the record.)

10 JUDGE LEVENTHAL: Mr. Reporter, I'm going :
11 to direct you at this point to include as an appendage
12 to the transcript the motion filed by Martin Marietta,
13 dated December 1, 1997 and the response of National
14 Lime and Stone Company, dated December 3, 1997.

15 All right, we're back to Conrail and New
16 York Cross Harbor Railroad Terminal.

17 Mr. Norton, it's your motion.

18 MR. NORTON: What Mr. Heffner had proposed
19 to me previously as a way to resolve this issue is not
20 acceptable. I think formally we have his motion to
21 block the continuation of the deposition. Our motion
22 was only addressing the classification of that

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1 portion. I have his letter yesterday which addresses
2 the motion.

3 JUDGE LEVENTHAL: So the issue is whether
4 the continued deposition of Mr. Crawford should be
5 canceled?

6 MR. HEFFNER: Yes sir. May I address that
7 issue?

8 JUDGE LEVENTHAL: Yes.

9 MR. HEFFNER: At the -- I guess it was the
10 November 26th, November 25th deposition, there is only
11 one place in the transcript, Your Honor, that even
12 suggests that Conrail might continue this deposition
13 to another day and it is at page 164 of the transcript
14 where Mr. Cunningham, who is the attorney examining
15 Mr. Crawford, says if Your Honor pleases, and I'd be
16 happy to bring up the transcript to you so you can see
17 it.

18 (Pause.)

19 JUDGE LEVENTHAL: All right, let me read
20 it.

21 (Pause.)

22 MR. HEFFNER: All right, if I can turn to

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1 the last page, page 240, so Mr. Norton can follow
2 along.

3 JUDGE LEVENTHAL: All right.

4 MR. HEFFNER: Here, you'll note that Mr.
5 Cunningham is adjourning the deposition, period. To
6 the best of my personal recollection there was no
7 discussion of a continuation of this hearing, this
8 deposition hearing and I note under the Board's rules
9 that absent good cause shown, it's sort of one party,
10 one day. That is to say when a party takes a
11 deposition, they're entitled to just one, absent good
12 cause and permission to do so.

13 Now I think the critical issue on which a
14 decision of whether or not to continue the deposition
15 depends is whether certain documents that Mr. Crawford
16 was asked to provide during the course of the
17 deposition are or are not work papers and that's laid
18 out in my letter to you.

19 Conrail, as Your Honor, I believe is
20 aware, wrote a letter to me approximately 4:30 p.m. on
21 Wednesday, November 26th, the day before Thanksgiving
22 when I was like many people in the world well on their

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1 way to wherever they were going to go for Thanksgiving
2 and then I was not aware of that request until Monday
3 morning, not because of Conrail, even though I'm not
4 going to tell you that Conrail did not do what it
5 should do because they did. Conrail did fax the
6 letter to me, but it was probably buried in a stack of
7 faxes this thick.

8 And so the first thing I knew about a
9 continued deposition was when my client called me, I
10 would say 9 o'clock in the morning, and he then faxed
11 it to me and then when the secretarial staff began
12 going through these things, I had a copy from Conrail.

13 So I was not aware of Conrail's desire to
14 continue the deposition and initially until I had a
15 chance to look at the deposition rules and find the
16 one person, one deposition rule, I said I checked with
17 the client as to December 9 and I was told that that
18 date was not good because in fact he was going to go
19 to a short line meeting conducted by CSX, where CSX
20 likes to sit down periodically with the president or
21 soon to be short line partners and they had invited
22 him to come to that meeting. So I then got on the

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1 phone to Mr. Norton and said we could do tomorrow,
2 December 5th, in other words, and there may be some
3 other dates. In fact, I think we even offered
4 December 10th. Eventually, Conrail said December 10th
5 would be just fine and then I came across this rule
6 and I said I've got a problem now.

7 Now so that Your Honor fully understands
8 the situation here, during the course of the
9 deposition, on roughly 18 occasions and I might be off
10 by one or two, but roughly 18 occasions we had an
11 interchange between Mr. Cunningham for Conrail and Mr.
12 Crawford where Mr. Crawford would make a statement and
13 Mr. Cunningham would say do you have any documentation
14 to back up that statement and Mr. Crawford would say,
15 yes, it can be found in -- and in some cases it was a
16 public record, like the request for proposal of the
17 Long Island Railroad for prospective freight operators
18 to make bids to take over the freight operation of
19 Long Island or in another case it was an SEC filing by
20 New York Cross Harbor's Hearing Corporation which is
21 a publicly traded entity.

