

SURFACE TRANSPORTATION BOARD

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UNITED STATES OF AMERICA

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ORAL ARGUMENT

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

Finance Docket
No. 33388

Thursday,
August 21, 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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of Locomotive Engineers; Brotherhood of
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P-R-O-C-E-E-D-I-N-G-S

(9:35 a.m.)

JUDGE LEVENTHAL: The oral argument will come to order. This is an oral argument in STB Finance Docket Number 33388. All right. For the railroads?

MR. CUNNINGHAM: Paul Cunningham and James Guinivan for Conrail.

MR. EDWARDS: John Edwards for Norfolk Southern, Your Honor.

MR. JOHNSON: Ron Johnson and Elizabeth Kandravy and Jeff Burt and Jodi Danis for CSX, Your Honor.

JUDGE LEVENTHAL: For Allied Rail Unions?

MR. EDELMAN: Rich Edelman. And, Your Honor, I would note that the Transport Workers Union of America has been added to the unions that are participating as Allied Rail Unions. I've informed the court reporter.

JUDGE LEVENTHAL: They're included in the Allied Rail Unions?

MR. EDELMAN: Yes, yes.

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1 JUDGE LEVENTHAL: All right. Very well.
2 The oral argument this morning is on the motion to
3 compel filed by the Allied Rail Unions to compel
4 responses to data requests.

5 I have before me the submission of the
6 railroads setting forth the interrogatories and their
7 objections thereto. And I have the letter dated April
8 20, 1997 from the Allied Rail Unions setting forth
9 their support of their motion to compel.

10 MR. EDELMAN: Your Honor, if I may? I
11 have I guess sort of a revised version of the letter
12 only that it has an ARU number on it. We were sort of
13 sure as to whether or not we were required to do that.
14 And we figured, given its size, we ought to.

15 And so I have all of that and an amendment
16 to the certificate of service that shows that the
17 parties that were served by fax didn't get the
18 attachment to the counsel for applicants. So you have
19 copies with the attachments.

20 JUDGE LEVENTHAL: All right. Very well.
21 Together with their letter, the Allied Rail Unions has
22 furnished me with copies of cases referred to in their

1 presentations.

2 Now, Mr. Edelman, I notice in your
3 response there are certain data requests and
4 objections to which you did not respond. Do I take it
5 you're abandoning those?

6 MR. EDELMAN: They're objections,
7 basically. We could get the information. We think it
8 would be easy for them. But we're not going to press
9 it, yes.

10 JUDGE LEVENTHAL: All right. So the only
11 ones in issue are the ones you've stated your position
12 with regard to in your presentation?

13 MR. EDELMAN: That's correct.

14 JUDGE LEVENTHAL: All right. And the very
15 first item we have I see is Interrogatory Number 9.
16 Interrogatory Number 9 requests the applicants to
17 "Identify all plans of the Applicants to contract out
18 work which is currently being performed by ARU" -- and
19 ARU is the abbreviation for Allied Rail Unions --
20 "represented employees of any Applicant railroad."

21 All right. Do you have anything further
22 to tell me, Mr. Edelman?

1 MR. EDELMAN: Sure. I mean, just
2 generally, this and various other interrogatories
3 relate to plans of the applicants to contract out
4 work. Contracting out of work is the scourge of
5 railroad workers and the scourge of union workers
6 everywhere.

7 The applicants have already stated certain
8 specific plans to contract out work, work that we
9 think under our contract is our work. And they have
10 even stated they're going to contract out to construct
11 new track, work that is clearly work of the
12 maintenance of way workers, even when they're going to
13 have 470 or so maintenance of way workers furloughed
14 in the first year of this transaction. That's
15 obscene, Your Honor, to us. These are men who can do
16 that work.

17 So this is a very important issue for us.
18 The interrogatories seek information regarding their
19 plans regarding contracting out. We want to know why
20 they think they have to contract out, why they can't
21 use our people to do this work, how they think it
22 somehow relates to their transaction that they ought

1 to be able to contract out, whether or not they're
2 going to claim that they can ignore our contracts on
3 this issue.

4 We think it relates to the general
5 argument as to whether or not the transaction is
6 consistent with the public interest, which is defined
7 in Section 11324(B)(4), which one of the specific
8 factors that must be considered is the interest of
9 employees. So we think it is plainly relevant.

10 I've set forth quite a lot there. I don't
11 want to go on. But contracting out is a very
12 important issue. And it's quite clear they're going
13 to do it. And it's implicit from some of the other
14 things they said they're going to do more. And so we
15 would like to probe that and find out just what they
16 plan to do.

17 JUDGE LEVENTHAL: All right. Do I take it
18 you're clarifying your request? In the response of
19 the applicants, they say that "The interrogatory is
20 unduly vague and overly broad and that it requests
21 information concerning oral plans."

22 And I take it you're saying you're only

1 seeking to find out what plans they have in general
2 affecting workers in general, not specific jobs?

3 MR. EDELMAN: Yes. We're not asking to
4 say which particular person's job is going to be
5 contracted out. What I did attempt to say by that is
6 they have said, "Well, this is vague" or "How can we
7 possibly answer that?"

8 Well, it seems to me you either have plans
9 or you don't have plans. If you do have plans, you
10 can identify what your plans are. If you don't have
11 plans, you can say you don't have plans. And we're
12 asking about tasks generally, things that our people
13 do.

14 JUDGE LEVENTHAL: All right. For the
15 applicants?

16 MR. EDWARDS: Your Honor, John Edwards.

17 Before we get into responding particularly
18 to Number 9 and to the others, we wanted to put this
19 argument in perspective. When the applicants came in
20 with discovery guidelines, we had proposed a limit on
21 discovery knowing the burden that would be placed on
22 us.

1 We're now only at the 59th day of this
2 proceeding. The applicants have received over 650
3 document requests and interrogatories, not including
4 the subparts, and 155 of which have been propounded by
5 Mr. Edelman's law firm, who did itself argue. That's
6 not including the subparts. If you include the
7 subparts, we're probably talking closer to 1,000
8 already.

9 Of these, of Mr. Edelman's interrogatories
10 and document requests, so far we have objected to 24.
11 We are really attempting. Last night we responded to
12 100 of them, 15 days after they were propounded to us.

13 So there really is a burden that must be
14 understood here. And Your Honor has not seen all this
15 paperwork that's come by because we have not burdened
16 you with that.

17 With that, I'd like to turn the argument
18 with particularity with regard to each one of these
19 items over to Ron Johnson for CSX.

20 MR. EDELMAN: If I may first respond to
21 the question about the numerosity of interrogatories?
22 Your Honor, I would point out we represent I think

1 about eight unions.

2 Our interrogatories, many of them concern
3 all of them, but many of them are readily identifiable
4 to particular crafts. And for purposes of convenience
5 for those unions, they have gotten together. They
6 have retained one counsel.

7 But you have to understand that many of
8 them have very craft-specific questions and sit there
9 and say the ARU as an entity has propounded 155
10 interrogatories sort of misstates what's going on.

11 Second, we have propounded a large number
12 of interrogatories, but that's because this plan is
13 going to have a significant impact on the members of
14 these unions.

15 The applicants have paid a 62 percent
16 premium for the purchase price of Conrail and for the
17 stock and plus millions of dollars in executive buyout
18 of this plan. The money has got to come from
19 somewhere. It's going to come from our people.

20 You have heard applicants tell the
21 shippers, "Oh, it's not going to come from you. We're
22 not going to raise your rates." Well, where is it

1 coming from? It's coming from us. It is coming from
2 laying off our people. It's providing not work for
3 our people, and it's changing our contracts.

4 So yes, we have a lot of questions about
5 this. And that's why there are so many of them. And
6 I'm not at all defensive about that. This is what
7 we're supposed to be doing, and we have every right to
8 do it.

9 JUDGE LEVENTHAL: All right. Very well.
10 I think this is really a superfluous argument. If the
11 interrogatories are appropriate, the number we can't
12 really control.

13 All right. Mr. Johnson, we're taking the
14 interrogatories one by one.

15 MR. JOHNSON: Right, Your Honor, although
16 what I would like to do, with respect to Interrogatory
17 Number 9 and then the next group -- and Mr. Edelman
18 alluded to them without mentioning them, and he's kind
19 of batched them in his letter -- 18 through 21, 78,
20 79, and 110, they all really turn around the same
21 issue and the same objection we have except that
22 Question 9 is broader. So let me go back and start

1 with Question 9.

2 The problem that we have -- and I'm
3 speaking for CSX, but I think this is equally true for
4 Norfolk Southern and Conrail -- is Question 9 asks us
5 to identify "all plans" to contract out work, not just
6 plans to contract out work that might relate to this
7 control application.

8 Now, it's true that unions don't like
9 contracting out, but it's equally true that under
10 today's collective bargaining agreements, the
11 railroads have the right to contract out certain work.
12 And they do that all the time.

13 The majority of their work is done by
14 their unionized employees, but they also contract out
15 certain types of work, like on CSX, we have the right
16 under our collective bargaining agreements with the
17 maintenance of way union to contract out new
18 construction if we build new track.

19 And that's CSX's position. Sometimes the
20 union disagrees. And if there's a disagreement, that
21 goes off. And it gets arbitrated under the Railway
22 Labor Act.

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1 The problem we have with 9 is they're
2 asking for "all plans" anywhere in the company dealing
3 with contracting out. And we believe that's
4 over-broad. We don't believe it's relevant to this
5 proceeding because there are only two specific areas
6 where the carriers indicted in their application where
7 they might contract out work. And that is in the area
8 of the construction of new track and related signal
9 work along the right-of-way, where NS and CSX have to
10 connect new track connectors and stuff in order to
11 take advantage of melding the allocated shares of
12 Conrail that they're going to receive if this
13 application is approved.

14 So our first objection is that it's
15 over-broad and it's not focused in on contracting out
16 but might relate to things the carriers might or might
17 not do to implement the transaction.

18 The second problem we have with this
19 question is the same problem we have with these others
20 I mentioned. For example, if you look at Question 18,
21 this is a very similar issue. You see Questions 18,
22 19, 20, 21, 78, 79, and 110. They all have a common

1 theme.

2 And maybe if we looked at their
3 Interrogatory 18 if you have that, that would be a
4 good place to start our discussion here. They're
5 asking us for a commitment to use their members in the
6 construction of these new track pieces that may have
7 to be done.

8 Now, our objection to that -- and that's
9 what they're also trying to get at through
10 Interrogatory Number 9 as well. You see that in Mr.
11 Edelman's letter, basically his motion to compel. The
12 justification they give for all of these
13 interrogatories is that they don't like contracting
14 out. They don't believe that contracting out is in
15 the public interest.

16 They may ask the STB to impose a condition
17 on the merger approval that would restrict the
18 carriers' existing rights to contract out work. They
19 may ask the STB to impose a condition that would
20 require the carriers to use their members to do this
21 work first before they do any contracting out.

22 And that's their justification for all of

1 these interrogatories, their primary justification.
2 They're saying, "Will you commit to do this or won't
3 you? And if not, why not?" And they're going to use
4 that information to go to the STB in these proceedings
5 and ask for this condition.

6 Our primary objection to this is that that
7 is not a proper question at this stage of the
8 proceedings. That question is proper at any time in
9 the implementing agreement process under New York
10 Dock. I don't know how familiar you are with this,
11 but I'll just explain it briefly.

12 The way the labor impacts historically
13 have been addressed in these STB and before the STB
14 the ICC proceedings is that the statute requires labor
15 protective conditions to be imposed for the benefit of
16 employees.

17 Congress, the ICC, the STB, the courts,
18 they all recognized that railroad mergers are going to
19 have adverse impacts on labor, no question about it.
20 But they have addressed those impacts by requiring the
21 ICC and now the STB to impose mandatory labor
22 protective conditions for the benefit of these

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1 employees that may be adversely impacted.

2 These conditions are very generous in our
3 view. They provide six years of labor protective
4 benefits. They provide up to six years of
5 guaranteeing wages and fringe benefits.

6 But, as relates to these particular
7 interrogatories in seeking this commitment, once the
8 transaction has been approved, once CSX and NS have
9 been approved to control their share of Conrail, they
10 cannot take any actions that would adversely impact
11 Mr. Edelman's clients until they complied with the New
12 York Dock procedures to get implementing agreements
13 for each particular coordination of the railroads.

14 And the way these New York Dock conditions
15 work is you first have to serve a notice under Section
16 4 of New York Dock on the unions that specifies the
17 particular changes you plan to make that are going to
18 impact employees.

19 You'd have to identify the employees or
20 the positions, at least, that might be abolished or
21 affected. Then you have to sit down and try and
22 negotiate an implementing agreement with the unions

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1 for how the protected conditions will be applied to
2 this particular coordination.

3 If you can't reach agreement through these
4 negotiations, then you go to arbitration before an
5 arbitrator, who acts as an extension of the STB. This
6 arbitrator essentially acts as a hearing officer, and
7 he takes evidence.

8 And then he issues a decision on what the
9 implementing agreement should be, whether the
10 implementing agreement can override collective
11 bargaining agreements or not in order to implement the
12 transaction. This becomes, in effect, an initial
13 decision of the STB. Either side has the right to
14 appeal that to the STB. And then you can go on to the
15 Court of Appeals.

16 It's our position -- and this is how we
17 responded in our objection -- that if the unions want
18 this type of commitment to us not to contract out
19 work, the place to do that is to raise it in the
20 implementing agreement process, not now. There is a
21 process for them to raise these issues.

22 And we think our objection is well-taken

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1 because, in fact, these very same unions, ARU,
2 represented by Mr. Edelman asked for this very same
3 condition in the Union Pacific-Southern Pacific merger
4 case.

5 And there the STB refused the condition,
6 saying, "It's inappropriate at this time. The place
7 for you to raise these issues is in the New York Dock
8 implementing agreement process. If you want to seek
9 these commitments, raise it then. It may be in the
10 give and take in negotiations for these implementing
11 agreements. You might be able to get this. You might
12 not. It might be an appropriate subject for New York
13 Dock negotiations. It might not. But you raise all
14 of that in the New York Dock procedures and then
15 before the arbitrator. And then we'll take a look at
16 it."

17 And, if I may approach, Your Honor, I have
18 the excerpt from the UP-SP decision that talks about
19 this. This merger decision is quite lengthy. So I've
20 just excerpted and highlighted the relevant language
21 dealing with this condition.

22 If you turn to the second page, you'll see

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1 the heading there entitled, "Contracting Out." And
2 you'll notice here that the -- I'll give Your Honor a
3 chance to read it.

4 It's the very same issue that we had here.
5 As in our case, the UP, the SP, they were going to
6 have to build some new connecting track. There was
7 some possibility they might contract ut this work.
8 And these very same unions came in and said, "We want
9 you to impose this condition saying they can't do it."

10 And the STB said, "Well, that may or may
11 not be a legitimate issue, but you have a time and
12 place to do it. It's through the New York Dock
13 procedures."

14 So that's the basis for our objection to
15 Question 9. Also, we can talk about it in more detail
16 if we need to when we get to 18 through 21, 78, 79,
17 and 110, but that's our common objection to those
18 questions, Your Honor.

19 We believe the STB has effectively already
20 ruled on this issue. And we think it's an easy issue
21 here because of the language I point you to.

22 JUDGE LEVENTHAL: Mr. Edelman?

1 MR. EDELMAN: Yes. I guess I'll start at
2 the end. You know, I think just because an
3 administrative agency rules against a position once --
4 you know, I know I said a couple of weeks ago I could
5 have said, "The railroads would like the last 15 years
6 of STB law carved in stone never to be touched again."

7 But the fact is things change. We saw for
8 sure. So the fact is we can go to the STB and say,
9 "You were wrong in this case. And we want to show you
10 why. Not only that. Crucial to protect potentially
11 doing that is the ability to try and bring some
12 information in front of them and try and say, 'Look,
13 they're planning to contract out all of this work.'"

14 In this particular instance, as I said,
15 they're going to lay off 470 maintenance of way
16 workers in year one. So the mere fact that in this
17 particular case, which had a lot else going onto it,
18 they denied it, I don't think that that says that
19 we're precluded either from raising that issue here
20 or, more particularly, seeking discovery of
21 information likely to lead to the development of
22 relevant evidence so that we can make that argument to

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1 the administrative agency.

2 JUDGE LEVENTHAL: How do you respond to
3 Mr. Johnson's argument that this is covered by the New
4 York Dock --

5 MR. EDELMAN: Sure.

6 JUDGE LEVENTHAL: -- implementing
7 agreements?

8 MR. EDELMAN: Sure. First off, it's
9 absolutely clear New York Dock conditions are a
10 minimum. The Second Circuit in the case that I cited
11 to you in affirming the New York Dock conditions said
12 they are a minimum. The Board and Supreme Court in
13 the OAR ALU case, 1952, that's cited in the New York
14 Dock decision specifically said the Board has
15 authority to impose greater levels of conditions than
16 those mandated by statute and, in fact, sent cases
17 back to the ICC because they were under the impression
18 that they couldn't do any more.

19 So, first off, we can ask for more than
20 New York Dock. Second, I guarantee you if we go to a
21 New York Dock arbitrator and we say, "Mr. Arbitrator,
22 we'd like you to impose a condition that requires them

1 to limit their contracting out or use our people to do
2 the contracting out," the applicants are all going to
3 scream that's outside his jurisdiction. And, in fact,
4 they've been very careful to say, "Well, it's a
5 discretionary matter."

6 Yes, we can negotiate with them. We can
7 negotiate with them for anything we want. But the
8 fact is the likelihood of getting it through that
9 process, as opposed to actually asking the Board to
10 impose it as a condition, is a very different matter.

11 And, yes, they all say they're willing to
12 negotiate. In the UP-SP case, all the answers to
13 interrogatories, "Oh, well, we plan to go through the
14 New York Dock process. We plan to do this. We always
15 like to negotiate with the unions."

16 Yes. One of the unions told me that the
17 labor relations people they spoke to described in
18 scatological terms what they were going to do with
19 their collective bargaining agreements now that they
20 had the authority.

21 So as for the efficacy of the negotiation
22 process, that doesn't do very much for me. And I

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1 think the point is with respect to that that we have
2 the right to ask the Board to impose a condition above
3 what would otherwise be involved in New York Dock.

4 And, again, I would point out that the
5 interests of employees as a separate public interest
6 factor in 11324(B) is independent of the statutory
7 requirement that employee protections be imposed.

8 I would also like to point out that I
9 don't think that -- I think it's incorrect to say that
10 they were only going to contract out in two areas or
11 increase their contracting out in two areas. The two
12 operating plants, I didn't bring them here today. But
13 they're replete with references about contracting out.

14 They're going to contract out. They're
15 going to send the rail welding work to Russell,
16 Kentucky, which is this mysterious CSX facility that's
17 a part of CSX but not really a part of CSX
18 transportation.

19 NS has indicated a very interesting
20 statement. I don't have the page number where they
21 sit there and say that the amount of savings we're
22 going to get -- in essence, what they're going to do

1 is they're going to need to hire more operating
2 employees, but they're going to have to spend more
3 money on track maintenance, not that they're going to
4 have to hire more track maintenance workers because
5 they're going to want to contract out.

6 I also think what they're going to want to
7 do is choose contracts to try and impose contracts
8 that have more freedom to contract out than other
9 contracts.

10 So we think that it is very likely that
11 there is going to be a -- if they're going to sit
12 there and say, "Our only current plans are to contract
13 out on those construction projects," I'd like to hear
14 it. I don't think they're going to say that.

15 Going back to the beginning, the problem
16 is that the carriers have converted this New York Dock
17 process to a collective bargaining process. I mean,
18 it's kind of funny. In their zeal for deregulation,
19 they've gone and regulated the collective bargaining
20 process by having the agency's agent decide what the
21 collective bargaining terms are going to be.

22 So the point is when they get around to

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1 it, yes, they want to say, "Oh, you should only be
2 entitled to information pertaining to things that
3 relate to the transaction." In their view, everything
4 relates to the transaction. Anything they want to do
5 after the transaction relates to the transaction. And
6 any plan they propose to take they can say relates
7 back to the transaction.

8 So we're reacting to their use of the
9 process. If their use of the process had been
10 confined to selection of forces and assignment of
11 employees and they hadn't sat there and tried 14 years
12 after the transaction to try and say that something
13 relates to the transaction and things that should be
14 bargained in periodic collective bargaining have to be
15 addressed in the New York Dock process, we wouldn't be
16 asking them the types of questions that we're asking.

17 So the fact is that whatever their plans
18 are, to the extent they have them, are relevant here
19 because they are going to say it relates to the
20 transaction.

21 JUDGE LEVENTHAL: Let me ask you a
22 question: Did you seek discovery on this item in the

1 UP-Southern Pacific case?

2 MR. EDELMAN: Yes, actually. And they
3 answered it.

4 JUDGE LEVENTHAL: And then the Board --

5 MR. EDELMAN: We asked for a condition
6 there.

7 JUDGE LEVENTHAL: And then the Board
8 denied your request.

9 MR. EDELMAN: That's correct. But, for
10 example, I asked representatives of Union Pacific and
11 Southern Pacific questions about: Would they be
12 willing to use our people to do the construction work?

13 And Mr. Anschutz, the President of
14 Southern Pacific, who was going to become an officer
15 of Union Pacific, testified that as an officer of
16 Union Pacific, he would recommend that bargaining unit
17 employees be used to do this work. And the other
18 people that I asked said, well, they really couldn't
19 come up with a very good reason why they couldn't use
20 bargaining agreement people to do that work.

21 So, for all I know, maybe the Commission
22 denied the condition because it seemed as if the

1 carrier representatives were saying that there wasn't
2 going to be a problem. I don't know, but the --

3 JUDGE LEVENTHAL: But the Board said,
4 "This is a matter committed to the Article I, Section
5 4 implementing agreement procedures."

6 MR. EDELMAN: Yes. I think they're wrong,
7 and I say --

8 JUDGE LEVENTHAL: And you want to try it
9 again in this case?

10 MR. EDELMAN: Yes, I would. Yes, I would.
11 All I'm asking for is discovery to be able to argue to
12 them and tell them they're wrong.

13 MR. CUNNINGHAM: Your Honor, I'm sure that
14 Mr. Johnson for CSX -- he may have some other
15 arguments. I don't wish to preempt them, but I note
16 that for Conrail, which isn't going to be doing any
17 contracting out after the conclusion of this process
18 assuming that the application is successful, that Mr.
19 Edelman has not answered two very critical questions.