22 On a number of other occasions it was what

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1 I would call historical traffic data that in some
2 cases was 20 years old and was part of the filing
3 cabinets that Cross Harbor inherited when current
4 management, namely, Mr. Crawford and his people,
5 brought to Cross Harbor in 1989, material that went
6 back to, if Your Honor will finally remember the
7 Brooklyn Eastern Terminal Railroad and the New York
8 Dock Railway and a name that lives in deep in the
9 hearts of those of us who represent short line
10 railroads, it strikes us with fear.

11 A lot of this material, and I'd be happy,
12 literally, to go over each one of the 18 or so items
13 and tell you what they are, was either public
14 information, or it was historical information. This
15 so-called material, these so-called work papers which
16 is what Conrail, I believe, would like you to believe
17 they are are not really work papers. These were not
18 documents prepared for litigation, prepared for
19 hearing, prepared for a deposition. Notes says it
20 were that the witness would rely upon.

21 Rather, this was historical material in
22 the files of the Cross Harbor and if Conrail wants

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1 these materials and if a decision is made to continue
2 the deposition, perhaps the deposition should be
3 conducted in the file cabinet, because what happened
4 Conrail was conducting a fishing expedition in support
5 of their defense of the anti-trust case that Cross
6 Harbor has filed against them.

7 And I only wish that you had been at the
8 deposition because, and I heard somebody say that a
9 20-page verified statement would take about two hours
10 to go over it. In this case, our deposition on a one
11 page, as it put by my client, verifying statement, and
12 about roughly 10, maybe 12 pages of comments that were
13 written by a lawyer, namely me, with input from Cross
14 Harbor, we began at 10 and we ended at approximately
15 6 o'clock at night with rough guess, an hour for lunch
16 and a few other breaks.

17 Literally, Mr. Cunningham was going over
18 not just each page, each sentence, almost each market
19 punctuation, so what you have as a scenario of a
20 statement would be made, what back up do you have,
21 that would then lead to another statement and another
22 request for documentation and it just went on and on

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1 and on and on.

2 Now, I have in a spirit of compromise and
3 cooperation offered some things to Mr. Norton, just as
4 we handled the other matter this morning. I said to
5 him yesterday I think, first of all, I don't have any
6 problem providing you the information you seek and in
7 fact, I gave him one piece of it this morning, the
8 only piece that I have in Washington.

9 And as soon as I'm through here, I'm going
10 to get on the phone and I'm going to go over with a
11 client and I'll go over it with Mr. Norton too or
12 someone in his office each of the 18 or so items that
13 I believe they're requesting. Because you don't have
14 a coordinated list.

15 I had made my own list by just going
16 through the transcript. But I am -- I will commit to
17 getting him the documents and since their offices are
18 literally across the street, I'd be perfectly happy to
19 walk them over myself. I could use the exercise and
20 the fresh air.

21 I will also ask to the extent possible
22 that the client overnight it to me. It's possible

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1 it's going to take them several days to get all the
2 stuff together and I'd be willing to start early Adam
3 so to speak, let's get as much as you can to go out
4 tonight, get it to me tomorrow. We'll do the same
5 thing Friday night and until it's done and hopefully
6 it can be done within the first couple of days of next
7 week. And -- but let's dispense with the need for a
8 continuation of a deposition.

9 What Conrail cannot concede is that when
10 you're an entrepreneur running a small business every
11 day for things like depositions is literally a day out
12 of your business life and even on the day that we were
13 sitting in your spacious offices eating your enjoyable
14 sandwiches there was a derailment which needed -- not
15 that Bob Crawford is in a position to rerail a
16 derailed car, but it's just another issue in the
17 course of running a small business. It's another
18 hassle.

19 Now I have said we're willing to
20 compromise with you. I would be happy to provide you
21 the information on an expedited basis, recognizing
22 that Conrail does have a deadline. I would be happy

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1 to entertain written questions and answer them on an
2 expedited basis, not on a 15-day turnaround basis.
3 I'd even be willing to consider so that we don't have
4 to have long drawn out objection because nonetheless
5 the answer is X, Y and Z, more of an informal, almost
6 like a letter type response and I said what about it?
7 And he said I can't agree.