20 One is why he needs any information about
21 contracting work that is not related to the
22 application, which Mr. Johnson raised immediately.

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1 JUDGE LEVENTHAL: Now, we may be able to
2 narrow that down.

3 MR. CUNNINGHAM: Okay. Well, I just want
4 to bring that to your attention. The second one is in
5 order to make this a petition for conditions since he
6 knows so much already about the contracting out, he
7 knows the numbers of people and so forth, why he needs
8 any information in order to petition for a condition
9 that precludes or limits contracting out since the
10 condition is going to be made on a policy basis and
11 the parties have already put into the record the fact
12 that they will be contracting out, whether they're
13 going to contract out in five cities or three and with
14 respect to two projects or ten doesn't seem to bear on
15 the policy merits in one way or the other.

16 Therefore, I think that he is seeking this
17 information for some other purpose than to get a
18 condition because the Board has no legal basis for
19 saying the number determined the condition. It's a
20 matter of the policy as to whether the Board would
21 want to reverse its decision in UP-SP.

22 This all looks to me like a hunt for

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1 information that has no bearing on the thing itself.
2 It has a bearing ultimately on the negotiations. And,
3 as the Board said in UP-SP, under New York Dock, that
4 information can be provided at the time of the New
5 York Dock negotiations and arbitrations when it is
6 finally determined by the applicants after the
7 approval of the application. But until then, it's a
8 total waste of time.

9 He doesn't need it to get a condition, and
10 he doesn't need the information now to be able to
11 properly represent his clients in whatever New York
12 Dock proceedings are instigated after the conclusion
13 of the transaction.

14 MR. EDELMAN: Your Honor, may I?

15 JUDGE LEVENTHAL: Wait.

16 MR. EDWARDS: Your Honor, there's one
17 other aspect to this. And that is the scope and the
18 dimension of the transaction are not at this time
19 defined, as in the UP-SP proceeding. The transaction
20 that was proposed there looks somewhat the same as
21 what came out in the end after the conditions which
22 were imposed.

1 And it's on that last formation of the
2 transaction, the transaction as it's been conditioned
3 by the STB, that is the form in which New York Dock is
4 imposed. So there is that aspect which needs to be
5 brought forth here.

6 We don't know what the transaction will
7 look like in the end. And so the plans that are now
8 may not be what ends up being approved.

9 JUDGE LEVENTHAL: All right. Mr. Edelman,
10 you're ahead of the game right now. All right?

11 MR. EDELMAN: I'm sorry.

12 JUDGE LEVENTHAL: I'm inclined to grant
13 the motion with respect to Number 9. I'm impressed
14 with your argument that "all plans" is somewhat
15 ambiguous. Is it possible for the parties, Mr.
16 Edelman and the counsel for the applicants, to narrow
17 down your request?

18 They're saying that you're asking, that
19 they interpret that as meaning all plans, even those
20 not involved in this transaction. That's not what
21 you're looking for, is it?

22 MR. EDELMAN: Well, Your Honor, my problem

1 is -- and I did answer the point that Mr. Cunningham
2 raised, which is the question of why all -- because
3 the carriers will say anything they do
4 post-transaction is related to the merger. They will
5 say that.

6 We receive New York Dock notices 14 years
7 after the CSX merger, after three rounds of national
8 collective bargaining, saying that we're going to do
9 something that is related to that 1980 merger for CSX.

10 If they want to do something ten years
11 from now that they want to try to override over
12 collective bargaining agreements, they will say that
13 it somehow relates to the control transaction of the
14 addition of Conrail here.

15 JUDGE LEVENTHAL: That's speculative, Mr.
16 Edelman.

17 MR. EDELMAN: Absolutely not, Your Honor.
18 If you look at the O'Brien case, which I gave you,
19 that is the case in which CSX cited the merger in 1980
20 as giving rise to the need to coordinate territory in
21 1994.

22 MR. CUNNINGHAM: Your Honor, his logic is

1 backwards because if the railroads are constrained to
2 identify their plans and they want those plans to be
3 all-encompassing, then they will make their plans very
4 broad. And if they don't want them to be
5 all-encompassing, they'd be very narrow.

6 So he shouldn't be worried that we're
7 somehow going to prejudice ourselves prospectively or
8 him prospectively because he, arguably, would be in
9 some strain.

10 Now, obviously, for the reasons that Mr.
11 Edwards has specified, the railroads are going to
12 qualify any plan they put in as saying, "These are the
13 plans that we're developing at the moment, but until
14 the transaction is approved and the conditions are
15 defined, we won't know what our plans are." So it's
16 all very circular and somewhat beside the point. It's
17 just a lot of work for nothing.

18 But to the extent that we more narrowly
19 define our plans at this moment, on the logic that he
20 is espousing, then we would have a more narrowly
21 constrained set of actions that we could take in some
22 hypothetical distant future that would be subject to

1 overriding those contracts.

2 So I don't see why constraining the plans
3 to the plans to the extent that were to be required is
4 going to prejudice him in the least.

5 JUDGE LEVENTHAL: Well, what is your
6 specific suggestion? How would you like to narrow the
7 question? As I told you, I think he's entitled to
8 this information. I'm willing to consider narrowing
9 it if you tell me what you want.

10 MR. JOHNSON: Well, I can't deal with 14
11 years from now, Your Honor. So I think, at a minimum,
12 we ought to limit it to the here and now and whatever
13 plans there might be implicated in the operating plan
14 relating to this merger transaction.

15 And it should be limited to this
16 transaction. That's where the starting point should
17 be in talking to Mr. Edelman.

18 JUDGE LEVENTHAL: Well, isn't that what
19 you're looking for? I mean, this is what we have
20 before us, this transaction.

21 MR. EDELMAN: All right. If they're
22 willing to specify what plans they have as to this

1 transaction, I think we can do that.

2 JUDGE LEVENTHAL: All right. Then that's
3 my order.

4 MR. JOHNSON: Okay. We'll sit down and
5 talk with him after this and see what we can work out.

6 JUDGE LEVENTHAL: All right. I'm
7 deferring discussion of the other interrogatories that
8 you raise together with Number 9. I prefer to decide
9 them one at a time.

10 MR. JOHNSON: Sure.

11 JUDGE LEVENTHAL: I think that there are
12 differences between the interrogatories.

13 All right. Now we go to Interrogatory
14 Number 11, "Identify all changes on an annual basis in
15 real wages, numbers of employees by crafts or classes
16 identified in the Labor Impact Exhibit and fuels costs
17 experienced by the Applicants since 1980."

18 Just a minute. Off the record.

19 (Whereupon, the foregoing matter went off
20 the record briefly at 10:09 a.m.)

21 JUDGE LEVENTHAL: Back on the record. All
22 right. Mr. Edelman, let me tell you before I hear

1 your argument the applicants' objection to Number 11,
2 among their objections is the fact that they have
3 trouble with your term "real wages."

4 MR. EDELMAN: I don't get it. I mean,
5 maybe they could tell me what their trouble is.

6 JUDGE LEVENTHAL: What do you mean by
7 "real wages"?

8 MR. EDELMAN: Wages based on 1980 data
9 adjusted for inflation. If there is some other
10 problem, I'd like to hear it. I thought that was --
11 I'm not an economist. And Your Honor has already
12 heard my views about them previously. But, from what
13 I knew, I didn't think that that was a controversial
14 term.

15 If they're asking about whether or not we
16 use the CPI or the ECI or something else, I'm prepared
17 to talk about that. But to just sit there and say we
18 don't know what real wages means to me is not really
19 much of -- I don't think is much of an objection
20 because I think it's trying to get at the concept that
21 wages increase over time and they're adjusted by
22 inflation.

1 JUDGE LEVENTHAL: All right. Do the
2 applicants have a problem with the term "real wages"?

3 MR. JOHNSON: Well, if Mr. Edelman could
4 I guess define for us or put down on a piece of paper
5 what he means, then it wouldn't be a problem. We'd
6 all be speaking off of the same hymnal.

7 But I think we can avoid a lot of this
8 discussion.

9 JUDGE LEVENTHAL: Well, it would be
10 helpful --

11 MR. JOHNSON: I think we can make this
12 whole issue go away with Mr. Edelman. I didn't mean
13 to cut Your Honor off. I didn't want to have us talk
14 unnecessarily about this if I think we can resolve
15 this.

16 And the reason why I think we might be
17 able to resolve it -- and I apologize. Because of
18 schedules and Mr. Edelman's vacation and mine, I
19 wasn't able to talk to him before this hearing. But
20 we had a call, I believe it was, Monday morning of
21 this week where Mr. Edelman said that the information
22 that he -- one reason he doesn't think it would be

1 burdensome for us to produce this information is
2 because he understood that the Association of American
3 Railroads, which is an umbrella trade association for
4 the industry, maintains these types of numbers on an
5 industry-wide, aggregate basis. And, therefore, it's
6 his belief that they must have this information also
7 on a railroad by railroad basis. And, therefore, it
8 should be easy for us to get it. And he alludes to
9 this in his letter, his motion to compel as well.

10 When I got back from vacation Tuesday, I
11 was able to talk to the AAR. And, in fact, they do
12 maintain this information on an individual carrier
13 basis. And it is publicly available from the AAR.

14 So we can talk about this however Your
15 Honor directs us, but I believe that much of the
16 information that Mr. Edelman wants under Interrogatory
17 Number 11 is publicly available from the AAR.

18 I've also done some checking. Some of
19 this information is available in the SEC reports that
20 the carriers file; for example, fuel costs. The
21 information is there. They can go find it themselves.
22 And we might be able to help them out with the AAR to

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1 expedite things.

2 With respect to numbers of employees in
3 crafts or classes and wages, another part of our
4 objection here is they have this information
5 themselves just as easily as we do. But I don't think
6 we need to belabor this.

7 I think perhaps when Mr. Edelman and I
8 have a chance to talk about this, he may be satisfied
9 that he can, in fact, get this information from public
10 sources and we don't have to be burdened to try and
11 reproduce it ourselves.

12 JUDGE LEVENTHAL: Mr. Edelman?

13 MR. EDELMAN: I don't see why if I'm
14 asking in an interrogatory for information they have
15 that they supply to the AAR to review why I need to go
16 to the AAR to do this.

17 JUDGE LEVENTHAL: No. I think he
18 indicated he's willing to get it for you from the AAR.

19 Isn't that right?

20 MR. JOHNSON: We'll assist him.

21 As I understand it, people can ask the
22 AAR. And, in fact, labor unions ask the AAR for this

1 information. And I can show him the type of
2 information they have. They may or may not keep it
3 precisely in the form he wants it, but I think it will
4 still go a long way to getting at whatever legal
5 theory he's trying to support the Board and whatever
6 conditions he might ask for.

7 There's also a basic precept, as you know,
8 that parties aren't required to do the other side's
9 work if the information is publicly available. So I'm
10 not abandoning that principle.

11 But if he has some sort of problem with
12 the AAR -- and I don't think he will -- we'll step in
13 and assist him on that.

14 JUDGE LEVENTHAL: Why don't we do this?
15 Why don't we defer Interrogatory Number 11 until a
16 later time this morning after parties can confer?
17 Maybe you can reach an agreement on it and it won't be
18 necessary to make a ruling.

19 MR. EDELMAN: Okay.

20 JUDGE LEVENTHAL: But we'll dispose of it
21 today. All right?

22 Now Interrogatory Number 18. The ARU's

1 answer lumps Numbers 18 through 21, 78 through 79, and
2 110.

3 Off the record.

4 (Whereupon, the foregoing matter went off
5 the record at 10:14 a.m. and went back on
6 the record at 10:15 a.m.)

7 JUDGE LEVENTHAL: Mr. Reporter, I'm going
8 to ask you to copy into the record at this point
9 Interrogatories Number 18, 19, 20, 21, 78, 79, and 110
10 on the copy of the interrogatories furnished to you by
11 one of the parties.

12 "Interrogatory No. 18. Are Applicants
13 willing to commit to using BMW-represented
14 maintenance of way workers for all of the track and
15 right-of-way construction and rehabilitation work to
16 be done in connection with the merger. If not, state
17 why not.

18 "Interrogatory No. 19. If the answer to
19 Interrogatory No. 34 is no, are Applicants willing to
20 refrain from using contractors or other non-BMW--
21 represented employees for Application-related track
22 and right-of-way construction and rehabilitation while

1 any pre-June 1997 maintenance of way employee who has
2 not separated from Applicants is furloughed? If not,
3 then state why not.

4 "Interrogatory No. 20. Are Applicants
5 willing to commit to using BRS-represented signalmen
6 for all signal work involved in track, right-of-way
7 and crossing construction and rehabilitation work done
8 in connection with the merger? If not, state why not.

9 "Interrogatory No. 21. If the answer to
10 Interrogatory No. 20 is no, state whether Applicants
11 are willing to refrain from using contractors or other
12 non-BRS-represented employees for signal work involved
13 in Application-related track and right-of-way
14 construction and rehabilitation while any pre-June
15 1997 signalmen who is not separated from Applicants is
16 furloughed. If not, why not.

17 "Interrogatory No. 78. With respect to
18 the signal construction work and signal upgrade work
19 referred to in the CSX Operating Plan and related
20 statements (including but not limited to those in Vol.
21 3A pp. 24, 56-59, 258-269) and CSX's assertion (Vol.
22 3A p. 493) that sufficient skilled employees and

1 equipment 'will likely not be available to perform all
2 of this work' so it may be necessary to utilize
3 contractors.

4 "a. Explain the basis for the assertion
5 that it may be necessary to use contractors.

6 "b. Explain the basis for the assertion
7 of a lack of skilled employees when Applicants plan to
8 abolish the positions of 15 signalmen.

9 "c. State whether CSX would agree not to
10 use contractors unless all CSX, and Conrail signalmen
11 were employed and likely to be working in at least 10
12 out of 12 months of years 1 through 3 after
13 consummation of the Transaction.

14 "d. State whether CSX believes that a
15 condition on approval of the Transaction that no
16 contractors may be utilized for Transaction-related
17 construction work unless CSX and Conrail signalmen are
18 working would impede or interfere with the
19 Transaction; if the answer is yes, explain the basis
20 for that belief.

21 "Interrogatory No. 79. With respect to
22 the signal construction work and signal upgrade work

1 referred to in the NS Operating Plan and related
2 statements (including but not limited to these in Vol.
3 3B pp. 49-52, 268-277 and 282-285) and NS' assertion
4 (Vol. 3B pp. 334, 365) that the alleged immediate need
5 for this construction work exceeds the capacity of
6 existing work forces and equipment so contractors will
7 be utilized.

8 "a. Explain the basis for the assertion
9 that it may be necessary to use contractors.

10 "b. Explain the basis for the assertion
11 of a lack of skilled employees when Applicants plan to
12 abolish the positions of 15 signalmen.

13 "c. State whether NS would agree not to
14 use contractors unless all NS and Conrail signalmen
15 were employed and likely to be working in at least 10
16 out of 12 months of years 1 through 3 after
17 consummation of the Transaction.

18 "d. State whether NS believes that a
19 condition on approval of the Transaction that no
20 contractors may be utilized for Transaction-related
21 construction work unless NS and Conrail signalmen are
22 working would impede or interfere with the

1 Transaction; if the answer is yes, explain the basis
2 for that belief.

3 "Interrogatory No. 110. With respect to
4 the track construction work and upgrade work referred
5 to in the NS Operating Plan and related statements
6 (including but not limited to these in Vol. 3B pp.
7 49-52, 268-277 and 282-285) and NS' assertion (Vol. 3B
8 pp. 334, 365) that the alleged immediate need for this
9 construction work exceeds the capacity of existing
10 work forces and equipment so contractors will be
11 utilized.

12 "a. Explain the basis for the assertion
13 that it may be necessary to use contractors.

14 "b. Explain the basis for the assertion
15 of a lack of skilled employees when Applicants plan to
16 abolish the position of between 450 and 500
17 maintenance of way employees.

18 "c. State whether NS would agree not to
19 use contractors unless all NS, and Conrail maintenance
20 of way employees were employed and likely to be
21 working in at least 10 out of 12 months of years 1
22 through 3 after consummation of the Transaction.

1 "d. State whether N3 believes that a
2 condition on approval of the Transaction that no
3 contractors may be utilized for Transaction-related
4 construction work unless NS and Conrail maintenance of
5 way employees are working would impede or interfere
6 with the Transaction; if the answer is yes, explain
7 the basis for that belief."

8 JUDGE LEVENTHAL: All right. Taking
9 Interrogatory Number 18, Mr. Edelman is asking whether
10 the applicants are willing to "commit to using
11 BMW-represented maintenance of way workers." Mr.
12 Edelman, do you think that that's a proper area of
13 discovery to get a commitment to use?

14 MR. EDELMAN: Well, my discovery comes,
15 really, in two parts. One is: Are they willing to
16 commit? And if not, why not? And I guess I'm more
17 focused on the why not, but I don't want to presume
18 that they won't commit to use bargaining unit people
19 to do it.

20 If they do it, then I'll be in the
21 situation -- one of the things, Your Honor, that we
22 want to know is we are going to ask the Board to

1 impose such a condition here. And one of the things
2 we'd like to know is what they are going to say in
3 response. What are they going to say?

4 Are they going to say that this somehow
5 interferes with their plans? Well, how? How would it
6 interfere with the transaction for them to use their
7 bargaining unit people, instead of outside
8 contractors, so that we can address that issue to the
9 Board so that we're not up there throwing in asking
10 for a condition and then finding out that there are
11 all of these allegedly insurmountable problems to
12 responding to our request for a condition?

13 And that seems to me typical of people
14 doing discovery. They want to ask in litigation,
15 "What's your position going to be on this? What's the
16 reason for your position? That's what we're going to
17 do.

18 And if they can't articulate they have a
19 good reason as to why they shouldn't be able to do
20 that, well, we're going to tell the Board, "Your
21 Honor, we asked them. We said, 'What's your problem
22 with using our people to do this work?' and they

1 couldn't come up with anything" or "They did. And
2 here's why we don't think that that should trouble you
3 any."

4 So I think that is a perfectly permissible
5 area to inquire into. We've asked it, and we've asked
6 it in 18, 19 two different ways, you know, "Are you
7 willing to do it at all?" and then at least "Well,
8 what about at least the guys that are currently
9 working that are going to lose their jobs?"

10 JUDGE LEVENTHAL: Mr. Johnson?

11 MR. JOHNSON: Your Honor, the problem we
12 have with this interrogatory is it's not asking for
13 information. As Your Honor alluded to, in discovery,
14 you're typically seeking information. They're not
15 asking for any information. They're seeking a
16 commitment.

17 Now, when he talks about -- earlier Mr.
18 Edelman alluded to: How can they be contracting out
19 this work when 500 employees are going to be laid off,
20 whatever, whatever?

21 There are other interrogatories that he's
22 asked and that we've answered to go to those types of

1 questions that actually deal with the information, you
2 know, how come you have to use contractors? How can
3 you use contractors when people will be laid off? Why
4 are you planning to do that?

5 There are interrogatory responses and
6 questions and answers that go to that that were served
7 last night. But he's not asking for information here.
8 He's asking for a commitment. He, in fact, is trying
9 to get us to negotiate now or state what our
10 negotiation position might be a year and a half from
11 now, when we have to get into these New York Dock
12 negotiations that the STB is going to require. I
13 mean, we probably answered this as best we can right
14 now anyway in the terms of our objection.

15 The applicants don't know what type of
16 commitments they're going to be willing or able to
17 make a year and a half from now when they get into
18 these negotiations. It also depends on what the
19 precise parameters of the transaction are at that time
20 and what the union is willing to do and what the
21 carriers are willing to do. So we can't sit here
22 today and say what we're going to commit to do or not.

1 And the STB has already ruled in the UP-SP
2 case that's not a proper thing for them to do now at
3 this stage in the proceedings. If they want to
4 extract this type of commitment, the proper place and
5 time for them to raise that is when we actually serve
6 a New York Dock notice specifying precisely what we're
7 proposing to do.

8 And at that time what the carrier does is
9 it serves a proposed agreement on the union specifying
10 how they're going to do the transaction. The union
11 comes back with a counter proposal. The parties sit
12 down and negotiate. That's the time when the parties
13 ask for commitments from each other.

14 But you can't talk about commitments in an
15 abstract vacuum. And that's what the STB is saying in
16 this decision that we handed you.

17 JUDGE LEVENTHAL: All right.

18 MR. EDELMAN: If it helps, I will change
19 this to say, "Are they going to oppose such a request
20 for a condition? And if not, why not?" We're going
21 to ask this of the Board. We think it's proper to ask
22 it of the Board. We'd like to have the information in

1 front of the Board so it can consider it.

2 Again, I would point out when they say,
3 their answer here, it says, "Although a discretionary
4 topic, the commitment sought is a matter to be raised
5 in the context of negotiating implementing
6 agreements," not in the context of arbitrating them.

7 They're not conceding the arbitrator has
8 the authority to actually impose this kind of
9 condition. They're not conceding that point. If they
10 are, I'd like to hear that.

11 JUDGE LEVENTHAL: No. But I don't think
12 they're saying at this point that you can't ask for
13 such a condition before the STB. What you're asking
14 here is for them to agree to do something at this
15 stage of the proceeding --

16 MR. EDELMAN: I will amend my.

17 JUDGE LEVENTHAL: Well, I assume their
18 objection to your amendment would be the same.

19 MR. EDELMAN: Of course, because it's the
20 same thing. We're going to ask for this condition.
21 We want to know what they're going to say in response
22 to it.

1 MR. JOHNSON: Well, that's a different
2 question. But I can tell you right now we'll oppose
3 their request for a condition at the STB, but the STB
4 will decide. They'll either impose the condition or
5 they won't.

6 MR. EDELMAN: And I would like to know
7 what they're going to tell the STB. Why is this
8 impossible?

9 I have to say I don't have the
10 interrogatories. I know they worked very hard to get
11 them in the 15 days. I wasn't in my office last
12 night. So I don't know what else they've said.

13 But my point here is that we're going to
14 ask for this condition. If they're going to tell the
15 STB that "We can't do this because of the following
16 reasons and it would interfere with the transaction,
17 it would be bad for the public," then we would like to
18 know what they're going to say in that regard so we
19 can address it.

20 MR. JOHNSON: Your Honor, if I may, if we
21 can move back to this language again, the STB has
22 already answered this new question or this revised

1 question that Mr. Edelman has said.

2 It says right here in the middle of this
3 paragraph you've highlighted, "This is a matter
4 committed to the Article I, Section 4 implementing
5 agreement procedures." So what the STB has said,
6 whatever issues the union wants to raise regarding
7 what the content of the implementing agreement should
8 be, whether it's a restriction on contracting out or
9 whatever, it's committed to that process.

10 Now yes, the carriers will argue to the
11 arbitrator that maybe he shouldn't do what the unions
12 are asking him to do. Maybe the carriers might argue
13 that the arbitrator doesn't have the authority to do
14 what the unions want him to do.

15 But the arbitrator, who sits also as a
16 hearing officer, in effect, will make the initial
17 decision for the Board. And it will either do what
18 the unions want him to do or not.

19 But the STB, it says right here in this
20 decision, that's where they go. That's the time to
21 ask it. So they have a time and place to raise this,
22 not now.

1 MR. EDELMAN: Your Honor, also I would
2 point out that the service of the New York Dock notice
3 is something that the carrier does in their
4 discretion. If they think that what they're doing is
5 not a New York Dock transaction, they won't serve a
6 notice.

7 So suppose they start contracting out the
8 construction work here and we say, "Hey, that's a New
9 York Dock transaction."

10 They'll say, "No, it's not." And under
11 the conditions, we can't initiate the New York Dock
12 process.

13 MR. JOHNSON: Your Honor, if the unions
14 believe that the carriers are carrying forward a
15 transaction which is subject to the New York Dock
16 conditions without complying with New York Dock, what
17 the unions do is they file a complaint with the STB
18 that we're violating the law.

19 And then the STB will have a proceeding
20 and decide whether we are or aren't. So that's a red
21 herring, Your Honor.

22 MR. EDELMAN: It's not because

1 construction will be done by the time the STB gets to
2 it. That's why we want to ask this up front.

3 JUDGE LEVENTHAL: Well, I don't think
4 there's anything that prevents you from asking for
5 such a condition when you file your evidence in this
6 case, but I think it's an improper area for discovery.

7 I'm going to deny Interrogatories Number
8 18, 19, 20, and 21. Now let's look at 78 and 79.

9 MR. JOHNSON: Your Honor, we believe 22 is
10 also of the same variety as 18 through 21. Again,
11 it's asking for --

12 JUDGE LEVENTHAL: Twenty-two?

13 MR. JOHNSON: Yes, Your Honor.

14 JUDGE LEVENTHAL: Without hearing
15 argument, I think that with regard to Interrogatory
16 Number 22, I think the first question, "Do Applicants
17 plan" -- well, 22 isn't in the record. So we'll read
18 it in. Interrogatory Number 22 asks, "Do Applicants
19 plan to contract-out any work now performed by
20 bargaining unit employees? If the answer is no, are
21 Applicants willing to commit to refraining from
22 contracting out work now performed by bargaining unit

1 employees as a condition of STB approval of the common
2 control/merger. If Applicants are unwilling to make
3 such a commitment, explain the reasons for the
4 negative response."

5 I think that a proper discovery is "Do
6 Applicants plan to contract-out work now performed by
7 bargaining unit employees?" The rest of the
8 interrogatory deals with a commitment on the part of
9 the applicants on which I've already ruled.

10 Do parties wish to argue this? You know
11 what my ruling is going to be. So --

12 MR. JOHNSON: Your Honor, I would agree
13 that the first sentence of Interrogatory Number 22 is
14 really the same as Interrogatory Number 9 that we've
15 already talked about.

16 I was looking at the rest of the question,
17 which I think is the same as the ones you've already
18 ruled on.

19 JUDGE LEVENTHAL: Mr. Edelman?

20 MR. EDELMAN: I guess I would concur on
21 that.

22 JUDGE LEVENTHAL: All right. That's my

1 ruling.

2 I think we have the same situation with
3 respect to 78 or 79. Your problem is, Mr. Edelman, in
4 these requests I think you're asking for a commitment.
5 And I agree with the arguments made by the applicants
6 that this really is a question of negotiation and
7 really isn't a matter of discovery. I don't think it
8 can lead to evidence that you can present to the
9 Board.

10 That doesn't stop you from asking for a
11 condition, but I don't think that these two requests
12 can lead to evidence that will help you in that
13 regard.

14 MR. EDELMAN: Your Honor, if I may, I
15 understand your thinking toward Part (c) of each, but
16 I'd like to speak to (d) of each, which asks whether
17 or not they believe that such a condition "would
18 impede or interfere with the Transaction." That's
19 different from asking whether or not they will commit
20 or agree.

21 The carriers have a very broad view of
22 what they think the transaction is and a broad view of

1 their benefit to the public. And they make these
2 arguments frequently. And if we're going to ask for
3 this condition, typically their response is --

4 JUDGE LEVENTHAL: You're talking about --

5 MR. EDELMAN: Subpart (d).

6 JUDGE LEVENTHAL: -- (d) in 78 and 79?

7 MR. EDELMAN: Yes, Your Honor.

8 JUDGE LEVENTHAL: All right. I'll listen
9 to argument on that. It seems to me that is a little
10 different, Mr. Johnson.

11 MR. JOHNSON: Excuse me, Your Honor.

12 (Pause.)

13 MR. JOHNSON: I have two responses, Your
14 Honor. First of all, we haven't seen this condition
15 that they might or might not ask for. So it's kind of
16 hard to respond now as to whether or not it "would
17 impede or interfere with the Transaction" or not
18 because they have not yet articulated what the terms
19 of the condition would be. So it's like they're
20 asking us again to sort of commit to a -- it's still
21 the same variety of objection we stated to the other
22 parts of the question.

1 They're still asking, in effect, for a
2 commitment from us. And they're now asking us to
3 commit to whether we would think this condition is a
4 good or a bad thing. And we haven't even seen what
5 the condition is.

6 Again, it's also a matter that goes back
7 to the implementing agreement process because whether
8 or not the condition -- and we don't know what the
9 terms are yet because they haven't told us. But
10 whatever the terms of the condition are, whether or
11 not they impede the transaction again is hard to say
12 in the abstract without seeing it and how it is
13 related to other aspects of the implementing
14 agreement. So I have the same problem with (d) as I
15 do with the rest of the question.

16 I mean, if they want to ask this, they can
17 ask it to the STB and ask for it. And they can argue
18 that it won't impede. They really don't need any
19 information from us. It's really, again, not
20 requesting information from us.

21 JUDGE LEVENTHAL: I would take it, though,
22 that you would find that any condition would impede

1 the transaction. Isn't that right, Mr. Johnson,
2 whatever condition they asked for? Wouldn't you
3 rather they don't ask for any conditions?

4 MR. JOHNSON: Yes, Your Honor, we would.
5 We think that they should be satisfied with the
6 standard New York Dock conditions, which the STB has
7 imposed on all of these merger and control
8 transactions since they were first issued in 1979
9 because they're very generous and they anticipate and
10 provide mechanisms to deal with all of the issues the
11 unions might want to raise through the New York Dock
12 procedures.

13 So I suspect -- you know, I can't
14 categorically say we'd oppose every condition they
15 might think up, but I suspect we would be inclined to
16 oppose most of them because the New York Dock
17 conditions have worked very well for 20 years now.

18 MR. EDWARDS: Your Honor, as well --

19 JUDGE LEVENTHAL: I'm sorry? I didn't
20 hear what you said.

21 MR. EDWARDS: As well, with regard to
22 whether or not we would oppose any condition, the

1 question goes even further. It says, "if yes, explain
2 the basis for that." Number one, if we don't know the
3 condition, we can't explain the basis for that.

4 And, number two, there is a time and a
5 place for that. When they put the condition forth,
6 they will explain the basis for why they think so.
7 And we will in rebuttal have their legal arguments to
8 respond to.

9 He's asking for our legal arguments to be
10 put forth months before they're required in this
11 proceeding.

12 JUDGE LEVENTHAL: Suppose they answer
13 these interrogatories, Section (d) of each of the
14 interrogatories, that they feel that any condition is
15 an impediment to the transaction and they go on and
16 they say, "We don't know the terms of the conditions.
17 So how can we give you a different answer?" Would you
18 be satisfied with that?

19 MR. EDELMAN: Well, first let me start at
20 the end, which is -- and, again, I don't know why
21 they're that confused. It says that a condition that
22 no contractors need to utilize unless the signalmen

1 are working.

2 I mean, I guess there are other potential
3 ways in which that could be tweaked one way or
4 another, but I think the basic thrust should not be
5 confusing to anybody.

6 And, second, I guess if they answer, "We
7 don't like any conditions on top of New York Dock," I
8 guess that's an answer.

9 JUDGE LEVENTHAL: I'm going to grant your
10 motion to compel on (d) of both 78 and 79. I don't
11 think the information you're going to get is going to
12 be useful to you, but, for what it's worth, I'll
13 require them to answer.

14 The motion is denied with respect to 78(c)
15 and 79(c). And then I think we have 110. Well, we
16 had the same thing.

17 MR. JOHNSON: Same thing.

18 JUDGE LEVENTHAL: I don't think parties
19 want any further argument on it, do you?

20 MR. JOHNSON: No.

21 JUDGE LEVENTHAL: I would deny (c) and
22 grant (d). All right? You don't have to agree with

1 me. I mean, that's my ruling unless you want to
2 argue. All right.

3 110(c) is denied, and 110(d) is granted.
4 I think that leaves us with 94. Ninety-four, will the
5 Reporter copy that into the record as if it were read?

6 "Interrogatory No. 94. With respect to
7 CSX's statement that it plans to consolidate
8 rail-welding facilities at its Russell and Nashville
9 facilities (Vol. 3A p. 308):

10 "a. State the full name and corporate
11 status of the Russell facility.

12 "b. Describe the relationship of the
13 Russell facility to CSX and CSXT including corporate,
14 real estate and any forms of CSX or CSXT ownership or
15 control over the Russell facility.

16 "c. Explain the manner by which CSX or
17 CSXT obtains welded rail from the Russell facility,
18 including whether such rail is obtained by order or
19 other internal CSX or CSXT communication or by
20 contract.

21 "d. If welded rail from the Russell
22 facility is obtained by CSX or CSXT by contract, state

1 whether such contracts are for individual orders of
2 rail or whether there is a master contract, a contract
3 for a period of years or a set amount of rail, and
4 explain the terms of such contract or contracts.

5 "e. State whether CSX considers employees
6 at the Russell facility including all welders at that
7 facility to be railroad employees within the meaning
8 of the Railway Labor Act, Railroad Retirement Act and
9 Railroad Unemployment Insurance Act.

10 "f. Identify any collective bargaining
11 agreement that CSX or CSXT, or the Russell facility,
12 believes applies to employees at the Russell facility.

13 "g. Describe how much rail welding work
14 from the Conrail territory allocated to CSX that CSX
15 plans to transfer to the Russell and the Nashville
16 facilities respectively.

17 "h. Identify how much welded rail was
18 produced at the Russell facility and how much welded
19 rail was produced for CSX or CSXT at the Russell
20 facility in 1996.

21 "i. Identify the impact that CSX believes
22 the transfer of rail welding work from the Conrail

1 property allocated to CSX to the Russell facility will
2 have on Conrail maintenance of way employees including
3 the impact on abolition, or creation or transfer of
4 positions and collective bargaining agreement
5 coverage.

6 "j. State whether CSX believes that the
7 transfer of rail welding work from Harrisburg to
8 Russell and Nashville has any Transaction-related
9 public transportation benefit, and if so state the
10 basis for that belief.

11 "k. State whether CSX believes that the
12 transfer of rail welding work from Harrisburg to
13 Russell and Nashville is necessary to the Transaction
14 and if so explain the basis for such belief."

15 MR. JOHNSON: Your Honor, I believe that
16 Mr. Edelman had Interrogatory Number 43 that he also
17 listed in his motion to compel and he's still pursuing
18 that.

19 MR. EDELMAN: Yes, I am.

20 JUDGE LEVENTHAL: I'm sorry. As we
21 already have Number 94 in the record, we'll come back
22 to 43. I'm sorry to take it out of order, but I was

1 momentarily confused.

2 All right. Why don't we take argument of
3 Number 94 now? And we'll come back to the Number 43
4 and others. I'll hear from you, Mr. Johnson, first.

5 MR. JOHNSON: Your Honor, this is another
6 question I think we can -- we still object to part of
7 it, but I think we can narrow the focus a little bit.
8 There are quite a few subparts to this question. And
9 after looking at it again, we believe that we can or
10 should answer Subparts (g) and (i) through (k), but we
11 still object to the other subparts, (a), (b), (c),
12 (d), (e), (f), and (h). Now --

13 MR. EDELMAN: Excuse me. I'm sorry.
14 Which one are we on?

15 MR. JOHNSON: Ninety-four. This is the
16 Russell facility question.

17 JUDGE LEVENTHAL: He's conceding Number
18 (g), (i), and (k). There were no objections on the --

19 MR. EDELMAN: Okay. I'm sorry.

20 JUDGE LEVENTHAL: Well, before I hear
21 argument, what is your objection to stating "the full
22 name and corporate status of the Russell facility."

1 MR. JOHNSON: Your Honor, the issue here
2 is we believe this is a situation where one particular
3 union that's a part of the ARU, the Brotherhood of
4 Maintenance of Way Employees, is trying to use
5 discovery in this case for another proceeding.

6 There is an ongoing controversy now that's
7 being arbitrated. And an arbitration hearing is
8 scheduled for October. And we believe this union is
9 trying to get information to use in that proceeding
10 because most of these subparts have no bearing
11 whatsoever on the merger transaction except for the
12 subparts I agreed we'd answer just a moment ago.

13 So if you take it and look at that, just
14 (a), by itself, it probably isn't anything terribly
15 harmful about that. It's more the principle here that
16 they're trying to improperly use the discovery process
17 of the STB as a back door way to get information that
18 they're not entitled to in the arbitration proceeding.

19 And we have court cases not involving STB
20 discovery processes, but we have court cases we can
21 point Your Honor to where unions in the past have
22 tried to use discovery processes of the courts to get

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1 information to use in arbitrations. And the courts
2 have said, "You can't do that."

3 JUDGE LEVENTHAL: I think that's
4 well-settled. Discovery has to relate to this
5 proceeding, not to any other.

6 MR. JOHNSON: Right.

7 JUDGE LEVENTHAL: What have you got to say
8 to that, Mr. Edelman?

9 MR. EDELMAN: I think it does relate to
10 this proceeding for a couple of reasons. In that CSX
11 operating plan, they discuss the rail welding work.
12 This is work done by maintenance of way employees
13 represented by the Brotherhood of Maintenance of Way
14 Employees union, on Conrail.

15 And what they say is that they think
16 they're going to close the shop that does it for
17 Conrail and they're going to move the work to CSX's
18 Nashville facility and Russell facility.

19 Now, one might think from the context of
20 this application that those are -- I know their
21 Nashville facility. That's a facility on the old L&N
22 Railroad.

1 One might think from this that that means
2 that the Russell facility is a CSXT, CSX
3 Transportation, CSX Railroad facility. I happen to
4 know by virtue of this other case that the Russell
5 facility is not a CSX Railroad facility but is
6 apparently some sort of affiliate of CSX.

7 And so when they say in their operating
8 plan, "We are going to transfer this work to CSX's
9 facilities in Nashville and Russell," it gives the
10 appearance as if these are being transferred to CSXT
11 facilities.

12 And we want to point out to the Board that
13 this is not a railroad facility, that they're talking
14 about transferring the work to a non-railroad
15 facility, a non-organized facility, something that's
16 not part of the CSXT Railroad, something which we
17 believe does not pay railroad unemployment and
18 railroad retirement under the unemployment and
19 railroad retirement systems. And so we think it's
20 important to get this information out.

21 This is my understanding, Your Honor. I
22 can't substantiate some of this. This is what I have

1 heard. And this is what we need to know. And Dave
2 made the representation to the Board that this is a
3 CSX facility.

4 So the questions, these questions, go to
5 the Board, go to us being able to tell the Board,
6 "Look, don't even implicitly sanction the transfer of
7 work to a non-railroad facility." And this thing is
8 being presented to you as if that's what's going on,
9 and that's not what's going on.

10 JUDGE LEVENTHAL: How about this
11 arbitration they're talking about?

12 MR. EDELMAN: We are doing this
13 arbitration, Your Honor.

14 JUDGE LEVENTHAL: Are they the same
15 issues?

16 MR. EDELMAN: Well, what it involves is
17 the performance of bargaining unit welding work in
18 Russell, Kentucky, a nonunion facility. You know, I
19 did offer on Monday that we would agree we wouldn't
20 use the information here in the arbitration. We won't
21 submit it in the arbitration.

22 I don't know if an arbitrator would let us

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1 submit it to this point anyway. They would be free to
2 object to it. But I think it is relevant to what's
3 going on here.

4 JUDGE LEVENTHAL: Suppose you get a
5 favorable ruling in this arbitration. How will that
6 affect what happens here?

7 MR. EDELMAN: That will be a ruling under
8 two contracts on CSX and wouldn't necessarily affect
9 other contracts on CSX or, in particular, Conrail. I
10 mean, that would be a ruling that under the contracts
11 on either the former L&N part of CSX or the former
12 Seaboard Coastline part of CSX or potentially under a
13 prior implementing agreement, one of those ways, that
14 they can't do that. But that would not preclude them
15 doing what they're saying they're going to do here by
16 taking the Conrail work and moving it to that Russell
17 facility.

18 JUDGE LEVENTHAL: Do you represent the
19 union in this arbitration?

20 MR. EDELMAN: Yes, I do, Your Honor.
21 Actually, my partner is handling it, but our firm
22 does, yes.

1 JUDGE LEVENTHAL: Mr. Johnson, he's saying
2 that the issues aren't exactly the same. How about
3 our highly confidential agreement and the discovery
4 guideline in the protective order? Will that protect
5 you?

6 MR. JOHNSON: I'm not entirely familiar
7 with that, but I think we could sit down with Mr.
8 Edelman and maybe work out some sort of a -- you know,
9 if he could work out some sort of an agreement that he
10 wouldn't use this information for any other
11 proceeding, I think that's --

12 JUDGE LEVENTHAL: The highly protective
13 portion of the protective order prohibits him from
14 doing that if he signs an agreement not to do it.

15 MR. JOHNSON: Well, I think that sort of
16 arrangement would satisfy us because what we're
17 concerned about here is how they're going to use the
18 information.

19 JUDGE LEVENTHAL: Well, no. You're
20 absolutely right. They can't use discovery here --

21 MR. JOHNSON: Right.

22 JUDGE LEVENTHAL: -- for the arbitration

1 proceeding.

2 MR. JOHNSON: Right.

3 JUDGE LEVENTHAL: Are you familiar with
4 the highly confidential provision?

5 MR. EDELMAN: Well, I think I've already
6 signed it. I don't remember it all here, but we will
7 certainly agree we will not use this. I mean, we can
8 certainly say that we will not use this for this
9 arbitration.

10 JUDGE LEVENTHAL: Yes.

11 MR. JOHNSON: I think the easiest way to
12 do it, we wouldn't have to come up with a new
13 agreement. We'd just --

14 JUDGE LEVENTHAL: No. That is the
15 agreement. That is the protective order that's in
16 effect.

17 MR. JOHNSON: Okay.

18 JUDGE LEVENTHAL: And as long as you
19 understand that the materials are being furnished
20 under the highly confidential provision of the
21 protective order, you're prohibited from divulging it
22 or using it anywhere else other than in this

1 proceeding. You won't be able to divulge this
2 information to your partner, for instance, or to the
3 parties in the arbitration proceeding.

4 MR. EDELMAN: See, that troubles me some,
5 Your Honor, because my client, the union, is the one
6 that's got an interest in these interrogatories on
7 account of their people.

8 We certainly agree we wouldn't use it in
9 the arbitration. We would agree. If we do, if we
10 start to put it in -- and Mr. Johnson is representing
11 CSX in that arbitration. So he's going to know. We
12 will not put it in. We will not produce any evidence.
13 We won't do anything.

14 But the highly confidential designation
15 often relates to privileged business information, a
16 lot of other sorts of things. And that's why it's
17 there. Whether or not the union knows this doesn't
18 seem to me to fall under the category of highly
19 confidential designation elsewhere in the proceeding.

20 I certainly understand that they don't
21 want us to be able to use it in the arbitration. And
22 we're willing to commit to that.

1 JUDGE LEVENTHAL: Would that satisfy you?

2 MR. JOHNSON: Well, the highly --

3 JUDGE LEVENTHAL: The provision is very
4 specific.

5 MR. JOHNSON: Right, right.

6 MR. CUNNINGHAM: Your Honor, under that
7 provision, as you know, highly confidential
8 information cannot be revealed to anyone other than
9 Mr. Edelman and consultants who have signed the
10 agreement. He cannot reveal it to the union.

11 JUDGE LEVENTHAL: That's right.

12 MR. CUNNINGHAM: And that would have to be
13 understood.

14 MR. EDELMAN: I would not agree to that
15 willingly, Your Honor. I think I ought to be able to
16 tell the union. They have an interest in this
17 information.

18 If the question is "Is this going to be
19 used in this arbitration?" we are prepared to deal
20 with that and say it won't be and that they can -- I
21 mean, I'm on the record here. And if anybody tries to
22 put that in front of that arbitrator, they can say,

1 "Wait a minute. That's barred."

2 But I don't think there's a reason within
3 the context of the highly confidential designation in
4 these STB transactions to say that I can't show the
5 union the answers to this question.

6 MR. CUNNINGHAM: You can't show the answer
7 to any question that's highly confidential.

8 MR. EDELMAN: That's right. Nothing else
9 here is highly confidential.

10 MR. CUNNINGHAM: And he can designate this
11 as highly confidential if he thinks it is.

12 MR. EDELMAN: Well, you can. And then we
13 can fight over that.

14 JUDGE LEVENTHAL: Let's go off the record.
15 (Whereupon, the foregoing matter went off
16 the record at 10:46 a.m. and went back on
17 the record at 10:48 a.m.)

18 JUDGE LEVENTHAL: On the record. In our
19 off-the-record discussion, I tried to explore whether
20 or not this material in Interrogatory Number 94 should
21 be furnished under the highly confidential provision
22 of the protective order. Mr. Edelman is willing to

1 commit not to use it in the arbitration proceeding but
2 feels that it is a legitimate area of information for
3 the union to know about.