8 One reason why he could not agree last
9 night is that he could not reach and I said let's go
10 to the Judge tomorrow and say Judge, we have a
11 possible compromise, if you'll give us a couple of
12 days to see if we can't work it out, if we can work it
13 out. If we cannot work it out we'll come back Monday
14 or Tuesday and we'll need your assistance. And
15 Conrail and he asked that I not represent his
16 position, but I will give you my perceptions. My
17 perception was that Conrail was totally inflexible,
18 just as they first were this morning on the other
19 issue.

20 Cross Harbor remains willing to meet
21 Conrail in the middle of the street, so to speak.
22 Actually, we'll walk into your offices. And that is

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1 my position, plain and simple. We're perfectly happy
2 to provide the information. Conrail has some
3 additional questions after they review this
4 information. We will respond in writing, so that we
5 don't have to have Mr. Crawford come down to
6 Washington and take a full day to do it and we'll do
7 it as expeditiously as possible. I think that's a
8 very reasonable response. And that's what I have to
9 say, Your Honor, thank you.

10 JUDGE LEVENTHAL: Mr. Norton? :

11 MR. NORTON: Your Honor, as is often the
12 case, there is some history here. It is also a
13 question of whether the matter is before Your Honor
14 today which I just want to mention at the threshold.
15 As Mr. Heffner acknowledges, he was aware Monday
16 morning of the -- of our intent to proceed with the
17 continuation of the deposition and we discussed on
18 Monday and agreed on a convening date.

19 On Monday, if he wanted to get a ruling
20 precluding the continuation of the deposition, prior
21 to that agreed date which is next Wednesday, Monday
22 was the day when he should have filed the motion to

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1 get this hearing today. He didn't do so. He called
2 back on Tuesday and said he had a couple of objections
3 under the guidelines and I gave him some answers which
4 were sufficient to meet the objections. He didn't
5 file anything Tuesday. He didn't file anything until
6 yesterday afternoon.

7 As Your Honor will -- and this is almost
8 all fours with the situation we had with EJE and their
9 discovery directed to Conrail to get information about
10 the IHB where Your Honor quite properly ruled that it -
11 was part of the guidelines and the Board upheld it.

12 In addition, this is -- we have a
13 recidivism problem here because as Your Honor may
14 recall on the first round on litigation over this
15 deposition, having had notice of the deposition for
16 some time and having had an opportunity to timely base
17 the question before the deposition, Cross Harbor
18 didn't do so.

19 Instead, it came in at the last minute,
20 the deposition was originally scheduled for the 18th
21 of November and Your Honor was gracious enough to
22 squeeze us in that morning to rule on the latter

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1 motion to quash. You rejected his arguments. And
2 then when he made clear that Mr. Crawford wasn't going
3 to appear even though he had no stay, you encouraged
4 us to be gracious and we were and we agreed to
5 reschedule. But we lost a week as a result of that.
6 We're now in a real bind on time.

7 Now I will address what he's had to say,
8 but I want to make clear I think we have a very solid
9 position and the whole issue is not properly before
10 you and they had the opportunity to seek timely relief
11 and they did not do so.

12 With respect to the argument going to the
13 merits of the issue, Mr. Heffner, in paragraph 12 of
14 the guidelines provides that a party depose only once.
15 It's in the second sentence, but in context that
16 refers -- that is a requirement that if there is -- if
17 a party is to be deposed, all people who want to
18 depose that party have to participate in the same
19 deposition. We noticed this in a later deposition as
20 to good cause or to consent of the parties. But
21 that's all it addresses.

22 It does not impose any time limit and that

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1 is made perfectly clear by the very next sentence
2 which says that parties shall make their best efforts
3 to try to complete depositions expeditiously and if
4 possible in two days. So obviously, there's no one
5 day, one deposition, one witness rule. So that is a
6 completely bogus objection here.

7 Mr. Heffner referred to two points in the
8 transcript and as we properly read they support us and
9 not him. Mr. Cunningham made it perfectly clear on
10 page 164 that the deposition was going to be
11 continued, not concluded because of the need to follow
12 up. At that point all of the questions about
13 documents that hadn't been produced were not yet on
14 the table. At the end of the deposition, it says that
15 the deposition was being adjourned.