4 Do you have a problem if the union knows
5 the corporate designation of the Russell facility,
6 whether or not it's connected to the CSX or not and
7 the --

8 MR. JOHNSON: Not that particular
9 question, Your Honor.

10 What I think we can do is I can sit down
11 and work out with Mr. Edelman what he's just proposed
12 here. I would like to have it in writing. It doesn't
13 need to be this highly confidential designation,
14 though. I think we can work out something in writing
15 based on what he's committed to do here on the record
16 about not using that information for any other purpose
17 and not using it in the arbitration.

18 JUDGE LEVENTHAL: All right. That seems
19 reasonable. And, again, we'll dispose of it today.
20 If you have a problem, I'll make a ruling.

21 I guess now we're up to Number 43. Mr.
22 Reporter, will you copy Interrogatory Number 43 into

1 the record?

2 "Interrogatory No. 43. With respect to
3 Applicants' assertions that they project traffic
4 losses for other railroads, state how many engineer
5 positions Applicants project will be eliminated on the
6 railroads that would lose traffic."

7 JUDGE LEVENTHAL: Mr. Edelman, among other
8 things, they say in their objection that they do not
9 have information regarding engineer staffing needs of
10 other railroads, which is what you're asking for here.

11 MR. EDELMAN: I thought I'm asking for
12 what they believe the impact will be on staffing other
13 railroads. Your Honor, they have estimated we are
14 going to get X hundred million dollars of business.
15 We're going to lose X hundred million dollars of
16 business. And, when all is said and done, that's
17 going to leave us with net XY hundred million dollars
18 of new business. And that will mean that we will need
19 to hire a specific number of engineers. That's in
20 their labor impact statement and in their Appendix A
21 to the operating plan.

22 They have also in their traffic diversion

1 studies estimated that there are going to be net
2 traffic gains and losses from the railroads as a
3 result of this transaction. I mean, it's specific
4 numbers, you know, Burlington Northern-Santa Fe, CP
5 Rail, CN. Each one has gotten.

6 So it seems to me that if they can
7 estimate that they are going to need Y number of
8 engineers for a net increase of traffic to them, then
9 they can estimate what the loss, net loss, of A
10 million dollars is to the other railroads in terms of
11 what that impact is going to be on engineers.

12 JUDGE LEVENTHAL: All right. Mr. Johnson?

13 MR. JOHNSON: Your Honor, let me explain
14 the legal basis for our objection here, but I'll
15 mention it. I don't want to belabor it because at the
16 end of the argument, our answer is going to be we
17 don't know. And I'll explain that in a little more
18 detail.

19 I'd like to approach, Your Honor, if I may
20 and hand you one more excerpt from an ICC decision.
21 This happens to be from the 1980 ICC decision
22 approving the CSX Corporation and its control of

1 several railroads. If you'll turn back to the third
2 page of what I handed you? As you read that, let me
3 explain it.

4 When the ICC and the STB impose these
5 labor protective conditions on control applications
6 like the one that's the basis for this proceeding,
7 it's required to do so by a specific provision in the
8 Interstate Commerce Act, which used to be 11347. Now
9 it's 11326.

10 The ICC and the STB have interpreted that
11 provision to mean that it imposes labor protective
12 conditions only for the benefit of railroad employees
13 of the railroads that are applicants in the
14 proceeding.

15 The ICC and the STB, following the ICC
16 precedence, has said, "We do not impose labor
17 protective conditions for the benefit of railroad
18 employees of railroads who are not applicants in the
19 proceeding."

20 One such authority is the one I've handed
21 to you. And it can't be stated any stronger than the
22 ICC stated it in this first sentence here.

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1 JUDGE LEVENTHAL: Mr. Johnson, I don't
2 like to interrupt you.

3 MR. JOHNSON: No. That's --

4 JUDGE LEVENTHAL: But I don't think that's
5 what he's looking for.

6 MR. JOHNSON: And our question is: Why
7 does he want this information?

8 JUDGE LEVENTHAL: All right. We're going
9 to find out.

10 You're not looking for a condition
11 protecting the engineers of non-applicant railroads,
12 are you?

13 MR. EDELMAN: We're not asking to have
14 them covered by the New York Dock conditions, no.
15 What we do want to do is we want to be able to say
16 they're telling the STB, "Look, this is going to
17 create a certain number of engineer jobs." What
18 they're not telling the STB is it's going to cause a
19 loss of other engineer jobs. And one of the criteria
20 in the statute is the interest of railroad employees.
21 That's in 11324.

22 Separate and apart from -- well, I guess

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1 it's 11326 now, which is the employee protection
2 provision --

3 JUDGE LEVENTHAL: But suppose they
4 estimate that it will create 50 new engineering jobs
5 and suppose other railroads will lose 50 engineer
6 jobs. How will that affect you?

7 MR. EDELMAN: How will --

8 JUDGE LEVENTHAL: Yes. How will that --

9 MR. EDELMAN: I represent --

10 JUDGE LEVENTHAL: How will that -- no.
11 But you're looking for conditions that will protect
12 the workers of these applicant railroads.

13 MR. EDELMAN: No. Actually, in respect to
14 this, I'm not asking for a -- I mean, I could.
15 Obviously they could say no.

16 JUDGE LEVENTHAL: You could ask for
17 anything you like.

18 MR. EDELMAN: Right, right. And there's
19 nothing in the statute that would stop me from saying
20 -- I mean, there's a difference, Your Honor. There's
21 a difference in saying that the New York Dock
22 conditions are not required to be imposed on other

1 people versus saying that they can be.

2 But separate and apart from that, Your
3 Honor, I believe it was in the original Burlington
4 Northern merger where the New York Dock conditions
5 were theoretically out in the pool. The Commission
6 rejected the transaction because of its impact on
7 employees and the communities that they worked on.
8 They rejected the entire application on the basis of
9 that.

10 Now, you know, we can argue that when the
11 Board is sitting here weighing the benefits of this
12 transaction going back and forth, one of the things
13 that the Board can consider is: What is the impact on
14 railroad workers generally?

15 JUDGE LEVENTHAL: So you want this
16 information to defeat the merger?

17 MR. EDELMAN: Yes.

18 JUDGE LEVENTHAL: All right.

19 MR. JOHNSON: I would point out that
20 they're not asking about railroad employees generally.
21 They're only asking about locomotive engineers. It's
22 a little far-fetched to think they're going to defeat

1 the application just because some locomotive engineers
2 might lose their jobs.

3 If you come back to if we had to answer
4 this question, even though this is a five-day
5 objection, we have essentially given the answer we
6 would give, which is we don't know what other
7 railroads would do.

8 Even if we don't know how much business
9 they're going to lose for sure, if any -- there are
10 some projections. But even if they lost -- I mean,
11 it's so speculative it defies imagination. It's
12 speculative what he's asking for.

13 Even if the Kansas City Southern Railway,
14 which is not an applicant here, lost some business
15 because of this control transaction, that doesn't mean
16 they're going to furlough any of their locomotive
17 engineers. In fact, they have other business.

18 And, in fact, there's a shortage. As Mr.
19 Edelman knows, there's a shortage in the industry
20 today of locomotive engineers. If I got tired of
21 being in discovery conferences like this one, I would
22 like to go out and become a locomotive engineer. And

1 I could get hired like that.

2 So it's just impossible to speculate. And
3 there's no way to answer this question. And it's
4 irrelevant anyway for it to lead into a discussion.

5 JUDGE LEVENTHAL: I'm going to deny Number
6 43 on the ground that I'm not convinced that it can
7 lead to any relevant information.

8 All right. Number 48. Mr. Reporter, will
9 you copy Number 48 into the record?

10 "Interrogatory No. 48. Identify all
11 savings that CSX believes were obtained by the
12 following consolidations:

13 "a. Consolidation of B&O, C&O, WM and
14 RF&P operating craft employees into the Eastern B&O
15 consolidated district.

16 "b. Consolidation of B&O and C&O
17 operating craft employees into the Central B&O
18 consolidated district.

19 "c. Consolidation of Waycross, Georgia
20 carmen work to CSXT's Raceland, Kentucky shops.

21 "d. Consolidation of CSX dispatching work
22 in Jacksonville."

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1 JUDGE LEVENTHAL: Off the record.

2 (Whereupon, the foregoing matter went off
3 the record at 10:56 a.m. and went back on
4 the record at 10:57 a.m.)

5 JUDGE LEVENTHAL: Back on the record. I
6 see that in his answer Mr. Edelman has combined 48,
7 49, and 50. And I'm going to ask the Reporter to copy
8 these three interrogatories into the record.

9 "Interrogatory No. 49. Explain how CSX
10 believes that the public benefitted by the following
11 consolidations (to the extent CSX believes that rates
12 were reduced or rate increases were avoided, provide
13 specific explanations regarding the bases for those
14 beliefs):

15 "a. Consolidation of B&O, C&O, WM and
16 RF&P operating craft employees into the Eastern B&O
17 consolidated district.

18 "b. Consolidation of B&O and C&O
19 operating craft employees into the Central B&O
20 consolidated district.

21 "c. Consolidation of Waycross, Georgia
22 carmen work to CSXT's Raceland, Kentucky shops.

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1 "d. Consolidation of CSX dispatching work
2 to Jacksonville."

3 "Interrogatory No. 50. Identify all
4 savings that NS believes were obtained by
5 consolidation of locomotive power distribution in
6 Atlanta."

7 JUDGE LEVENTHAL: Mr. Edelman?

8 MR. EDELMAN: I'm sorry. Your Honor, if
9 I may, I guess I should have included 51 in the same,
10 in that discussion.

11 JUDGE LEVENTHAL: Fifty-one? All right.

12 MR. EDELMAN: I'm sorry.

13 JUDGE LEVENTHAL: Mr. Reporter, include
14 Number 51.

15 "Interrogatory No. 51. Explain how NS
16 believes that the public benefitted by the
17 consolidation locomotive power distribution work in
18 Atlanta (to the extent CSX believes that rates were
19 reduced or rate increases were avoided, provide
20 specific explanations regarding the basis for that
21 belief)."

22 MR. EDELMAN: Your Honor, throughout the

1 application, it is replete with statements by
2 applicants an applicants' officers that this
3 transaction is going to be great for the public, that
4 there are going to be all of these improvements, all
5 of these changes, all of these things, and these are
6 going to result in savings to them, and then those
7 savings are then going to benefit the public somehow,
8 and that that's why the Board ought to approve this
9 merger.

10 And then they have this long operating
11 plan that explains all of the things that they want to
12 do and how this is going to create savings and this
13 will, in turn, benefit the public.

14 And then at the end, they have this
15 Appendix A that says, "Well, in order to do this
16 stuff, we're going to have to of the following things
17 to the collective bargaining agreements."

18 So the point is that their justification
19 for the transaction to begin with and their
20 justification for what they want to do to our
21 collective bargaining agreements rides off the notion
22 that there are, in fact, going to be savings received

1 and the further assumption that the public will see
2 the benefit of that.

3 So this is like -- I'm assuming that by
4 the carriers, it is a matter of sort of fundamental
5 principle. Well, of course, the market works that
6 way. If we have savings, they get passed on to the
7 consumer. Well, you know, I don't buy it. I think a
8 lot of people don't buy it.

9 And the question is: All right. Let's
10 look at actual experience. In each one of these
11 transactions, the ones that I've looked at over the
12 last number of years, the carriers always say the same
13 thing, "There's going to be all of these changes made.
14 There's going to be all of these savings. They're all
15 going to be passed on to the public."

16 Well, have they been? Have there been the
17 savings? And if so, where did they go or did they go
18 to putting a pile of money to buy more railroads at 60
19 percent stock premiums and pay off executives, give
20 millions of dollars in bonuses to executives? We
21 don't know.

22 But the point is a lot of these changes

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1 involve effecting the rights of employees. And so we
2 would like to know from actual historical experience
3 what they're going to do.

4 Now, you know, in UP-SP, I know they
5 answered. They said, "Well, we can't figure that out.
6 That's too much for us to figure out." Well, you
7 know, they give you these big applications, all of
8 this stuff with precise applications, "Well, we're
9 going to close the Canton shop and save X million
10 dollars." But they can't go back and say, "Oh, this
11 is what we actually did, what would have actually have
12 happened"?

13 I know that they have said that the Board
14 denied my request on this point the last time. But
15 we're going to keep pressing it because we think this
16 is like ideologically driven blindness that has
17 nothing to do with the statute. It just assumes that
18 this is going to happen. And I don't know that that's
19 true for a fact.

20 And we'd like to be able to sit there and
21 say, "You know, you guys have been assuming for a long
22 time that, oh, their savings are going to take. It's

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1 going to come from the employees, but that's okay
2 because the public is going to benefit from this.
3 Let's see a little evidentiary meat on those bones.
4 Let's see whether it has actually happened." And
5 that's the point of our inquiry.

6 JUDGE LEVENTHAL: And they say that each
7 deal is different, that the savings from this
8 operation would have nothing to do with the savings or
9 lack of savings in the other consolidations that you
10 have asked for.

11 MR. EDELMAN: I'm not looking to compare
12 the precise operational change that they're making.
13 I'm asking about the general principle. Did you
14 actually make savings --

15 JUDGE LEVENTHAL: Suppose they didn't make
16 any savings from the consolidation of B&O, C&O, WM,
17 and RF&T operating craft employees into the Eastern
18 B&O consolidated district. Suppose they didn't make
19 any savings.

20 MR. EDELMAN: Then we would say to the
21 Board: Then don't believe them now. Then don't
22 believe them now. They told you back then there were

1 going to be savings from that and that they were going
2 to pass it on the public and that this is good and
3 that's why it's okay to change all of these seniority
4 districts around and change the rules under which they
5 worked. We would say: Well, then don't believe them
6 now.

7 JUDGE LEVENTHAL: All right. Mr. Johnson?

8 MR. JOHNSON: Thank you, Your Honor.

9 This raises a question which -- I'll get
10 at 48, 49, 50, and 51 if it's been added. There's
11 sort of the common stripe again. And of all the
12 questions that we've objected to, -- and we tried to
13 be careful with our objections -- these are probably
14 the most burdensome questions that the union has
15 asked.

16 We think they're particularly burdensome
17 because we don't think they are relevant because we
18 think savings did occur. But, even if savings did or
19 didn't occur from these past coordinations, some of
20 which he wants us to go back, like the dispatching,
21 for example, in CSX -- CSX moved all of these
22 dispatchings of its trains, like the air traffic

1 controller, moved all of the dispatching to a
2 centralized location, which was done pursuant to the
3 New York Dock conditions. That was done in 1988.

4 And he wants us to go back and calculate
5 all of the savings we think we got from that from 1988
6 up to today. And that's a very burdensome task to do,
7 and we don't think it's relevant because, as Your
8 Honor alluded to, that was a different transaction,
9 different facts.

10 And, whether or not we realize savings and
11 whether or not those savings were passed on to
12 ratepayers, which, by the way, we don't agree that's
13 the legal test here, that's irrelevant to this
14 proceeding because those aren't the savings that we're
15 justifying this control transaction on.

16 We're justifying what we want to do in
17 this case on the savings set forth in this
18 application. And if the unions want to test those
19 savings, they can. If they want to label those
20 claimed savings as "unsubstantiated" and
21 "self-serving," the words they use in their motion to
22 compel, they can. And they can put us to the test

1 whether those savings are there.

2 And the place to do it, as I'll explain in
3 a minute again, is in the New York Dock procedures
4 because that's when these issues will come up.

5 I might mention that in most of these
6 coordinations, they're arrived at, these New York Dock
7 implementing agreements, they're arrived at, through
8 negotiation. I'd venture to say that 90 percent of
9 the implementing agreements are arrived at through
10 negotiation.

11 Sometimes you have to arbitrate it. And
12 when you have to arbitrate them, that's when the
13 carrier has to put on its case and justify that these
14 savings and there and the efficiencies are there. But
15 that goes to this transaction.

16 When he talks about unsubstantiated
17 savings, I mean, he's talking about what we're
18 claiming in this transaction. But that's not what
19 he's asking in these interrogatories. He's asking
20 about these already consummated transactions that
21 happened years ago or some maybe more recently. But
22 it's completely irrelevant.

1 We would also argue -- and another basis
2 for our objection here is -- that he can't contest
3 that, in fact, there were savings from these prior
4 coordinations.

5 Take the one you mentioned. What happened
6 about three years ago is CSX sought to coordinate
7 train and engine operations from several former
8 railroads into what's called the Eastern Baltimore and
9 Ohio consolidated district. The way that process
10 works I've described is the carrier.

11 First you have to get the control approval
12 from the ICC or the STB. The ICC/STB imposes the New
13 York Dock conditions. Then if we want to go to a
14 particular transaction which we say is authorized by
15 that control, we serve the New York Dock notice. We
16 have a proposed implementing agreement. We describe
17 the impacts. We describe the labor agreements of the
18 ARU or whatever unions that we think have impediments
19 that have to be modified. and to justify that
20 override, we have to show transportation benefits and
21 efficiencies.

22 We put that case on before the arbitrator.

1 The union puts in a contrary case. The arbitrator is
2 the fact finder for the STB. And the parties can
3 appeal up to the STB. The STB says, "Yes, the savings
4 were there," "No, the savings weren't there." And
5 they prove the override or not of the labor
6 agreements.

7 That happened in connection with the EBOC.
8 The ARU members, at least one of them, the BLE, is
9 party to all of those proceedings. They are
10 represented by Mr. Edelman's firm. They litigated
11 these issues. And the arbitrator found savings. They
12 were unsubstantiated. They weren't self-serving. The
13 arbitrator found the savings were there.

14 The unions appealed to the ICC. The ICC
15 found the savings and approved the carriers' proposed
16 implementing agreement. The unions then appealed to
17 the D.C. Circuit. And the D.C. Circuit found the
18 savings were there. And the transaction went forward.

19 And then after the fact, the unions went
20 back now to the STB and said: Make them prove what
21 they're trying to do here. Make them prove in this
22 past coordination that the savings were really there.

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1 And the STB refused and said: We've
2 already found that the savings were there. You can't
3 re-litigate this issue again. Yet, that's what
4 they're trying to do through this interrogatory.

5 And, if I could hand the Court the STB's
6 decision? If I may approach the bench again? This is
7 the entire decision. This is where they came in after
8 the fact, like they're doing here now, trying to
9 challenge whether, in fact, there were savings. And
10 they asked us almost essentially this very
11 interrogatory question they asked us now.

12 They asked the STB to order us to do this.
13 And the STB declined. The STB found specifically that
14 the savings were there. I'd like to refer you to Page
15 3. If you look there under the discussions and
16 conclusions part, if you look in the second paragraph,
17 they're arguing, the unions are arguing, that the
18 arbitrator and the ICC erred by finding these savings.

19 And the STB says: We disagree. "As noted
20 by the ICC in its December 7 decision and affirmed by
21 the Court, the efficiency benefits of the
22 consolidation were supported and quantified in the

1 record before the arbitrator."

2 So not only are these past savings
3 irrelevant to whether or not we can justify the
4 savings in this new transaction. This has already
5 been judicially determined, already determined by the
6 ICC. And we think it would be unfair and burdensome
7 and basically a collateral attack on these decisions
8 to make us go back and do it again.

9 With respect to these other transactions,
10 they're of the same variety. Either the unions
11 contested the savings and lost or they agreed, the
12 issues never came up because the unions agreed that
13 the coordination was in the public interest, they
14 negotiated an implementing agreement and never
15 challenged the savings.

16 So we think it would be unfair and
17 burdensome for us to have to go back and try and
18 re-create going back 16 years what these savings were
19 when they're they're not even relevant to this case in
20 the first place.

21 JUDGE LEVENTHAL: Mr. Edelman?

22 MR. EDELMAN: Well, first off, the EBOC

1 one, which is the I guess (a), 48(a), I guess I have
2 to agree with Mr. Johnson I'm probably barred from
3 asking that of this decision, this particular one. As
4 to the others, there was never any such ruling in this
5 regard in the other ones.

6 And I would point out that all the STB or
7 an arbitrator ever does in one of these things is say
8 that "It seems to me that you've made a case that
9 there looks like there's going to be savings. The
10 carrier says that if we consolidate all of this and
11 interline traffic and do this, that, and the other
12 thing, we're going to save X dollars. Well, I guess
13 they say that. It sort of seems reasonable," the ICC
14 or the arbitrator might say. So off they go.

15 You know, in these cases they found that
16 was so. The question we're asking now is: Okay. Was
17 that presumption, in fact, borne out by the facts?
18 What actually happened?

19 And I would point out if you look at the
20 decision Mr. Johnson handed you this is the sort of
21 thing I'm talking about. In the quoted paragraph at
22 the bottom of Page 3, the third sentence, "The savings

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1 realized by CSXT can be expected to be passed on to
2 the public because of the presence of competition,
3 where the transportation," and they go on. Okay.

4 They're assuming that's going to happen.
5 The question is: Did it? And that's what we're
6 trying to ask. And yes, I guess probably after this
7 particular one, it's probably inappropriate, and I
8 withdraw it.

9 As to the other ones, the issue was not
10 litigated. And the specific issue of requiring
11 reporting as to these particular things wasn't
12 litigated. And as to the question actually being
13 litigated of whether or not there were savings
14 retrospectively, as opposed to maybe savings
15 prospectively, was not put at issue in those cases.

16 MR. JOHNSON: That's my point, Your Honor.
17 They didn't put them in issue. So they can't
18 challenge them now. In addition, I might also point
19 the Court back to the first item I handed you, the
20 excerpt from the Union Pacific-Southern Pacific merger
21 case.

22 This is the very short, two-page document

1 that we talked about when they were seeking a
2 commitment on contracting out. If you look to that
3 highlighted language, you can find the paragraph that
4 talks about contracting out. If you look immediately
5 below that, there's a short paragraph entitled,
6 "Annual Reports."

7 What happened in this case is ARU again,
8 the same group of unions that's here this morning,
9 asked the STB to order the applicants to report after
10 the fact on an annual basis what the savings were.

11 And the STB found that was too burdensome
12 a requirement to do to try and sort all of that out.
13 So the STB has recognized that what they're asking for
14 is a very burdensome undertaking.

15 And it's totally irrelevant again because
16 whether savings occurred in the past or not, we showed
17 they've been found to occur or they weren't contested.
18 But whether they occurred or not, whether they were
19 passed on or not, or whether that's even required or
20 not is all irrelevant to the case before us.

21 They have to test the merits of the
22 application of what we put forward today, not what

1 happened 18 years ago.

2 JUDGE LEVENTHAL: All right. Do you have
3 anything further to say, Mr. Edelman?

4 MR. EDELMAN: The only other thing I would
5 say is that I would point out there are two separate
6 parts to the various discovery requests. And one is:
7 What savings did you get? The other is to describe
8 how you believe that the public benefitted?

9 And I think the two things are different.
10 And whether or not there are arguments as to -- for
11 example, theoretically they could say, "Yes, there
12 were savings. There were or there weren't savings.
13 It doesn't really matter to you. What really matters,
14 what the Board's considering is: Is there a benefit
15 to the public?"

16 That's what the Board is being told here,
17 is that by virtue of the changes being made, the
18 public is going to benefit. So there are two separate
19 parts.

20 JUDGE LEVENTHAL: Well, what bothers me,
21 Mr. Edelman, is that you're dealing with other
22 transactions and not this transaction. I don't see.

1 Suppose the public did not benefit from
2 any of these consolidations and suppose there were no
3 savings from any of these consolidations. Does that
4 necessarily mean that there won't be savings as
5 projected in this transaction?

6 MR. EDELMAN: What we would say to the STB
7 is you should no longer presume that there will be
8 savings or, more importantly, that you should no
9 longer presume that they benefit the public.

10 All of this is built on a presumption and
11 where we get the evidence to be able to say the
12 presumption is incorrect except through discovery
13 here. This is the same parties doing the same thing.

14 And what we are saying is you're saying
15 the same thing here that you said before. Let's see
16 whether or not there was any validity to what you said
17 the last time.

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

19 (Whereupon, the foregoing matter went off
20 the record at 11:14 a.m. and went back on
21 the record at 11:16 a.m.)

22 JUDGE LEVENTHAL: Back on the record. All

1 right. I'm going to deny the motion to compel with
2 respect to Interrogatories 48, 49, 50, and 51 on the
3 ground that it cannot lead to information that would
4 be relevant in this proceeding. These are separate
5 proceedings from the one that's before the Board at
6 this time.

7 All right.

8 MR. CUNNINGHAM: Your Honor, before we go
9 on to 137, could we take a 5-minute break, please?

10 JUDGE LEVENTHAL: Sure. All right.
11 Five-minute recess.

12 (Whereupon, the foregoing matter went off
13 the record at 11:17 a.m. and went back on
14 the record at 11:26 a.m.)

15 JUDGE LEVENTHAL: We're back on the
16 record. I guess we're up to Interrogatory 137. Mr.
17 Reporter, will you copy Number 137 into the record at
18 this point as if it were orally read?

19 "Interrogatory No. 137. As of the date of
20 filing this discovery request, all sheet metal workers
21 on the roster at the Altoona Shop have been recalled
22 and more sheet metal workers are needed. As to this

1 situation:

2 "a. Explain why Conrail has not hired new
3 sheet metal workers at the Altoona shop as it has done
4 in the past when the roster was exhausted and more
5 workers were needed.

6 "b. Explain why the Vice-President of
7 Conrail's mechanical department can no longer make the
8 decision to hire additional sheet metal workers as he
9 has done in the past but must now obtain permission
10 from Mr. Ron Conway to hire additional workers.

11 "c. State whether Conrail must first
12 obtain approval or permission from NS and/or CSX
13 before it can hire new sheet metal workers at the
14 Altoona Shop."

15 JUDGE LEVENTHAL: All right, Mr. Edelman.
16 Is there anything further you wish to tell me?

17 MR. EDELMAN: Well, just generally to
18 explain these interrogatories request various types of
19 information pertaining to whether or not the CSX and
20 NS are already controlling Conrail, not merely by
21 nature of legal control or ownership or other elements
22 of legal sorts of elements that we've already alleged

1 in our petition to the STB but with respect to virtual
2 operation of Conrail itself. Can they hire employees?
3 Can they do certain maintenance work? Are they
4 required to limit certain work in certain areas, which
5 has an impact on employment?

6 We feel that these interrogatories are
7 pertinent because basically what they're asking is:
8 Are they now in illegal control of Conrail? Are they
9 now directing to some degree what Conrail does?

10 In part, some of this comes from a
11 statement made by a Conrail official -- and I have
12 copies here for the panel by Senator Specter and Mr.
13 Ouslander, who said that, was asked -- what happened
14 was some employees testified that they thought that
15 Conrail wasn't doing the level of maintenance that it
16 had done in the past. And attributed to the pending
17 merger of that, they were deferring maintenance, they
18 were deferring work they would otherwise do.

19 And, if I may, Your Honor, this is an
20 excerpt from a transcript I had made of a tape
21 recording at that hearing. And this is Mr. Ouslander,
22 who is a Conrail official. I think it says up front

1 he's a VP for Federal Affairs, Conrail.

2 It says in the middle of Page 29, "Capital
3 improvements would be as agreed to with CSX in the
4 agreement between the two companies. And I'm saying
5 in terms of normal maintenance we're doing what we
6 always do."

7 But then he goes on to say, "With respect
8 to capital improvements, I haven't been party to the
9 agreements with Conrail and CSX, but it's my
10 understanding that as part of the agreement, it was
11 addressed what capital improvements we would be
12 allowed to make." And then it goes on. There is some
13 further discussion, and Mr. Ouslander says he'd agreed
14 this in writing on the next page.

15 The point is it's not mere speculation on
16 our point that there seems -- I mean, you know, to
17 begin with, it's the observation of our members that
18 Conrail is not doing the level of work that it did in
19 the past and that it related to the merger, but
20 there's actually some information here that seems to
21 suggest that there are, in fact, limitations being put
22 on Conrail by CSX and NS.

1 With respect to Interrogatory 137, we have
2 some rather specific information here about the sheet
3 metal workers. And an official of that union was told
4 that they had to get permission from Ron Conway of NS
5 to hire additional workers.

6 MR. CUNNINGHAM: Pardon me. Mr. Ron
7 Conway of NS?

8 MR. EDELMAN: That's what we're --

9 MR. CUNNINGHAM: I don't think so. Mr.
10 Conway is an employee the last I heard of Conrail.
11 He's the Senior Vice President for Operations --

12 MR. EDELMAN: Well, maybe he has to --

13 MR. CUNNINGHAM: -- or, else, he's the
14 Executive Vice President. But he doesn't work for NS
15 as of a week ago.

16 MR. EDELMAN: Or maybe. In any event,
17 Your Honor, if there are agreements, we would like
18 them to be produced. If there aren't, they can say
19 that there aren't in response to a formal
20 interrogatory.

21 Now, you know, we asked some of these
22 questions early on. Carriers took the position that

1 this was improper at the time. And they said: Maybe
2 you'll get the answers to your questions when you look
3 at the application. And we agreed to withdraw them.

4 The agreement, my understanding was that
5 they would sort of tell us in the document depository
6 we could find things. And this ultimately didn't
7 happen.

8 We had an exchange of correspondence. And
9 we ultimately got a letter sort of saying: Oh, there
10 are no agreements. And now they're saying: Well,
11 that's the answer to your interrogatories.

12 We would like formal answers to the
13 interrogatories. They're saying they don't have to
14 answer them. If their answer is on the record in a
15 formal interrogatory there are no agreements to do any
16 of these things, then that's an answer. But we think
17 it's certainly relevant for us to ask whether or not
18 there are current agreements restricting what Conrail
19 does.

20 I also think that whether or not the fact
21 that we have a pending petition alleging that Conrail
22 is currently controlled legally by CSX and NS doesn't

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1 make it somehow irrelevant in the overall proceeding.
2 First off, I think it's something that the STB could
3 consider in deciding whether or not to approve the
4 transaction overall.

5 JUDGE LEVENTHAL: It goes to the issue of
6 premature control?

7 MR. EDELMAN: Yes, Your Honor.

8 JUDGE LEVENTHAL: All right.

9 MR. CUNNINGHAM: Well, Your Honor, I think
10 there are several issues that have been compounded
11 here by Mr. Edelman. Let's start with the first one.
12 Conrail will stipulate for the record with respect to
13 Number 137(c) that the answer is no.

14 We'll also stipulate for the record that
15 Mr. Ron Conway is a senior officer, senior to the Vice
16 President of Conrail's Mechanical Department, of
17 Conrail, and not of any other railroad. And yes, he
18 does have the authority to approve almost anything
19 that goes on on the operating side of the railroad.

20 With respect to Interrogatory Number 138,
21 Conrail will also stipulate --

22 JUDGE LEVENTHAL: How about (a)?

1 MR. CUNNINGHAM: Well, can I come back to
2 those, Your Honor?

3 JUDGE LEVENTHAL: All right. Sure.

4 MR. CUNNINGHAM: This is the agreements
5 issue Mr. Edelman is talking about.

6 JUDGE LEVENTHAL: All right.

7 MR. CUNNINGHAM: I'm going to give him
8 answers to his questions.

9 With respect to Number 138, Conrail will
10 stipulate that the answer is none. There are no such
11 agreements. So we have no agreements which adversely
12 affect our decision-making process with respect to the
13 issues other than the agreements which are now on the
14 record, which are the merger documents, and which
15 provide that we have to maintain the property, not
16 spend more money than we spent before, and keep things
17 going, and make as much money as we possibly can.

18 They're standard merger agreements. And
19 he has access to all of this.

20 MR. EDELMAN: And, if I may, now that
21 we're getting actual responses to my questions, what
22 about Mr. Ouslander? I said: Was he --

1 MR. CUNNINGHAM: No one asked me about Mr.
2 Ouslander. It's not a question. I've never seen this
3 document before in my life. And if you'd like to
4 submit a question, we may want to answer it.

5 MR. EDELMAN: All right.

6 MR. CUNNINGHAM: With respect to the other
7 questions as to why Conrail is doing what it did,
8 Conrail is doing a lot of things. It's a big
9 railroad. It's an independent railroad. It's
10 required by law to be an independent railroad. It's
11 required by law for the benefits of the shareholders
12 to maximize its profits. And it's going to do
13 everything possible to do that.

14 And to go through and justify these and
15 then under some other principle any other actions that
16 Mr. Edelman or anyone else wanted to explain bears no
17 relationship to the merits of the application, which
18 asks the question whether or not it is in the public
19 interest for NS and CSX to acquire Conrail.

20 It solely has to do with how Conrail is
21 conducting its business today, which is its
22 competitors and its proprietary information has no

1 bearing on the merits of the application whatsoever
2 and no bearing on the question of control since there
3 is no control in effect.

4 And I can stipulate that we are making
5 none of these decisions at the direction of CSX or NS.

6 JUDGE LEVENTHAL: All right. Now you're
7 referring to --

8 MR. CUNNINGHAM: I'm referring to 137(a)
9 and (b), 138, 139, 140, and 141. All of these things
10 relate to what Conrail is doing or plans to do as an
11 independent company, do not bear on the merits of the
12 proceeding, and does not relate, except in some
13 ethereal way that all information about Conrail's
14 activity in general would relate to, any control
15 conspiracy theories that Mr. Edelman may have.

16 He could bring a complaint if he believes
17 that there is actual control, in fact, which there is
18 not. He has brought an action arguing that there is
19 control in theory, a declaratory judgment theory,
20 which is now pending before the Board and which all of
21 the applicants have answered.

22 But this is merely an inquiry into things

1 that interest his members about why Conrail is doing
2 what it is doing today. And we have no obligation
3 whatsoever. There is no relevance.

4 And the burden of these particular
5 questions or of any other in terms of interfering with
6 our ability to run the railroad would be substantial,
7 Your Honor, if we continue, if this theory applied and
8 we generally had to justify all of our actions on the
9 railroad.

10 Any action that we do, that we take to cut
11 costs and run the railroad more efficiently is
12 obviously what we're supposed to be doing. And going
13 beyond that and having to bring operating people in or
14 running the lawyers out to ask them, "Well, why did
15 you do this?" seems absolutely irrelevant to this
16 proceeding. And, therefore, we would --

17 JUDGE LEVENTHAL: All right. Mr. Edelman?

18 MR. EDELMAN: Yes, Your Honor. We
19 understand that Conrail as an independent entity has
20 an incentive to try and be as efficient as possible
21 and cut costs reasonably.

22 The question is that our members perceive

1 the difference. Our members perceive that things are
2 not being -- that they are cutting more for doing less
3 than they did prior to the announcement of this
4 transaction.

5 JUDGE LEVENTHAL: But let's go to specific
6 questions. Now, 137(a), you're asking them to explain
7 why they have not hired new sheet metal workers at the
8 Altoona shop. What has that got to do with this
9 application? Suppose whatever reason they had --

10 MR. EDELMAN: Because in the past, when
11 they've had a lot of work, they hired more people and
12 now they're not.

13 JUDGE LEVENTHAL: Well, they have a
14 pending merger application before the Commission.
15 Whatever reason they have, how does that affect the
16 merger application?

17 MR. EDELMAN: Because it may indicate CSX
18 and NS telling them that "We don't want you to hire
19 any more people, and we don't want you doing more
20 work."

21 I would say that, remember, this comes at
22 the background of the Santa Fe-Southern Pacific case,

1 where the voting trust was, in fact, breached. And
2 what happened there was communications were made
3 between the controlling entity through this trustee to
4 the controlled entity. And some of those happened to
5 relate to work that was being performed by our people.

6 And the question is: Why are you tracking
7 over a kind of particular place?

8 MR. CUNNINGHAM: Your Honor, I stipulated
9 for the record that we did not do these things at the
10 request of either CSX or NS. So I am, therefore,
11 answering the question in that degree. We see no
12 reason why we should tell you why we do things.
13 They're for our business interests, does not bear on
14 the application.

15 I think Mr. Johnson is informing me of the
16 liturgy of SF-SP. And I believe the Board agreed with
17 that perspective also at that time.

18 JUDGE LEVENTHAL: All right. Except for
19 the stipulations made on the record, I'll deny 137(a).
20 (b) you've already answered, haven't you?

21 MR. CUNNINGHAM: Yes, I have.

22 JUDGE LEVENTHAL: Yes. All right. Now

1 138.

2 "Interrogatory No. 138. Identify all
3 agreements between Conrail and CSX and/or NS, other
4 than those that were submitted along with the
5 Application, that control, or in any way relate, to
6 the manner in which Conrail has conducted or will
7 conduct its operations during the pendency of the
8 Application, including but not limited to the level of
9 service, the number of employees it hires, the amount
10 of overtime that employees perform, the amount of
11 capital improvement it undertakes, and its maintenance
12 of track or locomotives. For each agreement, provide
13 the name of the agreement, the date of the agreement,
14 a brief statement regarding the purpose of the
15 agreement, and how the agreement impacts employees."

16 MR. CUNNINGHAM: I've answered. The
17 answer is none.

18 JUDGE LEVENTHAL: You've answered that.
19 And 139?

20 "Interrogatory No. 139. Identify all
21 actions taken by Conrail since December 1, 1996 until
22 the present which involve a reduction in the level of

1 services offered by Conrail, a reduction in the use of
2 certain lines, a reduction in overtime for employees,
3 or deferred maintenance on tracks or locomotives. For
4 each such action, describe in detail the action taken,
5 the date of the action, and the specific impact, if
6 any, the action had upon employees."

7 JUDGE LEVENTHAL: Now, do you want to
8 defend that, Mr. Edelman? The question is relevance.

9 MR. EDELMAN: I don't want to belabor the
10 time, Your Honor.

11 JUDGE LEVENTHAL: Your argument is the
12 same?

13 MR. EDELMAN: Yes.

14 JUDGE LEVENTHAL: All right. One
15 thirty-nine is denied. One forty. All right. One
16 forty, 141 denied.

17 "Interrogatory No. 140. Identify all
18 future actions that Conrail intends to take pending a
19 ruling on the Application which involve a reduction in
20 the level of services offered by Conrail, a reduction
21 in the use of certain lines, a reduction in overtime
22 for employees, or deferred maintenance on tracks or

1 locomotives. For each such action, describe in detail
2 the action to be taken, the anticipated date of the
3 action, and the specific impact, if any, the action
4 will have upon employees.

5 "Interrogatory No. 141. State the number
6 employees in each craft represented by the Allied Rail
7 Unions that performed work on Conrail in each month of
8 1996 and 1997, the number of straight time hours they
9 worked, and the number of overtime hours they worked.
10 Your response to this interrogatory must be
11 supplemented as the information for future months in
12 1997 becomes available."

13 MR. EDELMAN: If I may, just so I
14 understand that, I presume we would not be thereby
15 limited asking specifically about Mr. Ouslander's
16 statements and whatever he's referring to.

17 JUDGE LEVENTHAL: I only rule on what's
18 before me. That's my general principle. I only rule
19 on what is before me formally.

20 I think that we have now handled each one
21 of the items. We have two items open. That's 11 and
22 94 where the parties are going --

1 (Whereupon, the foregoing matter went off
2 the record at 11:40 a.m. and went back on
3 the record at 11:41 a.m.)

4 JUDGE LEVENTHAL: All right. We have 11
5 and 94. How do parties want to handle this? Do you
6 want to recess and I keep the Reporter? Do you want
7 me to close the argument? If you can't agree, we can
8 hear further argument in my office. And I'll make a
9 ruling and issue an order. Whatever you desire I'll
10 do.

11 MR. JOHNSON: I feel pretty confident that
12 Mr. Edelman and I can reach an agreement on the use of
13 information in the arbitration that would dispose of
14 94. I feel it's highly unlikely that we'll be back
15 before you on that.

16 With respect to Interrogatory Number 11 on
17 whether this information that we say is publicly
18 available will satisfy Mr. Edelman or not, I don't
19 think he'll be able to look at that today in time. So
20 I suggest we close the hearing. He can look at it.
21 If he's not satisfied, then we'll be back here another
22 day.

1 JUDGE LEVENTHAL: All right.

2 MR. EDELMAN: I would agree with Ron as to
3 respect to 94. With respect to 11, I'm amenable to
4 the notion of trying to see whether or not that data
5 satisfies what we're looking for, but I feel that CSX
6 ought to provide me what it gave to the AAR.

7 JUDGE LEVENTHAL: Wait a minute. Let's go
8 off the record.

9 (Whereupon, the foregoing matter went off
10 the record at 11:42 a.m. and went back on
11 the record at 11:43 a.m.)

12 JUDGE LEVENTHAL: The parties indicated
13 they will make every effort to dispose of 11 and 94
14 without any further action on my part needed. If any
15 unanticipated problem arises, the party, Mr. Edelman,
16 can bring it before me again at one of our weekly
17 sessions if needed.

18 Anything else before us this morning?

19 All right. The oral argument stands
20 closed.

21 (Whereupon, the foregoing matter was
22 concluded at 11:44 a.m.)

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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,
August 28, 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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P-R-O-C-E-E-D-I-N-G-S

(9:31 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. This is a discovery conference in Docket Number STB Finance 33388. We have the motion to compel filed by New York State Electric and Gas to compel responses to data requests by the applicants.

All right. We'll take appearances at this time. For the movant?

MR. MULLINS: William Mullins with Troutman Sanders representing New York State Electric and Gas.

JUDGE LEVENTHAL: All right.

MS. BROWN: Sandra Brown, also with Troutman Sanders.

JUDGE LEVENTHAL: Very well.

MR. DENIS: Paul Denis, Arnold and Porter, on behalf of CSX.

MS. BRUCE: Patricia Bruce from Zuckert, Scoutt and Rasenberger on behalf of Norfolk Southern.

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

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

3 JUDGE LEVENTHAL: All right. Very well.
4 I'm ready to hear argument. I propose we'll take each
5 data request individually. By the way, I did not
6 receive any written responses to the motion. Is that
7 correct? Did anybody file any?

8 MR. EDWARDS: Your Honor, no, we did not
9 file any written responses.

10 JUDGE LEVENTHAL: All right. Very well.
11 Before we go on, are any of these items disposed of,
12 resolved?

13 MR. MULLINS: No, Your Honor.
14 Unfortunately, we tried to settle them on Friday and
15 Monday through some conferences. And it's unfortunate
16 that we were unable to come to any agreement.

17 You know, we offered some things up to try
18 to limit the scope of these questions and proposed
19 various ways that we could work with them. And, for
20 whatever reason, they objected to our proposals to
21 limit and to try to settle these.

22 And that necessitated us coming in front

1 of you today.

2 JUDGE LEVENTHAL: All right. Let's take

3 --

4 MR. NORTON: Your Honor? Your Honor, if
5 I might just --

6 JUDGE LEVENTHAL: Yes, sir?

7 MR. NORTON: -- clarify, or after that,
8 there is one qualification. I think we have come to
9 an agreement that the requests at issue are limited in
10 their application to CSX and NS and do not apply to
11 Conrail.

12 JUDGE LEVENTHAL: All right. Is that
13 correct, Mr. Mullins?

14 MR. MULLINS: I don't believe we came to
15 an actual handshake deal, so to speak, on that. We
16 discussed that. And we are willing to discuss that as
17 part of this discussion today. We think it's probably
18 a legitimate idea to limit, to not require Conrail to
19 produce some documents in response to 1 through 5 and
20 14 through 16.

21 Mr. Norton and I have not had a chance to
22 discuss this before this morning. I did not realize

1 it was an actual agreement. I thought it was a
2 proposal on the table that we were looking favorable
3 on.

4 MR. NORTON: It was in the context of
5 discussing these requests and their statement of why
6 they wanted it. It emerged that it didn't apply to
7 Conrail. And it was an agreement with Ms. Brown and
8 in a conference call with Mr. Edwards and Mr. Datz
9 that it wouldn't be applied to Conrail. I sent Ms.
10 Brown a letter yesterday morning, a fax, confirming
11 that. This is the first I've heard any qualification
12 or suggestion to the contrary.

13 JUDGE LEVENTHAL: Mr. Mullins' motion.
14 You tell me what you want to do, Mr. Mullins.

15 MR. MULLINS: I think what we ought to do
16 is go through each one of them. And to the extent it
17 doesn't apply to Conrail, we can address that.

18 JUDGE LEVENTHAL: All right. The first
19 item is "Identify and produce all contracts between or
20 among any of the Applicants for delivery of coal to
21 any shipper whereby the amount of coal delivered
22 exceeded or is expected to exceed 100,000 tons."

1 Do you want to tell me first what the
2 objection is, applicants?

3 MR. EDWARDS: Your Honor, the objection is
4 that this discovery request has been heard. This
5 exact discovery request has been heard, argued,
6 decided upon by Your Honor, then argued on appeal,
7 then decided on by the STB, and joined in by NYSEG in
8 future discovery, which was argued and heard and ruled
9 upon by Your Honor. And we think that the question
10 has been settled.

11 And if I could approach Your Honor to give
12 you a copy of the discovery request in question, which
13 is Atlantic City Electric Company, ACE, et al., and
14 you could compare it to the one before you with NYSEG,
15 I think that the comparison, it's plain on its face.