16 Adjourned means suspended. It doesn't
17 mean concluded and indeed if you compare the
18 terminology even in this deposition it says they
19 adjourned for lunch, where the deposition is being
20 concluded it says either concluded to ceased or words
21 to that effect. So the record itself makes perfectly
22 clear that the deposition was not ending, but to be

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1 continued and specified. And indeed, before that
2 final statement on the record, I made clear in a
3 statement to Mr. Heffner that the deposition was being
4 adjourned and not concluded or terminated.

5 So that is the state of the record.

6 Then it comes to the reasons for why we
7 have to continue the deposition. Mr. Heffner, I don't
8 think disputes that if Cross Harbor had failed to
9 produce prior to the deposition documents that it
10 should have under the discovery requirements in the
11 Board's decisions that we would be entitled to follow
12 up with further questioning after those documents were
13 produced.

14 Well, that's the situation we're in here.
15 Decision numbers specified that a party making a
16 filing has to produce in the depository all documents
17 that are relevant to their submission. The term work
18 papers is sometimes loosely used to mean those
19 documents. Here, Cross Harbor produced no documents
20 in the depository at all. In the course of this
21 deposition, Mr. Crawford identified by our count over
22 two dozen documents or categories of documents that

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1 supported the statements made in Cross Harbor's
2 submission or his verifying statement or were relevant
3 to it or provided documentation for it.

4 It remains a dispute whether there are 18
5 or 25, but there's no dispute that that was the state
6 of the record. We obviously couldn't question about
7 those documents because we didn't have them.

8 If these documents had been produced in a
9 timely way as part of the depository back with their
10 October 21 filing, we would not have had to spend most
11 of the day identifying the records that existed that
12 hadn't been produced. The deposition could have been
13 completed in the original day and there would have
14 been no need for continuation. So the problem that
15 we're dealing with here is one that is engendered by
16 their failure to comply with the guidelines and
17 produce the documents that they should have produced
18 on October 21.

19 Mr. Heffner has suggested that work papers
20 that have to be produced in that fashion are limited
21 to documents prepared as part of the testimony in the
22 process of preparing the submission that the party

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1 makes. That is not a definition that has any support.
2 It certainly is not supported in the language of
3 Decision 6 which talks about documents relevant to the
4 filing and if you look at the documents that are in
5 the depositories of other parties, including the
6 applicants, the primary applications, it includes all
7 matter of documents that are pre-existing documents,
8 whether they're public or internal or whatever they
9 might be, that were relevant to the submissions and
10 would provide support for the statements made in those
11 submissions. So this notion that only a document
12 prepared specifically for the submission have to be
13 produced is just nonsense.

14 We think it's clear that the documentation
15 and we can go through some of the particulars, I don't
16 think there will be any question about that
17 characterization, that there were documents that
18 should have been produced previously that weren't and
19 that's the reason that we have not been able to
20 conclude a deposition in the one day that -- the first
21 day and there's no basis for precluding us from being
22 able to do so.

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1 There is one thing I would suggest. We
2 are -- we don't want to spend time in a deposition --
3 two things. The suggestion of a response by written
4 questions and answers, if time were no problem, maybe
5 that would make sense, but time is extraordinarily a
6 problem here. There's very little time left before we
7 have to conclude the rebuttal submission that was due
8 December 15 and has to go to the printer even before
9 that and make all the arguments about what is to be
10 said and what's appropriate for inclusion there.

11 We are in this bind because of their
12 failure to make a timely motion concerning their
13 efforts to block the deposition which resulted in
14 taking over. We're here because of their failure to
15 make timely production of work papers and documents
16 required by Decision 6. We shouldn't be prejudiced
17 because of delays that we didn't create. Going
18 through the process of written questions and answers
19 is just too inefficient and too likely to produce not
20 what we're trying to get, particularly if they're
21 coming in on a piecemeal basis.

22 We may get a document tomorrow that the

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1 answer to a question it raises, we'll get it next
2 Tuesday. So just from an efficiency standpoint what
3 makes the most sense is to get the documents by a date
4 certain before the deposition so we can see what
5 follow up questions they raise. And then be able to
6 get answers from the person who knows about them
7 directly and not have to follow everything through Mr.
8 heffner. That's what a deposition is all about.

9 Now we are sensitive to the situation of
10 Mr. Crawford. We know it's a small business and he is
11 the management. To that end, I think we would be
12 willing to have a continuation of the deposition by
13 telephone so he would not have to spend time coming
14 down to the office for the deposition and would limit
15 the intrusion on his schedule. These are all Cross
16 Harbor documents, so he should be able to have them
17 present.