16 The only restriction here that makes a
17 difference is that the interrogatory or discovery
18 request by NYSEG is limited to the years 1995 through
19 1997 through the instructions; whereas, ACE was a
20 little bit broader. And in other ways, the NYSEG
21 question is even broader than the ACE.

22 We just totally don't need to argue the

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1 same question again.

2 JUDGE LEVENTHAL: All right. Mr. Mullins?

3 MR. MULLINS: Well, that's not really the
4 issue, Judge, but I will be happy to address that.
5 Number one, I wasn't here for any of those ACE
6 arguments or discussions or discovery conferences
7 prior to the time I showed up before you the first
8 time. So I don't even know what went on. We weren't
9 even part of any of those discussions.

10 If you recall, the last time we were here,
11 I had the one letter. And we were trying to -- one
12 part of our case dealt with some similar issues to
13 what Mr. McBride and his consultants were trying to
14 accomplish.

15 If you can recall, we sat up here. And I
16 was quite candid. And I told you and the other side
17 that our theory was different than the ACE theory. We
18 were not pursuing the one-lump theory. We had a
19 completely different situation. And we weren't part
20 of that one-lump notion.

21 And Mr. Norton stood up, and he tried to
22 get us to agree to a deal where I wouldn't file any

1 more discovery if we would just allow maybe them to
2 produce some relevant things.

3 And, of course, "Well, I'm not going to
4 limit my response to discovery from now into the
5 future."

6 And Your Honor said, "Yes. Mr. Mullins,
7 we'll rule at those one at a time when you file those.
8 And we'll come about." So you ordered that Conrail
9 and only Conrail produce documents that are relevant
10 to NYSEG's situation. And that's appropriate because
11 Conrail serves NYSEG today. So we want to know what
12 Conrail -- how they view the NYSEG situation, an we
13 want to know how Conrail views the NYSEG situation.

14 But that is not really the ultimate point
15 here. The ultimate point is that post-transactions,
16 if I can take a moment to just roughly explain the
17 situation to you and give you a basis of
18 understanding, New York State Electric and Gas has
19 four coal-fired plants. Those coal-fired plants, Your
20 Honor, are all currently exclusively served by
21 Conrail, by rail, by Conrail.

22 Conrail also exclusively serves all of our

1 coal mines. So we have no other rail carrier involved
2 in our current NYSEG movements. We have Conrail. And
3 Conrail serves all the mines. Conrail serves all of
4 our plants.

5 CSX and Norfolk Southern, as you know,
6 have proposed to divide Conrail, to take some of the
7 assets and divide them up. Well, for whatever quirky
8 reason, which we're trying to figure out, we are the
9 only utility company in this whole entire transaction
10 who has had their plants split between Norfolk
11 Southern and CSX.

12 CSX is going to take over the Conrail line
13 that serves one of our plants. Norfolk Southern is
14 going to take over the line, the Conrail line, that
15 serves the other three of our plants. So we are
16 having our plants divided between CSX and Norfolk
17 Southern.

18 Now, when you're trying to put on a case
19 at the STB, or formerly the ICC, you have to go in as
20 a shipper if you're going to challenge a merger or
21 request a condition. You have to go in as a shipper,
22 and you have to say why you are going to be harmed by

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1 the transaction. You have to establish that
2 post-transaction there is going to be some sort of
3 harm to you that requires the Commission to impose a
4 condition to alleviate that harm.

5 So we are trying to figure out -- and, in
6 fact, it is the key element of this case -- exactly
7 how CSX and NS view competition in the utility
8 industry. And by "competition," I mean the
9 competition in the rail industry, not competition
10 necessarily among utility companies, but how they view
11 competition for the delivery of coal into utility
12 plants, because we're going to have CSX service to one
13 plant after the merger, we're going to have NS service
14 to the three plants after the merger.

15 So we want to know in order to establish
16 harm. In order to prove to the Board that we're going
17 to have harm, we want to know how CSX views
18 competition. When they go to negotiate a contract
19 with a utility company, for CSX-served utility
20 companies, currently right now pre-transaction, we
21 want to know what they view as the competitive factors
22 in that negotiation.

1 We want to know whether they think trucks
2 are an alternative, whether they think barges are an
3 alternative, whether they think Norfolk Southern is an
4 alternative.

5 These are the kinds of issues that are
6 extremely relevant to New York State Electric and Gas'
7 point because those are the things we have to look at
8 in order to establish that there is going to be a harm
9 to NYSEG post-transaction.

10 It's the same for Norfolk Southern. We
11 want to look into Norfolk Southern's files. We want
12 to see how they negotiated with the utility companies,
13 what they view is the competitive market, whether they
14 view CSX as a competitor. Those are the exact issues
15 we need to know.

16 But indeed they themselves in their own
17 application have brought up many arguments about why
18 northeastern utilities are not going to be harmed.
19 And in depositions and actually in the application
20 themselves, their own witnesses point to the fact as
21 an element of competition, CSX witness and NS' witness
22 both say, "Well, you're not going to be harmed, NYSEG,

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1 post-transaction because you know what? If the rate
2 that Norfolk Southern charges to the three plants that
3 it's going to deliver post-transaction, if the rate
4 that it's going to charge for the delivery of your
5 coal goes too high, you're just going to ramp down
6 your generating capacity down on the Norfolk
7 Southern-served plants and ramp up your generating
8 capacity on the CSX-served plant. So you're going to
9 get the benefit of CSX and Norfolk Southern
10 competition. You'll be able to play the two of them
11 off of each other in order to get your rates lowered."

12 And indeed their own witnesses in their
13 application say, "Hey, Southern Company Utility does
14 this all the time to CSX and Norfolk Southern.
15 Virginia Power does this all of the time to CSX and
16 Norfolk Southern."

17 Well, we're here to test that, Judge.
18 We're here to see if that's true, whether or not what
19 they say is true, because that's what this case is all
20 about. Are we going to have competition
21 post-transaction or are we going to be harmed
22 post-transaction? So we are going straight to the

1 issues that they themselves have raised in the
2 application.

3 Now, that's a general basis and
4 background, Your Honor for the reason why we
5 submitted these 20 interrogatories and document
6 requests. They've objected to 11 of our 20
7 interrogatories and document requests. And they're
8 trying to compare us to ACE and all of these other
9 rulings that you've done that weren't even relevant to
10 the NYSEG situation.

11 So I'm happy to go through each one of
12 these requests and explain to Your Honor why they're
13 necessary. And for the first request, for example, we
14 want to know why. You know, we want to see the
15 contracts between CSX and its coal utility companies.
16 It's coal receivers. And we want to see the contracts
17 between Norfolk Southern and its coal utility
18 contracts.

19 And then the second request says --

20 JUDGE LEVENTHAL: Well, no. We're going
21 to take one request at a time.

22 MR. MULLINS: Okay. One and 2 are tied

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1 together.

2 JUDGE LEVENTHAL: Oh, all right.

3 MR. MULLINS: Because 1 says: Produce all
4 of the contracts. And then 2 says: Produce all of
5 the documents that back up the reasons why you entered
6 into those contracts.

7 So, in other words, the real stuff, the
8 real juicy stuff, about, wow, we're going to give them
9 a lower break because NS is going to serve their other
10 plant or we're going to give them a lower break
11 because if we don't, trucks are going to deliver the
12 coal, that's what we're trying to find out.

13 Now, they objected and are saying it's
14 burdensome. We offered, Your Honor, to make that
15 100,000 tons to be a million tons because NYSEG ships
16 about 3 million tons a year.

17 So if we're trying to figure out how CSX
18 and NS view large utility companies, like NYSEG, that
19 ship three million tons a year, I admit it. A hundred
20 thousand was probably -- you know, we didn't need to
21 do that. You know, we could go up to a million
22 because post-transaction CSX is going to ship about

1 1.6 million and NS is going to ship about 1.3 million.

2 So we want to know comparable situations
3 on the current CSX and NS lines, how they view the
4 competition for their shipment of coal to these
5 utility companies. And so we were willing to go up to
6 a million tons.

7 Now, Mr. Norton made a point, and I think
8 it was a legitimate point. Mr. Norton said: Well,
9 post-transaction, you're not really going to get
10 service by Conrail because Conrail is going out of
11 business. So if you're trying to test the theory of
12 how CSX and NS are going to view competition, you
13 don't need Conrail documents for that because you
14 already know how Conrail treats you. And Conrail
15 isn't going to serve you post-merger. And so this is
16 really you don't need Conrail because Conrail isn't
17 going to be in existence.

18 And, quite frankly, Mr. Norton is right on
19 that. We really don't because we do know how Conrail
20 serves NYSEG. But we don't know how CSX or NS views
21 their utility customers.

22 So in the context of these discussions, we

1 offered up -- I was on the call part of the time. And
2 then I was in the middle of a deposition on this case.
3 And my associate, Ms. Brown, handled most of the call.

4 But she offered up that we would waive it
5 for Conrail, but we still wanted these documents for
6 CSX and NS. And we were willing to go to a million
7 tons. And they still wouldn't produce it. And I'd
8 like to know why.

9 JUDGE LEVENTHAL: All right.

10 MR. EDWARDS: Your Honor, I would like to
11 address just a few of the points, not necessarily in
12 order of importance here. NYSEG has been involved in
13 this case since May 9th, prior to the date the
14 application was filed, and have received all of the
15 orders and all of that. With regard to whether or not
16 they're bound with your prior rulings, I think it's
17 fairly evident that they would be.

18 Mr. Mullins speaks to the point that
19 they're not a one-lumper and so shouldn't be bound by
20 Mr. McBride's arguments. Mr. Mullins was here last
21 week when we had the discussion as to whether or not
22 the discovery covered by ACE dealt only with the

1 one-lump theory. And it was pointed out at that time
2 that, in fact, Delmarva was the only power plant
3 involved in that discovery that even implicated the
4 one-lump theory.

5 And the question was quite a lot --
6 according to Mr. Bride and Mr. Mullins, the question
7 under ACE was quite a lot broader than that. It was:
8 How do Norfolk Southern and CSX set their rates?

9 Now, we have heard: How do Norfolk
10 Southern and CSX view competition in negotiations?
11 And so while we need the contracts to figure out how
12 they set their rates and all the documents with regard
13 to those contracts to see how they set their rates,
14 now we need all of the contracts to see how they view
15 competition and negotiate how they set their rates.

16 The arguments have been we have already
17 had many of these arguments here. Mr. Mullins, in
18 fact, has been part of those. If I could approach?
19 This is a copy of Mr. Mullins' "Me, too," with regard
20 to the ACE discovery. And that was August 5th. And
21 we have dealt with that issue as well.

22 Really, that's it. I fail to see how any

1 of his discussions of how NYSEG is different than
2 Delmarva is any different than the argument that
3 Indianapolis Power and Light is different, that the
4 American Electric Power Company is different than
5 Delmarva.

6 We have had these arguments before. They
7 have been ruled upon. He is joined into the
8 discovery. He has argued the discovery. We have
9 been, Your Honor, and --

10 JUDGE LEVENTHAL: Well, Mr. Mullins,
11 Request Number 1, how does that differ from the
12 Document Request Number 1 of ACE?

13 MR. EDWARDS: It differs in two ways.

14 JUDGE LEVENTHAL: What else is he asking
15 for?

16 MR. EDWARDS: It differs in two ways, Your
17 Honor. In Mr. Mullins' request, he gives an
18 instruction that the time periods covered by the
19 documents are 1995 to present; whereas, with ACE, they
20 asked for 1978 through 1997.

21 In response to arguments a week ago, I
22 believe, you limited NYSEG's discovery request with

1 regard to these documents to 1995 through 1997.

2 JUDGE LEVENTHAL: That's now what he's
3 asking for?

4 MR. EDWARDS: That's what he's asked for
5 and received --

6 JUDGE LEVENTHAL: Well, what is --

7 MR. EDWARDS: -- or will receive.

8 MR. MULLINS: Well, I was supposed to
9 receive those yesterday. I haven't received them yet.

10 But here's the difference, Your Honor. If
11 you closely read our letter, what we are saying is we
12 are going to join in the request based upon your
13 ruling. Your ruling had limited ACE's discovery to
14 destinations served by Conrail, which is in the
15 letter.

16 That means since we are solely a -- there
17 are three sets of documents we're looking here for:
18 documents related to NYSEG for Conrail, documents
19 related to utility companies for CSX, documents
20 related for utility companies for Norfolk Southern.

21 Documents related to destinations served
22 by Conrail, which is what you ruled on previously for

1 ACE, since Conrail is our only carrier, the only
2 documents that are going to be produced when you
3 ordered that those documents be produced are going to
4 be documents that are in Conrail's files. CSX and NS
5 aren't going to have any documents that are related to
6 NYSEG because they don't serve NYSEG right now.

7 So we joined in the request and said:
8 Yes, Your Honor. Our first request is for the
9 documents related to Conrail because that's
10 destinations served by Conrail. And, yes, we need
11 that information. We need to see how Conrail views
12 NYSEG.

13 Then we filed, the next day we filed,
14 these discovery requests to cover the documents that
15 are CSX and NS documents, which are documents we
16 weren't asking for in this letter.

17 What we needed to do in this discovery
18 request now that's in front of you that's different
19 from this letter is we needed to see how CSX and NS
20 view competition, how they view setting rates with
21 utility companies. You had ordered the information as
22 to how Conrail views that.

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1 And, quite frankly, all three of those
2 issues are relevant. And it's more relevant,
3 actually, as to how CSX and NS view competition
4 because they're going to serve our plants.

5 They're taking our plants, splitting them
6 in two, and they're saying: You're not going to be
7 harmed. Don't worry about it, NYSEG. It's great. We
8 provide great service to our utility companies. We're
9 the best in the world. You're going to get slow
10 sulphur coal access, single line access. You're going
11 to have all of this competition. And, gee, if you
12 don't like the rates that we're going to charge at the
13 NS plants, you'll just switch all of your generating
14 capacity over to the CSX plants. And, gee, Virginia
15 Power does this all the time. And Southern Company
16 does this all the time.

17 Well, let's see. Let's test their theory.
18 And that's all we're doing, Judge, is trying to get
19 the information to test their theories.

20 JUDGE LEVENTHAL: All right.

21 MR. EDWARDS: If I may, Your Honor? I
22 wasn't able to finish answering your question, and I'd

1 like to go ahead and do so.

2 JUDGE LEVENTHAL: Sure.

3 MR. EDWARDS: The discovery propounded by
4 ACE was in three different documents: one directed to
5 Conrail, one directed to Norfolk Southern, and one
6 directed to CSX.

7 The request you have before you happens to
8 be the one directed to Conrail. If you substitute
9 Norfolk Southern in there, you've got the same thing;
10 CSX, the same thing.

11 So, in fact, ACE did ask for documents
12 from the files of Norfolk Southern and from the files
13 of CSX. And you ruled that they could get the
14 documents from Conrail's files.

15 So in that way, the discovery questions
16 are not any different. It's just that one was more
17 efficient in asking applicants, and one asked three
18 different questions, one of each of the applicants.

19 And, in fact, the request by NYSEG is even
20 broader than the one requested by ACE in that ACE even
21 limited it for carriage of coal by unit train or train
22 load movement; whereas, that isn't even a limitation

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1 in the one before you.

2 JUDGE LEVENTHAL: Now, do I understand
3 that you have furnished the information to ACE
4 regarding Norfolk Southern?

5 MR. EDWARDS: With regard to ACE, we have
6 been able to provide them with the recent years. With
7 regard to NYSEG, we are in the process of developing
8 computer tapes and producing documents in response to
9 your order.

10 JUDGE LEVENTHAL: They're only asking for
11 the recent years; right?

12 MR. EDWARDS: They're only asking for the
13 recent years. You've ruled that they could only get
14 the recent years.

15 JUDGE LEVENTHAL: Right.

16 MR. EDWARDS: And that's what we're
17 producing. And we're working diligently to do so.

18 We have a much different and much broader
19 question before you, though, because, I mean, this
20 goes back to what they asked for before and what you
21 ruled upon before. And we are not providing them at
22 this time all documents related to all contracts for

1 all coal shipments, as ACE had originally asked as
2 well.

3 JUDGE LEVENTHAL: All right. Any further
4 --

5 MR. NORTON: Your Honor, if I might? I
6 hesitate because I think Mr. Mullins has now
7 acknowledged that Conrail isn't covered by 1 and 2.
8 But since I've been involved in all of this, it might
9 be helpful.

10 I think a difference here is that what Mr.
11 Mullins is asking for here, he's getting the documents
12 relating to service to Conrail because that was what
13 he asked for in his letter. What he's asking for in
14 these requests is documents relating to delivery of
15 the coal to other facilities than those of NYSEG
16 served by Conrail; in other words, anyone else.

17 This was part of Mr. McBride's original
18 request. It is what you cut him back on and said that
19 was too broad. He went up on appeal on that very
20 issue, saying that they needed everything, now just
21 the Conrail-served destinations. And they needed it
22 not only because of the lump sum theory, but they had

1 broader theories that they were trying to probe in
2 terms of getting a better understanding of the pricing
3 practices of the railroads.

4 The Board upheld your limitation, saying
5 he wasn't entitled to get that. So he is asking for
6 now precisely what the Board said in its ruling in
7 Decision 17 that Mr. McBride was not entitled to.
8 There's no difference. I think it's as simple as
9 that.

10 MR. DENIS: Your Honor, if I might concur
11 in Mr. Norton's remarks? I think what you've heard
12 from Mr. Mullins today gives you further reason to
13 adhere to the rulings that you had prior made and the
14 Board affirmed.

15 Mr. Mullins has told you that he keeps
16 hearing this wonderful story -- he told it very well,
17 grave benefits to his client that will result from
18 this transaction and we do firmly believe that. He's
19 suspicious. He says: I'm not sure we're going to be
20 better off, and I want to test that.

21 Your Honor, that is not being made worse
22 off. His client is not suffering any harm in this

1 transaction. He's not telling Your Honor that they
2 are. He's saying: I'd like to see if we're really
3 going to be better off or not. That is not a relevant
4 line of inquiry of discovery.

5 Secondly, he says: I would really like to
6 understand how they negotiate and what they go about.
7 That is highly competitively sensitive information.
8 As Your Honor well knows, -- he's heard this argument
9 before in these proceedings -- that is precisely why
10 CSX -- and if I can speak for NS as well -- does not
11 want to turn over this information.

12 What the NYSEG group would like to do is
13 understand how they're going to negotiate with us once
14 we begin to compete to serve them. And,
15 understandably, as commercial enterprises, we do not
16 like to open up our books and records to people on the
17 other side of the table.

18 Now, where there is no relevance here, we
19 see no purpose for that. And we think Your Honor
20 should adhere to the rulings you issued prior.

21 MR. MULLINS: Your Honor, let me address
22 it because he's now brought up a whole separate issue,

1 which is the commercial sensitivity.

2 You know, they're arguing three things
3 here. First, they're saying: Well, this is just like
4 ACE. Okay? Then they're saying: Well, it's not
5 relevant. Then they're saying: Even if it is
6 relevant, it's commercially sensitive.

7 I mean, let's take first the relevance
8 argument because we can deal with that right off the
9 bat, which is the Board's standard for whether
10 something should be produced is contained at 49 CFR
11 1114.21A.

12 The standard is not relevant, Your Honor.
13 The standard is whether it appears, the discovery that
14 you put forth, appears reasonably calculated to lead
15 to the discovery of admissible evidence.

16 You don't have to ask for something that
17 you're necessarily going to put into the case. You
18 just have to ask for something that is reasonably
19 calculated to lead to admissible evidence. So
20 relevance is really not the standard. And that's the
21 Board's own regulation.

22 Now let's deal with the ACE argument.

1 Simple diagram. Okay? I'm not any tricks. I'm not
2 trying to play any tricks there. Can I approach, Your
3 Honor?

4 JUDGE LEVENTHAL: Yes, sure.

5 MR. MULLINS: You have there ACE at the
6 end, the destinations served by Conrail. ACE is
7 testing the theory that NS picks up coal where their
8 coal mines are, takes it to the interchange point with
9 Conrail, gives it to Conrail, who then Conrail takes
10 it to ACE.

11 CSX also has the ability, Your Honor, to
12 take coal from the mines that it serves and take it up
13 to the interchange with Conrail, the point that they
14 give the traffic over to Conrail. And then Conrail
15 takes it to ACE.

16 What ACE is trying to test is whether or
17 not since their coal -- they get coal in what's called
18 joint line moves. That means they get coal in a
19 CSX-Conrail move or an NS-Conrail move. So what ACE
20 is trying to test is whether or not CSX and NS compete
21 for that first leg, so to speak, of the journey of the
22 coal to ACE.

1 That's not NYSEG's situation. NYSEG is
2 exclusively served by Conrail right now. What we're
3 trying to test is how NS and CSX view competition
4 between themselves for the delivery of coal to utility
5 plants. It's different from ACE. We're not a
6 one-lump theory.

7 Your Honor's discovery request and the
8 whole appeal up to the Board, all of that dealt with
9 the one-lump theory. And the Board said: Hey, for
10 the one-lump theory, you don't need this information.
11 Judge Leventhal was right on target. He limited it.
12 It was great, and we uphold this decision. That's
13 fine.

14 They say: NYSEG's been in this case
15 forever. Well, I'm brand new counsel. NYSEG switched
16 counsel in the middle of this case. And NYSEG's
17 previous counsel was Mike McBride. And he never filed
18 anything on behalf of NYSEG. So I'm a totally new
19 counsel to this.

20 I've addressed the relevance argument.
21 I've addressed to you the theory of why we're
22 different from ACE. Now, if you'd like me to, Judge,

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1 I can address the commercial sensitivity argument or
2 we can address that later.

3 JUDGE LEVENTHAL: Yes. I don't think we
4 have to go to the commercially sensitive argument --

5 MR. MULLINS: Okay.

6 MR. EDWARDS: Just one clarification, Your
7 Honor?

8 JUDGE LEVENTHAL: -- at this point. All
9 right.

10 MR. MULLINS: Yes.

11 MR. EDWARDS: ACE is Atlantic -- there are
12 four utilities there that were represented by the ACE,
13 et al. discovery requests. Delmarva Power and Light
14 is the only power shipper in the situation that Mr.
15 Mullins was referring to.

16 In fact, Indianapolis Power and Light and
17 the Ohio Valley Coal Company, American Electric Power
18 Company were all part of those requests. You did
19 order discovery with regard to those.

20 And we had a discussion last week, I
21 believe, in which the question was whether or not your
22 ruling solely fell with regard to the one-lump theory.

1 And Mr. McBride very eloquently stated that if that
2 were the only rationale for it, then you could not
3 have ordered discovery with regard to American
4 Electric Power Company, Indianapolis Power and Light,
5 and ACE, and, in fact, that the Board when they
6 affirmed your rulings affirmed the entire ruling,
7 including that rationale.

8 JUDGE LEVENTHAL: Let me understand
9 specifically. What information are you willing to
10 furnish to NYSEG?

11 MR. EDWARDS: Your Honor, we are willing
12 to provide exactly the information that you ordered us
13 to provide with regard to the narrowed request from
14 last week. And that is the documents dealing with the
15 delivery of coal to NYSEG's plants for the years 1995
16 through 1997, as requested by NYSEG in his letter of
17 August 5th and based upon Your Honor's ruling on
18 exactly the request that you have before you.

19 JUDGE LEVENTHAL: Have you delivered coal
20 to NYSEG's plants?

21 MR. EDWARDS: Norfolk Southern has not.
22 It is a Conrail-served plant, as are the other ACE

1 plants that were the ACE, et al., plants that were at
2 issue before this.

3 If Norfolk Southern or CSX did deliver
4 coal to these plants, it would be taken up in the same
5 discovery request, and those documents would be
6 produced.

7 So it's not a question as to it's only
8 Conrail going to be producing. If we have documents,
9 we will produce them pursuant to the earlier request
10 and the earlier rulings. Norfolk Southern is bound to
11 look for those documents and to produce any tapes as
12 well as documents.

13 MR. MULLINS: Your Honor, there aren't
14 going to be any documents. That's the point. NS
15 doesn't serve NYSEG. CSX doesn't serve NYSEG. That's
16 not the point of this discovery request.

17 The last discovery request that we were
18 dealt with had to do with documents for destinations
19 served by NYSEG. We knew that the only documents we
20 could get would be Conrail documents because they
21 don't serve NYSEG.

22 Now, I could have just as easily made a

1 Question Number 1A or whatever that says, "And all
2 documents for destinations served by NYSEG that are in
3 the possession of Conrail."

4 Well, I had already done that in this
5 letter. So now I came back, and I said: No. We need
6 to test the theory of how CSX and NS are going to
7 compete for the movement of coal post-transaction. If
8 you limit it to what you did for ACE, they're not
9 going to have any documents. And that doesn't go to
10 help our case.

11 When we have to go to the Board to prove
12 we're going to be harmed, we have to say to the Board
13 how NS and CSX are going to serve us and why we think
14 that's going to be harmed.

15 Well, how do we test that, Your Honor,
16 unless we can look at how NS and CSX view competition
17 between themselves for the delivery of coal to the
18 utility plants that they serve?

19 JUDGE LEVENTHAL: And how is the
20 information you're seeking here going to help you do
21 that?

22 MR. MULLINS: Absolutely critical to help

1 us do that because what we're seeking is basically --
2 and it's basically 1 through 5, but what we are
3 seeking are the contracts and the documents related to
4 the negotiations that led up to those contracts
5 between CSX and its utility plants that it serves and
6 NS and the utility plants that it serves.

7 Now, here is how this is going to help us.
8 Prime example is let's say there's a document in
9 there, CSX produces the documents related to the
10 contracts. And we're limiting. Now we're willing to
11 go up to a million tons.

12 Somewhere in there they say: Well, we
13 don't ever really view trucks as a competitive
14 alternative for the delivery of coal to X utility.
15 Okay? Well, in this case, one of the arguments
16 they're making is that trucks are going to be able to
17 provide coal for the transportation to NYSEG.

18 Well, one of the ways we can disprove that
19 is we've got a document from CSX's own files that
20 says, you know, it would be even better if we had four
21 or five documents that said: Hey, we never really
22 considered trucks as an alternative for the delivery

1 of coal to the utility plants.

2 On the one hand, they're going to be
3 telling the Board: Don't worry, NYSEG, because if we
4 jack up your rates, you're going to be able to switch
5 to trucks. But when you look at their files, when you
6 look at how they negotiated, how they entered into
7 contracts or whatever, they've never considered trucks
8 a competitive alternative. Well, that's exactly what
9 we need to prove to the Board.

10 So it's absolutely critical to NYSEG's
11 case to get this information because we really kind
12 of, frankly, know how Conrail and NS operate. We
13 don't know how NS and CSX operate.

14 You know, when they increase their rates,
15 we want to know what it is that they're increasing
16 their rates or when they decrease their rates, we want
17 to know why it is they decrease their rates.

18 That's what defining the market is.
19 That's why we want to define what competition means.

20 JUDGE LEVENTHAL: Anything further?

21 MR. DENIS: Your Honor, there is a close
22 connection between the arguments you're hearing today

1 and the one-lump arguments. Underlying the one-lump
2 theory is this notion that you can't do worse than a
3 monopoly. The bottleneck carrier will extract all the
4 available rents. That's the Board precedent from D.C.
5 Circuit underlying your prior orders in this case.

6 The same proposition holds true in NYSEG's
7 situation, where all of your coal line sources and all
8 of your coal-burning facilities are served by the same
9 carrier. You have one carrier, Conrail, that will be
10 available to extract all of the available rents. You
11 cannot do worse.

12 Now, if Mr. Mullins wants to suggest that,
13 as Mr. McBride is trying to do with the ACE group, for
14 some reason, Conrail, the bottleneck carrier, is not
15 acting as the theory posited as well, to pursue
16 discovery to determine how Conrail had set its rates
17 and whether, in fact, Conrail has left money on the
18 table, how CSX sets its rates, how CSX views
19 competition, how CSX views trucks, how CSX views NS
20 has nothing to do with the fact that Conrail is a
21 monopoly carrier, the only carrier serving the NYSEG
22 plants, and is able to extract all of the rents. They

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1 can't be any worse off when they have two carriers,
2 rather than one.

3 JUDGE LEVENTHAL: All right.

4 MR. EDWARDS: And, just to supplement
5 that, this is exactly the argument that we have heard
6 earlier with regard to one lump. But I just remind
7 Your Honor that it is a broader argument that we have
8 also heard from both Mr. McBride and Mr. Mullins
9 earlier. And it's: How does Norfolk Southern and how
10 does CSX set their rates?

11 And we've heard this. It's broader than
12 the one lump. And that's why these other ones, other
13 power plants and shippers, were brought into it.

14 I have been corrected by my colleague
15 that, in fact, we're not certain there are no
16 documents to produce to NYSEG. We're still searching
17 to see if there's anything responsive to the request
18 that has earlier been made and ruled upon.

19 Thank you.

20 JUDGE LEVENTHAL: All right. Last chance.
21 Anybody else have anything further?

22 (No response.)

1 JUDGE LEVENTHAL: All right. I'm going to
2 rule that NYSEG's entitled to receive the same
3 information that I have previously ruled that ACE can
4 receive. I think that the information sought by NYSEG
5 at this point cannot lead to acquiring admissible
6 evidence in this case.

7 If NYSEG wants to test the competition for
8 coal, they can have it by the competition that may
9 exist now between Norfolk Southern and CSX in their
10 connecting point with Conrail.

11 All right. That disposes of 1 and 2.
12 Let's go off the record for a moment.

13 (Whereupon, the foregoing matter went off
14 the record at 10:16 a.m. and went back on
15 the record at 10:18 a.m.)

16 JUDGE LEVENTHAL: Item No. 3.

17 MR. MULLINS: Your Honor, this -- I guess
18 I'm a little confused by your prior ruling when you
19 say the documents to A. Can I ask a clarification on
20 that?

21 JUDGE LEVENTHAL: Sure.

22 MR. MULLINS: Are you then just upholding

1 your previous ruling with respect to this art
2 conference that we had two weeks ago?

3 JUDGE LEVENTHAL: Yes.

4 MR. MULLINS: So that's for any documents
5 that they -- that CSX, Conrail or Norfolk Southern has
6 in their possession with respect to the delivery of
7 coal NYSEG?

8 JUDGE LEVENTHAL: That's correct.

9 MR. EDWARDS: For the time period --

10 MR. MULLINS: For the time periods that
11 you've honored.

12 JUDGE LEVENTHAL: Yes.

13 MR. MULLINS: Okay. Your Honor, when you
14 go into the issue of competition, Your Honor, which is
15 what the whole merger is about, when the Board reviews
16 a merger, and Your Honor, I'm going to speak from
17 personal experience here because I spent six and a
18 half years there as a chief of staff to three
19 different Commissioners.

20 Sandy spent a year at the STB, leaving
21 last year. We're the only two people who have been on
22 this Board, been on there, on the inside. No one else

1 here has been employed by the ICC or the STB.

2 I was on the other side of the fence when
3 we looked at over three different railroad mergers,
4 Your Honor. When the Board decides whether or not to
5 impose a condition for the protection of a shipper,
6 the only thing that they look at is the competition
7 pre and post merger and how that competition is going
8 to be affected.

9 Now Your Honor, how do we look at that
10 competition? How do we decide how the competition is
11 going to be affected? How do we test the theories of
12 NS and CSX with respect to what they say in the
13 application for post-transaction to NYSEG unless we're
14 allowed to go and look at how CSX views competition?

15 This interrogatory says CSX, for the
16 utility shippers that you've negotiated with in the
17 past three years, 1995 through 1997, let us see -- at
18 first it says identify all the shippers, utility
19 companies that you've negotiated with. By the way, we
20 use shippers. In discussions, we are willing to limit
21 that to shippers who transport over \$1 million per
22 year, instead of the -- over \$10 million per year

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1 instead of the \$1 million. I just again offer that up
2 as we were trying to reach a settlement or compromise.
3 But what this interrogatory asks is CSX identify all
4 the shippers who you've decreased the rates from 1995
5 to 1997. And 4 says, produce the documents that are
6 relevant to that. That's in 5.

7 JUDGE LEVENTHAL: Wait a minute, you're
8 going from 3, 4 and 5?

9 MR. MULLINS: Yes. 3, 4 and 5 are kind of
10 tied together. 3 says rates have decreased. Identify
11 all the shippers that CSX have decreased their rates
12 over the past, from 1995 to 1997.

13 4 says identify all those shippers who,
14 pursuant to your contract, you could have increased
15 the rates on because there is some sort of rate
16 escalation clause in there, but you chose not to.

17 5 says give us all the documents related
18 to your decision.

19 So 3, 4 and 5 are roughly the same.

20 Again, this is going to the precise issue
21 of what the Board looks at when they're trying to
22 impose a condition for the protection of a shipper.

1 You have to prove that post-transaction --
2 and this is the only way you can get relief, is you
3 have to prove that post-transaction, you're going to
4 be worse off.

5 Now, Your Honor, this goes to exactly
6 trying to prove that point, that we're going to be
7 worse off because we know, once again, Your Honor, we
8 know how, why Conrail has increased or decreased our
9 rates because we were served by Conrail and we've
10 never received service from CSX, never received NS.
11 We don't get called from the NS served origins. We
12 don't get called from CSX served origins, so we know
13 how Conrail used competition and why Conrail is
14 willing to offer rate breaks, decrease their rate or
15 increase their rate or -- I mean because we've been
16 served by them for 20 years. Now we're trying to get
17 that same information from CSX and from Norfolk
18 Southern.

19 Why CSX, when you're going to look at a
20 rate decrease or a rate increase, what is it that you
21 look at and why do you do that?

22 Now their argument, one of their

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1 arguments, and we didn't really touch on this is well,
2 we're just trying to figure out how to negotiate in
3 the future. Okay?

4 Number one, none of the in-house people
5 can see any of this stuff because they're going to
6 market highly confidential. So I can't even show it
7 to my people that are going to be in negotiation, do
8 the negotiations in the future.

9 Number two, I don't even have any outside
10 consultants that I would show this to that are going
11 to be employed by New York State Electric & Gas in the
12 future for the negotiation in the future. That's not
13 why we want this information. This information is
14 going to be produced to the law firm. The lawyers are
15 going to look at it. We're going to produce it to the
16 Board, if it supports our case. This has nothing to
17 do and quite frankly, I'm a little offended by the
18 fact that they would somehow imply that we would give
19 this NYSEG so that they could use this in future
20 negotiation, if that's what they were trying to imply
21 because it's absolutely not true. We're trying to
22 make our case and we're trying to make our case that

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1 competition, we're going to be worse off after the
2 merger than we were before the merger and in order to
3 look at that, we have to look at what you define as
4 competition and how they increase rates and decrease
5 rates is exactly the issue, because that's what
6 competition is all about. That's what the market is.
7 You're trying to look at how the market -- what are
8 the competitive factors in the rail market and whether
9 or not those competitive factors will apply to NYSEG
10 situation post merger. And if they're not going to
11 apply, then we could theoretically be worse off
12 because if CSX increases its rates because of the
13 competitive factors it views as competitive factors
14 does not apply to NYSEG, then CSX could come in and
15 raise our rate because we don't have the same
16 competitive factors that CSX sees in their other
17 utility companies. That's -- Your Honor, that is what
18 all this is about, is trying to view what it is that
19 they view as competitive factors to look at that view,
20 look at NYSEG's situation and see whether or not we're
21 going to fit into that view. Because if we don't fit
22 into that view, then we're at a risk at a rate

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1 increase and if we're at a risk of a rate increase,
2 then the Board will give us relief and how can we
3 prove our case unless we can look at these documents?

4 We can address the protective order issue.
5 I mean, if you want me to, I can even get further into
6 that issue.

7 JUDGE LEVENTHAL: We have a protective
8 order in this proceeding.

9 MR. MULLINS: Yes, we do, but the recent
10 trend that they've done is even though you've ordered
11 that something be produced under rail market, highly
12 confidential and still redact information. Now we can
13 address that issue.

14 Even if you ordered it to be produced,
15 Your Honor, they're going to produce it and then still
16 redact it and then we'll be back right here in front
17 of you.

18 JUDGE LEVENTHAL: We can reach that later.

19 MR. MULLINS: Right, exactly.

20 JUDGE LEVENTHAL: All right, Mr. Mullins.

21 MR. EDWARDS: As Mr. Mullins and Ms.
22 Brown, having been with the Board before, I just want

1 to address a point that Mr. Mullins was making with
2 regard to whether or not NYSEG would be worse off than
3 before the transaction.

4 Of course, the issue is in a global sense
5 is whether or not there has been a competitive harm
6 as a result of the transaction, not whether or not
7 they're going to be worse off or not. I mean there
8 are changes in corporate philosophy that if the
9 transaction never went forth, Conrail's own corporate
10 philosophy with regard to setting rates could change
11 and they conceivably could be worse off, unassociated
12 with the transaction or the valuation of the
13 transaction before the Board.

14 So it's not just a general philosophy out
15 there.

16 The arguments you've heard here are
17 exactly what we heard 10 minutes ago and last week,
18 the week before and the week before that. But what
19 he's looking for is a subset of 1 and 2. He's looking
20 for each shipper's coal shipper's rates and contracts
21 and all discussions and documents related thereto.

22 We have not changed what he's seeking

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1 here. Just the words have changed and the approaches
2 have changed, but the documents and the reasons why he
3 wants those documents are essentially identical. He
4 wants the contracts for coal shippers and all
5 documents related thereto.

6 Now in here, he's offered to have the
7 limitation of 50 largest shippers or \$10 million worth
8 of transport. Those limitations do not go to the
9 reason why you limited interrogatory 1 into ACE before
10 that. In essence, these are same questions which you
11 have ruled upon before, put in another guise, but a
12 little bit different limitation, seeking the exact
13 same documents which you have just told NYSEG they
14 would not receive.

15 Again, we will in response to the earlier
16 request provide the documents with regard to NYSEG,
17 including the documents requested in 5 which seek
18 decisions to decrease or maintain rates. Those are
19 all documents which would be swept up in the earlier
20 ruling and we see no reason to broaden your earlier
21 ruling of today or the previous weeks.

22 MR. MULLINS: Your Honor, it's not the

1 same documents. We had asked in 1 and 2 for the
2 contracts and all documents relating to the
3 negotiation of those contracts. Here, we've limited
4 it only to rates and why a rate increase or why a rate
5 decrease.

6 A contract contains many more types of
7 things than just rates. A contract contains cycle
8 times, how many cars are going to be used, loading
9 instructions, unloading instructions, I mean a
10 contract contains numerous things that are not being
11 requested here. All we're requesting here is
12 information related to the rate and why it went down
13 or went up and the documents relating to the rate, not
14 information relating to any of the other stuff
15 contained in the contracts.

16 Again, with respect to ACE, Your Honor,
17 they're not going to ever have any documents, so when
18 you order them to produce documents, consistent with
19 your ACE rulings, we're only going to get documents
20 from Conrail. We're not going to get any NS or CSX
21 documents because we've never taken coal from NS or
22 CSX served origins ever. And so all you're doing is

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1 limiting, all you're doing when you rule that way is
2 saying Conrail should produce their documents because
3 NS and CSX are not going to really have any documents.

4 JUDGE LEVENTHAL: Well, if you had access
5 to the documents they're producing for ACE, would that
6 satisfy your request?

7 MR. MULLINS: No, Your Honor, because
8 you've limited it.

9 JUDGE LEVENTHAL: No, no. Suppose you had
10 the documents that you're requesting here limited to
11 those shipments that ended up at destinations served
12 by Conrail for ACE. In other words, if there is
13 connecting shipment that originated on an NS line, and
14 interchanged with Conrail and delivered to ACE and you
15 had the information that they're furnishing to ACE,
16 wouldn't that give you the same information you want?

17 In other words, what you're doing here is
18 instead of having the broad request that all documents
19 to every destination served by these railroads, you're
20 getting one portion of it, the portion that relates to
21 shipments going to ACE.

22 MR. MULLINS: Well, ACE --

1 JUDGE LEVENTHAL: Wouldn't that enable you
2 to --

3 MR. MULLINS: I understand finally what
4 you're saying and I think that that would be helpful.
5 We haven't received access to the documents.

6 JUDGE LEVENTHAL: No, so far they haven't
7 been obligated to give it to you, but let's see. How
8 do you feel about that, Mr. Edwards?

9 MR. MULLINS: If we said that, would we
10 limit it to ACE and Delmarva and all those other four
11 or five utilities?

12 JUDGE LEVENTHAL: Let's say the proposal
13 is the same information you're giving to ACE make
14 available to NYSEG.

15 MR. EDWARDS: It is available, Your Honor.

16 JUDGE LEVENTHAL: It is available now?

17 MR. EDWARDS: Yes, and in fact, they're
18 available to his consultants as well. Tom Crowley is
19 doing the study for NYSEG and for ACE. Mr. McBride
20 and Mr. Mullins recognize --

21 JUDGE LEVENTHAL: Mr. Mullins, doesn't
22 that give you an opportunity to test what their rate

1 making positions are with respect to competition?

2 MR. MULLINS: I think the way you limited
3 your ruling, Your Honor, was to destinations served by
4 ACE since Conrail serves all of ACE's destinations or
5 in the --

6 JUDGE LEVENTHAL: Well, you have the other
7 three also. You have Indianapolis --

8 MR. MULLINS: Right, but Conrail serves
9 all of those destinations too.

10 JUDGE LEVENTHAL: But NS and CSX are
11 originating shippers, originating railroads, I'm
12 sorry.

13 MR. MULLINS: Only with respect to one.
14 It's my understanding and again I wasn't here, you
15 know, when all that was taking place, because we
16 weren't even hired yes, okay? But let me, I know that
17 doesn't --

18 JUDGE LEVENTHAL: Mr. Mullins, that's not
19 a very good argument.

20 MR. MULLINS: Okay, okay.

21 JUDGE LEVENTHAL: Because every time your
22 client changes lawyers, you can't start all over.

1 MR. MULLINS: Okay, we tried to catch up.
2 We honestly have tried to catch up. It's my
3 understanding that because of the way that you have
4 limited your ruling with respect to produced documents
5 for destinations served by ACE or destinations served
6 by Delmarva or destinations -- that means that if CSX
7 or NS have never delivered coal or never even
8 considered delivering coal to those destinations, that
9 there wouldn't be any documents, just like in NYSEG's
10 situation.

11 JUDGE LEVENTHAL: We don't know if that's
12 so. Have you looked at the documents? Have you found
13 that to be true?

14 MR. MULLINS: Well, for one thing some of
15 those documents are being redacted and we can't even
16 see them because you've been having this in camera
17 review stuff and all that other stuff.

18 And I understand also that some of those
19 documents were not placed in the document depository.
20 If they will represent to me that all those documents
21 are going to be placed in the document depository,
22 everything with no redactions as to the rate

1 information and all that stuff, then I will commit
2 that we will go over there, look at all those
3 documents and see if that helps answer our question
4 and then we can just maybe, you know, we might have to
5 be back here in two weeks if somehow those don't do
6 it.

7 I mean I understand sort of where you're
8 coming from in thinking that there might be -- and you
9 know, you're right, Your Honor. There might be some
10 information in those documents that would be relevant
11 to the theory that we're trying to test, although
12 again, most of those documents went to the one lump
13 theory which we don't have anything to do with because
14 that's not our theory, that's not our case, that's not
15 anything we're trying to present.

16 JUDGE LEVENTHAL: But the information you
17 can use for any purpose. It's not limited to the one
18 lump theory.

19 MR. MULLINS: Some of it is --

20 JUDGE LEVENTHAL: Whatever information you
21 get, you can use for whatever purposes you like.

22 MR. MULLINS: Right, some of it is, Your

1 Honor. And so I would be -- if we could -- I guess
2 there was what, four utility companies involved in
3 that situation?

4 JUDGE LEVENTHAL: Yes. Yes.

5 MR. MULLINS: I think that I would be
6 happy to go and defer consideration of 3, 4 and 5
7 until such time as all those documents are produced
8 and we've been able to review those.

9 JUDGE LEVENTHAL: All right. We're not
10 dealing with the redacted material.

11 MR. EDWARDS: I understand, Your Honor.

12 JUDGE LEVENTHAL: That's the subject of
13 another conference that we've had which has not yet
14 been resolved.

15 MR. EDWARDS: I fully understand. I will
16 not address that. In fact, I just wanted to clear the
17 record here that I am unaware of any documents which
18 have been produced to any party which has not been
19 placed in the document depository and if there's
20 information otherwise, we would really like to know
21 that.

22 And for him to have access to the

1 documents in the document depository, he's got that
2 access.