18 JUDGE LEVENTHAL: How would you have the
19 documents, if we go along with the telephone
20 continuation, how would you have the documents in
21 hand?

22 MR. NORTON: They will be produced. Mr.

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1 Heffner's agreed to produce them to us here in
2 Washington.

3 JUDGE LEVENTHAL: And then you'd have the
4 telephone conference?

5 MR. NORTON: Right.

6 JUDGE LEVENTHAL: I think it's a very
7 reasonable offer, Mr. Heffner. You know, last time I
8 denied the motion to quash and I prevailed upon
9 Conrail to reschedule the deposition. You're really
10 out of court. And Conrail went along with my
11 suggestion that they be gracious. I think they're
12 entitled to a second day of deposition.

13 MR. HEFFNER: Your Honor, if I might,
14 please --

15 JUDGE LEVENTHAL: Let me tell you, I agree
16 completely with Mr. Norton with respect to his
17 interpretation of paragraph 12. There's no limitation
18 on the number of days that a witness can be deposed.
19 And reading the record that you showed me, it
20 indicates that they intended to continue the
21 deposition on another day.

22 The question as to whether or not they're

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1 entitled to look at these work papers and ask
2 questions about them, you know, that's something
3 that's really reserved for trial, on a deposition, it
4 seems to me, without looking at the papers, they're
5 entitled to get answers. If the questions are
6 objectionable in any way, that's reserved for trial.

7 All right, now I'll listen to you.

8 MR. HEFFNER: Yes sir, thank you. First
9 of all, just as a preliminary matter, I must say I
10 object to the use of the term "recidivism" or
11 whatever, a variation on that. That assumes that one
12 is a criminal who repeats a crime --

13 JUDGE LEVENTHAL: I don't think Mr. Norton
14 had that in mind.

15 MS. BRUCE: I will permit him to retract
16 that. First of all, as to Conrail in terms of their
17 schedule, they are as much responsible for the delay,
18 assuming that I'm responsible for delay, their role in
19 that is 50-50.

20 My recollection from the discovery rules
21 without consulting them is that after October 21, you
22 can notice. I think there's a 5-day -- there's a

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1 shorter schedule for deposition advance or notice time
2 than there is before October 21. And Conrail waited
3 until I believe the notice date was around the 5th of
4 November or the 6th of November and the original
5 deposition was to take place around either the 17th or
6 the 18th which I don't recall.

7 There's no reason why they could not have
8 noticed the deposition within a few days after getting
9 and reading the Cross Harbor filing. I'm sure that
10 they were waiting for it and it probably came as no
11 surprise. So they are personally responsible for
12 their own delay.

13 Second of all, while normally I would be
14 sympathetic to Conrail's position that any document
15 that supports your claim in the case is something that
16 should be in a depository, let me read for you what
17 Conrail's notice says or I'd be happy to bring it up
18 and I'm sure Mr. Norton is familiar with it. He's the
19 author of it.

20 Let me show you what it says and it
21 doesn't put Cross Harbor on notice as to what
22 documents they should bring, otherwise we would --

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1 JUDGE LEVENTHAL: All right.

2 MS. BRUCE: It says, I believe, "any work
3 papers."

4 JUDGE LEVENTHAL: You can read it into the
5 record if you like.

6 MS. BRUCE: This is -- I'll skip a few
7 words: "This is to advise that at the deposition of
8 Robert R. Crawford, Conrail intends to question Mr.
9 Crawford about the comments, quote unquote, of your
10 Cross Harbor Railroad Terminal Corporation, including :
11 Mr. Crawford's verifying statement dated September
12 18th" -- which I suspect is a typo -- "as well as any
13 other work papers of NYCH and other filings in this
14 proceeding by other parties addressing NYCH or its
15 operation." It says -- excuse me, "as well as any
16 work papers."

17 There is no way that Cross Harbor would be
18 on notice as to which work papers. How would Cross
19 Harbor know, for example, that it should bring with
20 it, or have it in the depository the Long Island
21 Railroad Freight RFP? This was not a document
22 generated by Cross Harbor.

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1 How would Cross Harbor know that it should
2 bring historical traffic records from the New York
3 Dock Railway or the Brooklyn Eastern District Terminal
4 Railroad or even a study that apparently was prepared
5 in 1991 either by or for Conrail? There's no way that
6 we could have done that.

7 The only thing that we could have done is
8 taken every scrap of paper in the Cross Harbor files
9 that in any way remotely dealt with Conrail or Cross
10 Harbor's business level and brought it to Washington -
11 and I guess I would have moved out of my office then
12 because I would need my room for all of these files.
13 There's no way that we could have known that.

14 In addition, as Your Honor may recall,
15 when I was here a week and a half ago, two weeks ago,
16 whenever it was, I even suggested maybe we could do
17 this by telephone. And Conrail said absolutely not.
18 We need him here in person, so they can torture him.
19 They didn't say that. I say that. But no, there's
20 only one way we can do it and he's got to be here.
21 Written is unacceptable, telephone is unacceptable.

22 Now again, I come in a cooperative mode,

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1 in a spirit of compromise.

2 Now as to the December 1 Monday issue,
3 once again I called your law clerk. I don't remember
4 if it was Monday or Tuesday. I spent time on Monday
5 attempting to convince my good colleague at Conrail of
6 a more cooperative way of doing things, but Conrail
7 isn't into cooperation. They know only one position
8 and it's inflexible and what Jennifer -- and I don't
9 know what her last name is -- told me is that you
10 would not be back, I think she said until Wednesday,
11 so even if I send you something earlier --

12 JUDGE LEVENTHAL: I think Mr. Norton was
13 concerned about notice to him, not to me.

14 MR. HEFFNER: Oh, we started talking on
15 Monday and as soon as I had a reversal position, if
16 you want to call it a reversal position, I notified
17 him. And so I don't think he can really claim
18 surprise. So perhaps after he responds, I may have
19 something else to say, otherwise that is our position,
20 our offer to meet Conrail half way, so to speak, is
21 still up, still available.

22 JUDGE LEVENTHAL: All right, a reference

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1 made by Mr. Heffner to my not being available is
2 correct. I was out of town until Wednesday of this
3 week, that was December.

4 All right, I'm ready to rule. I am going
5 to deny the motion to cancel the adjourned deposition
6 of Mr. Crawford. Let's go off the record.

7 (Off the record.)

8 JUDGE LEVENTHAL: On the record. In our
9 off the record discussion, the parties agreed, subject
10 to my ruling, that the continued deposition of Mr.
11 Crawford will take place on December 10th by
12 telephone, unless Mr. Crawford prefers to appear here
13 in Washington. The parties have agreed that the data
14 requested by Conrail will be furnished seriatim as
15 produced to be completed by noon of December 9, 1997.

16 Do you want me to put your letter of
17 December 3rd as an appendage to the record?

18 MR. HEFFNER: Why not?

19 JUDGE LEVENTHAL: Do you have a clean
20 copy?

21 MR. HEFFNER: I have the original copy.

22 JUDGE LEVENTHAL: All right. I'm going to

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1 direct the reporter to include as an appendix, the
2 letter of Mr. Heffner dated December 3, 1997 on behalf
3 of New York Cross Harbor Railroad Terminal
4 Corporation.

5 MR. NORTON: Your Honor, I assume that the
6 deposition, except for the fact that Mr. Crawford will
7 be in New York and won't be in our office, wherever he
8 is, we have the documents present and Mr. Heffner will
9 come to our office and we'll settle it that way.

10 MR. HEFFNER: No problem.

11 JUDGE LEVENTHAL: All right, so ordered.
12 All right, is there anything else before us this
13 morning?

14 MS. BRUCE: Yes, Your Honor, at the
15 beginning of the conference you granted Norfolk
16 Southern's Motion to Compel Ohio Steel Industry and in
17 our motion we asked that those documents be produced
18 immediately. I would ask you to rule that they be
19 produced by close of business tomorrow and we'll
20 contact Ohio Steel to tell them of your ruling by fax.

21 JUDGE LEVENTHAL: Tomorrow's date is the
22 5th?

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1 MS. BRUCE: Yes, Your Honor.

2 JUDGE LEVENTHAL: All right, so ordered.

3 MS. BRUCE: Thank you, Your Honor.

4 JUDGE LEVENTHAL: Anything further now?

5 All right, conference stands closed.

6 (Whereupon, at 11:33 a.m., the discovery
7 conference was concluded.)

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CERTIFICATE

This is to certify that the foregoing transcript in the
matter of: **FINANCE DOCKET NO. 33388**

Before: **SURFACE TRANSPORTATION BOARD**

Date: **DECEMBER 4, 1997**

Place: **WASHINGTON, D.C.**

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

Christopher Baker