3 JUDGE LEVENTHAL: All right, there's no
4 question about that.

5 MR. EDWARDS: I don't know what else to
6 say.

7 JUDGE LEVENTHAL: With regard to NS and
8 CSX, NYSEG has access to all of the documents you've
9 produced so far.

10 MR. DENIS: I believe that is correct,
11 Your Honor.

12 JUDGE LEVENTHAL: All right, well, why
13 don't you see where you go from there. I would -- I
14 am trying to give you discovery that you need related
15 to the universe of this proceeding.

16 So why don't you see if that's sufficient
17 for your needs. If that's sufficient, that disposes
18 of it. If it isn't, you can always come back.

19 MR. MULLINS: Okay.

20 JUDGE LEVENTHAL: All right?

21 MR. MULLINS: Yes sir.

22 JUDGE LEVENTHAL: So that disposes of 1

1 through 5. Now we have 8. What is the problem with
2 8?

3 MR. MULLINS: What is our problem?
4 They're the ones who have objected.

5 JUDGE LEVENTHAL: All right. What is your
6 objection to 8? Let's go off the record.

7 (Off the record.)

8 MR. NORTON: Footnote 2 on page 5.

9 JUDGE LEVENTHAL: All right. Mr. Edwards,
10 I'll hear from you.

11 MR. EDWARDS: Thank you, Your Honor. To
12 put this question 8 and actually 9 in perspective, as
13 you observed, we have to look to 6 which is asking the
14 applicants to identify each track line or segment
15 where CSX and NS jointly serve a specific origin, a
16 specific destination or a specific shipper.

17 As you can see in our footnote, we are in
18 the process of compiling exactly that information.
19 And we'll be providing that information to NYSEG, but
20 8 and 9 both go a little bit --

21 JUDGE LEVENTHAL: Just a minute, are we
22 back on the record? Okay.

1 MR. EDWARDS: Thank you. Both 8 and 9 go
2 quite a bit further than that. 8 asks for all
3 communications regarding service by CSX and NS in
4 response to 6. In our discussion on Monday, we
5 understood and had limited, agreed to a limitation
6 with regard to this that service dealt with complaints
7 of quality of service, how does NS, what's NS's
8 quality of service over those lines?

9 With regard to specific shippers that are
10 served over those joint segments, we're happy to take
11 a look at those shipper files and look for complaints
12 with regard to the -- with regard to -- that go to the
13 service that results from joint line service and we
14 understood that to be their issue there.

15 I'm not quite sure why we're still here
16 with regard to 8, given that discussion. 9 goes a
17 little bit further, well, I should say 8 asks for any
18 information regarding any shipper discussion and we
19 simply cannot look through every single shipper file
20 for this information. It's extraordinary burdensome
21 and it's not required and we can't see the relevance
22 of it.

1 9 --

2 JUDGE LEVENTHAL: Let me understand.
3 You've limited that now to complaints, is that
4 correct?

5 MR. EDWARDS: That's what I understood Ms.
6 Brown to mean was the quality of service, the
7 complaints about the quality.

8 JUDGE LEVENTHAL: All right. Let's find
9 out. Is that correct, Ms. Brown?

10 MS. BROWN: Your Honor, the one thing I'd
11 like to point out is when we're having these
12 discussions and trying to settle these, it is true
13 that we did talk about all these limitations and we
14 still don't have a problem with these limitations, but
15 they were entered into in an attempt to settle these.

16 My understanding of the end of that
17 conversation was let's take this all to the Judge.
18 And that nothing was really worked out. 8 and 9, I
19 did understand that they were going to try to see that
20 with these limitations they could find more documents
21 and I hadn't heard whether or not there would be any
22 documents responsive to that.

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1 JUDGE LEVENTHAL: Even though you were
2 attempting to settle, if we limit it to complaints, is
3 that satisfactory to you?

4 MS. BROWN: Yes, Your Honor.

5 JUDGE LEVENTHAL: All right.

6 MS. BROWN: We're looking for quality of
7 service complaints or compliments, that type of thing,
8 yes.

9 JUDGE LEVENTHAL: All right, Mr. Edwards,
10 you may continue.

11 MR. EDWARDS: And we further were talking
12 about in 6 we're going to be identifying certain line
13 segments where origins or destinations are served and
14 we'll be identifying those. If the limitation we were
15 talking about was with regard to shippers on those, at
16 those origins or destinations with regard to
17 complaints for the service and if that's agreeable to
18 Ms. Brown, I'm not sure why we're here.

19 JUDGE LEVENTHAL: Is that true? Both 8
20 and 9?

21 MR. EDWARDS: Your Honor, if that
22 limitation regards 8, 9 asks for documents evidencing

1 that and that would be swept in. If you're marking up
2 documents with regard to the origins of shippers on
3 the origins and destinations, with the regard to the
4 complaints and quality of service, dealing with the
5 joint trackage or the joint service in those shipper
6 files.

7 JUDGE LEVENTHAL: All right.

8 MS. BROWN: That's fine, Your Honor, if
9 they're willing to looking for those documents, then
10 I think that we can obviously agree to that.

11 My understanding at the end of that
12 conversation we had had, the telephone conference that
13 we had had was since we're going to the Judge, then
14 let's talk about all these issues.

15 JUDGE LEVENTHAL: But now they're willing
16 to comply.

17 MR. EDWARDS: But a clarification and my
18 colleague pointed out, are we dealing with all
19 shippers still or are we only dealing with the coal
20 utility shippers which are kind of a breed among
21 themselves and I'm not sure whether or not a widget
22 plant is the same concept. I just need clarification

1 on that.

2 JUDGE LEVENTHAL: All right. Up until now
3 we've been speaking about coal shipments.

4 MR. EDWARDS: Right.

5 JUDGE LEVENTHAL: Aren't we limiting it to
6 coal shipments?

7 MS. BROWN: That's fine, Your Honor.

8 JUDGE LEVENTHAL: All right, then 8 and 9
9 are disposed of accordingly.

10 MR. EDWARDS: Thank you, Your Honor.

11 JUDGE LEVENTHAL: All right, now we go to
12 12.

13 (Pause.)

14 All right, what's the problem with that?

15 MR. EDWARDS: Your Honor, this is quite a
16 different breed. It resembles 6 through 9, but as you
17 will see it is quite a different breed of animal here.
18 Request 10 and 11 essentially go to identifying any
19 location, any track over 10 miles in length which is
20 owned by either CSX or NS in which the other railroad
21 has trackage rights. That in and of itself is a very
22 burdensome process, but we have undertaken to identify

1 those to the degree we can. Some of these contracts
2 are ages old and we're attempting to identify all of
3 them. Some of them are in use, some of them are not,
4 but we're attempting to identify them.

5 But then with regard to those tracks, the
6 request is that we identify all communications,
7 extraordinarily broad, that deal with service over
8 such lines. Again, here there's no easy limitation
9 with regard to a shipper on one of these lines. We're
10 literally talking about hundreds and hundreds of miles
11 in these United States. We would have to undertake to
12 identify each and every shipper on those lines, try to
13 determine whether or not they have ever filed a
14 complaint from 1995 to present, and it's such an
15 extraordinarily burdensome request. We would suggest,
16 Your Honor, that there are locations in our
17 organizations, for example, strategic planning which
18 might -- for Norfolk Southern, which might have a
19 study regarding the ability of Norfolk Southern to
20 provide service over trackage rights in general. If
21 that's what they're looking for is whether or not
22 Norfolk Southern has -- I can't offer this for CSX, if

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1 they're looking for a general study with regard to the
2 ability of Norfolk Southern to provide service over
3 its trackage rights, we'd be happy to look for that in
4 the few offices where it's most likely to be found.

5 This subject has been explored in Union
6 Pacific, Southern Pacific. There's thousands of
7 documents or I'm sorry, that's an exaggeration. There
8 would be several documents and several discussions in
9 the public files there. This is a general subject
10 that the STB has discussed often, whether or not
11 somebody can compete over trackage rights.

12 We proffer that. CSX, I can't speak for
13 CSX. But that would seem to be a reasonable approach
14 to getting to what we understand we're looking for.

15 JUDGE LEVENTHAL: Is CSX's position the
16 same?

17 MR. DENIS: Your Honor, I can certainly
18 explore that with my client. I have not done so, but
19 if that is your preference, I certainly will do so.

20 JUDGE LEVENTHAL: Who's going to address
21 this, Ms. Brown?

22 MS. BROWN: First of all, if there is some

1 sort of study that was done, obviously that would be
2 helpful. That wasn't something that we had discussed
3 before.

4 We had also briefly discussed limiting all
5 communications to these studies, reports, internal
6 memorandum, that type of thing, if that is helpful.
7 But as far as the UP SP argument, we are seeking
8 information about CSX and NS, not about how UP SP
9 serve their trackage rights. And so specifically, for
10 12, in regard to what we talked about in 10 and 11,
11 we're looking for how those trackage rights have
12 worked or whether or not they have worked. Not how
13 trackage rights worked for UP or SP.

14 JUDGE LEVENTHAL: Would these studies, if
15 they have them, satisfy your inquiry?

16 Is that what you're looking for?

17 MS. BROWN: In other words, yes, if
18 there's a study that was done, if there are reports
19 that were done about this issue, yes, that may satisfy
20 our question. I'm not sure and I don't think they'd
21 know whether or not that has been done.

22 JUDGE LEVENTHAL: Well, do you want to

1 defer this to see whether or not they have that
2 information?

3 MS. BROWN: I guess -- we're also looking
4 for shippers' complaints. If the studies contain
5 those, I guess then yes. I'm not sure that it will
6 contain the documents of a shipper complaint that they
7 would send in to them. I mean we'd also like to see
8 those, so possibly the question could be deferred if
9 there are studies that may contain that information.

10 MR. EDWARDS: Your Honor, go back to the
11 original proposition here. Essentially, the question
12 is so extraordinarily broad that we would, in effect,
13 have to look through every shipper file to see if they
14 filed a complaint with regard to service over trackage
15 rights.

16 If we limited it to shippers in which
17 there was service over trackage rights, it would be
18 extraordinarily burdensome to identify those. We
19 would essentially have to go through all the shipper
20 files, identify the routes, the service that they're
21 getting and figure out exactly are they served by
22 trackage rights or not served by trackage rights.

1 It's an enormous job.

2 And then we would have to go through each
3 one of those files and look for complaints. It's
4 almost unworkable.

5 MR. MULLINS: Your Honor, may I address?

6 JUDGE LEVENTHAL: All right, Mr. Mullins.

7 MR. MULLINS: Just listening to this, as
8 I see -- I see two subsets or two sets of documents.
9 One is the internal studies or analysis that they may
10 have done on the general issue of trackage rights
11 versus ownership. That sort of goes to the question
12 of 13. It's roughly -- there tying 12 and 13 together
13 and what Mr. Edwards is saying is well, we think we
14 have some general studies and analysis about trackage
15 rights versus ownership and the strategic planning
16 area that we might be willing to produce. And we're
17 saying fine, that's great.

18 But then we have this other issue which is
19 we have asked them in 10 and 11 to identify all track
20 segments over 10 miles in length owned by CSX over
21 which both CSX and NS operate and then identify all
22 track segments owned by NS in which both CSX and NS

1 operate. And then we're saying as to those track
2 segments that you've identified, produce any documents
3 or communications that deal with the quality of
4 service over those track segments. Now those
5 documents would not include or I should put it this
6 way, a study or an analysis of the general view of
7 whether or not trackage rights versus ownership is the
8 best way to go. Will probably not include a
9 discussion about the communications involved with the
10 specific track segments that they've identified.

11 So we are really looking for whether or
12 not shippers for the track segments that they've
13 identified in 10 and 11, whether or not -- which
14 they're willing to do. They're willing to identify
15 the track. They didn't object to 10 and 11. What
16 they object to is giving us the real juicy stuff which
17 is really whether or not a shipper has said you know,
18 CSX you operate over NS's tracks via trackage rights
19 and you know my service is there. You guys really
20 ought to own this line rather than have trackage
21 rights over it. That's the real juicy stuff. Of
22 course, they don't want to produce that. Of course,

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1 that's the whole issue.

2 Why this is relevant is because service to
3 NYSEG's plants will be via trackage rights over
4 certain segments, over about a 200 mile segment. So
5 we want to know how CSX and NS operate via trackage
6 rights, very simple question and we want to know if
7 shippers have complained and he argues oh burden,
8 we'll have to go to every shipper.

9 All they have to do, Your Honor, really
10 and honestly, is call up the general superintendent of
11 operations who has jurisdiction over the track
12 segments that they've identified in 10 and 11 and say
13 hey, Frank, do you remember any complaints that any
14 shippers have said about service over this? Or they
15 have to call up the marketing guy and say, Joe, has
16 your shipper ever complained about his service via the
17 trackage rights over point A to point B? You know,
18 make a few inquiries like that. Joe and Frank will
19 say yeah, I remember something like that. Then they
20 can produce it. They don't have to go through this
21 huge study of the shipper files and it's a red
22 herring, Your Honor.

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1 JUDGE LEVENTHAL: In 12 what you're
2 seeking now is also complaints? Quality of service
3 complaints?

4 MR. MULLINS: Absolutely.

5 JUDGE LEVENTHAL: All right, I can't
6 believe you get that many complaints, do you?

7 MR. EDWARDS: Well, Your Honor, just one
8 other note that might be of interest here is again
9 this is a different animal than what we've identified
10 earlier with 6 through 8 in that we've got a track
11 line, a main line where there's trackage rights.
12 Shippers have their traffic moving over those lines.
13 We do not keep files with regard to a chunk of track.
14 We keep files with regard to shippers. To identify
15 who might filed a complaint with regard to service
16 over a trackage segment or with regard to trackage
17 rights, we, in fact, would have to look in the shipper
18 files and I'm surprised that his -- at the limitation
19 offered, but I really don't think that it goes to the
20 issue of where these complaints would be found and how
21 we would have to go about the process of identifying
22 them.

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1 JUDGE LEVENTHAL: But he makes -- Mr.
2 Mullins makes a valid point, it seems to me. This is
3 information, if, in fact, you've received many
4 complaints and your service is very, very poor, isn't
5 this something that he may really need to make
6 whatever point he wants to make before the Board?

7 MR. EDWARDS: We could if the -- again, I
8 speak only for Norfolk Southern based upon the
9 arguments made today. I would have to go back to my
10 client on this, but I believe that we could call the
11 person in charge of providing coal shipment service to
12 utilities and see whether or not he has received
13 complaints with regard to traffic over trackage rights
14 and if he would be satisfied with that, I believe that
15 could be done.

16 JUDGE LEVENTHAL: Again, we're talking
17 about coal shipments, are we not?

18 MR. EDWARDS: Yes sir.

19 JUDGE LEVENTHAL: Let's limit it to coal
20 shipments.

21 MR. EDWARDS: Yes, Your Honor.

22 JUDGE LEVENTHAL: All right, let's see if

1 he cu give you the information you want. I'll defer
2 ruling in this respect. I think you're entitled to
3 the information. We have to find out, well, I'll
4 order it produced. You have a problem, you have to
5 come back.

6 MR. EDWARDS: Thank you, Your Honor.

7 JUDGE LEVENTHAL: All right. Now 14.

8 MR. MULLINS: You want me to go first or
9 do you want to go first?

10 MR. EDWARDS: No, please.

11 JUDGE LEVENTHAL: All right. Back to 14.

12 All right, Mr. Mullins?

13 MR. MULLINS: Okay, now this is definitely
14 information that would not be covered by the ACE
15 situation. Here, what we are asking CSX and NS to do
16 and again we're wiling to limit this to utility
17 companies, okay? Let's just start out right out front
18 even though --

19 JUDGE LEVENTHAL: Utility companies and
20 coal.

21 MR. MULLINS: Right, that's right.

22 JUDGE LEVENTHAL: All right.

1 MR. MULLINS: Utility companies and coal.
2 Let's just set that limitation out on the table.

3 What we're doing here is saying CSX, NS,
4 Conrail, you guys tell us, identify to us, their
5 utility coal shippers where you are the exclusive,
6 sole rail provider of service. Some utility companies
7 have two railroads. Some even have three. It's
8 highly unusual, but some do, but a lot have two or a
9 lot have a rail barge combination or a rail truck
10 combination. What we want to know is what companies,
11 CSX, do you serve utility companies, coal users, do
12 you serve exclusively as the sole rail carrier.

13 JUDGE LEVENTHAL: What would that
14 information lead to?

15 MR. MULLINS: Here's -- because here is a
16 direct comparison with NYSEG's situation which is
17 NYSEG has one rail carrier that serves all of our
18 plants and all of our origins. So we're saying, hey,
19 CSX and NS, is there any similar such shipper on your
20 system? Do you have a NYSEG on your system where you,
21 CSX, are the sole rail provider and you, NS, are the
22 sole rail provider. That's -- so we're just asking

1 them to identify that first.

2 Quite frankly, it's not going to be tough
3 because in depositions the other day, I asked this
4 question to both Mr. Sharp who is the Vice President
5 of Coal for CSX and Mr. Fox, who is the Vice President
6 of Coal for NS and you know, they thought off the top
7 of their head and they gave me two or three examples,
8 but they said you know, we really don't know. We have
9 to do a study or we have to sort of look into that
10 issue for us. But you know, I think so and so is, or
11 so and so is. There was no objection about burden or
12 how terrible this was going to be.

13 So in fact, I think CSX could come up,
14 just off the top of his head he came up with like
15 three and NS said none, but here we want -- but both
16 witnesses said well, we're just guessing. We'd have
17 to really do a little study.

18 So that's all we're asking here.

19 JUDGE LEVENTHAL: All right, let's see
20 what the problem is. Mr. Edwards?

21 MR. EDWARDS: Your Honor, 14, 15 and 16
22 really go into a package here, much as we've seen

1 earlier.

2 With regard to his questions to Mr. Fox,
3 for example, if you ask Mr. Fox to think off the top
4 of his head as to whether or not he knew of any,
5 that's one thing. And that is not a burden for him to
6 explore his mind and see if he knows any. That's
7 fine. That's unobjectionable.

8 For us to do so is a different matter
9 because we'll explore it with many other people and
10 we'll have to come up with an answer.

11 But when you lump 14, 15 and 16 together,
12 we are going back to our old friend, the ACE
13 discovery. We're looking for the 50 largest coal
14 shippers in this case. We're now talking about another
15 subset and all contracts and communications with
16 regard to that.

17 JUDGE LEVENTHAL: No, he's talking about
18 where you're the sole carrier.

19 MR. EDWARDS: Yes, it's a different
20 subset, Your Honor. It's still a subset of the same
21 request, the rationale for needing it is exactly the
22 same based upon your earlier rulings.

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1 The burden of producing the list that he
2 speaks to, the contracts for all these shippers, and
3 all communications --

4 JUDGE LEVENTHAL: Let's take -- let me
5 interrupt you for a moment. Is the 50, the number 50,
6 is that the burden? Let's say if that could be
7 reduced to say 10?

8 MR. EDWARDS: Your Honor, to do the study
9 they asked, we would have to go through our utility
10 files and sort them by volume which I think we could
11 probably do and then look at each one and attempt to
12 identify number one, is there any competition for any
13 of these plants. We've got to look and first identify
14 the plants and second, identify whether or not they
15 are being served by others than Norfolk Southern, for
16 example. If it was, then we'd put it on the list. If
17 it's not, then we go to the next one. We could be
18 going through several --

19 JUDGE LEVENTHAL: Don't your marketing
20 people know off the top of their heads who your big
21 shippers are?

22 MR. EDWARDS: Yes, they do.

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1 JUDGE LEVENTHAL: And can't then eliminate
2 it in that manner?

3 MR. EDWARDS: We could do so. It would
4 take some work, but we could probably --

5 JUDGE LEVENTHAL: All discovery is
6 burdensome. I've never heard of discovery that wasn't
7 burdensome.

8 MR. EDWARDS: You're right.

9 JUDGE LEVENTHAL: I'm sure you've made the
10 argument on both sides. Let's find out. Suppose
11 instead of 50, it was the 10 largest shippers.

12 MR. MULLINS: That's fine, Your Honor,
13 because I think based upon deposition they may only
14 have three or four type shippers, so you know, ten is
15 fine.

16 JUDGE LEVENTHAL: All right, so if we
17 limit it to 10 --

18 MR. EDWARDS: We're talking about
19 utilities.

20 JUDGE LEVENTHAL: Utility and coal.

21 MR. EDWARDS: Well, Your Honor, there's
22 coal that is used in several different processes.

1 JUDGE LEVENTHAL: No. Utilities who are

2 --

3 MR. EDWARDS: Receiving coal.

4 JUDGE LEVENTHAL: Receiving coal.

5 MR. EDWARDS: Very good, Your Honor.

6 JUDGE LEVENTHAL: That's what we've been
7 talking about all along.

8 MR. EDWARDS: I understand, Your Honor.
9 I just wanted to clarify that. Thank you.

10 JUDGE LEVENTHAL: Yes.

11 MR. EDWARDS: I'm sorry to have
12 interrupted.

13 JUDGE LEVENTHAL: All right, does that
14 dispose of the problem if we limit it to that?

15 MR. EDWARDS: To the identification.

16 JUDGE LEVENTHAL: All right. 14 deals
17 with the identification. All right, I'll grant 14,
18 limited to ten utilities receiving coal.

19 All right. 15, you have a problem with?

20 MR. EDWARDS: Yes, Your Honor. We do. We
21 -- unless there is a different rationalization which
22 we have yet to hear, we question the relevance of this

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1 outside of the bounds of your prior rulings with
2 regard to ACE.

3 And I can let Mr. Mullins address that
4 question and then I'd be happy to respond, but this is
5 ACE all over again, Your Honor. There's no additional
6 rationalization to be given for the relevance of this
7 information and to go beyond your prior rulings. This
8 is just another way of getting at the same information
9 that Your Honor has previously ruled they are not
10 entitled to.

11 JUDGE LEVENTHAL: All right, Mr. Mullins.
12 How does this differ from 1 through 5?

13 MR. MULLINS: Your Honor, let's just be
14 frank. What we're saying is identify your ten largest
15 shippers and then we're saying okay, of those that
16 you've identified which based on deposition it may be
17 three or four, they're saying give us your contracts.

18 JUDGE LEVENTHAL: What would the contracts
19 show you?

20 MR. MULLINS: It would show us things like
21 rates and cycle times and volumes, so that we can
22 compare whether or not they have treated -- you know,

1 contracts in and of themselves are not necessarily the
2 relevant factor. Contracts are very important, but it
3 was the communications, documents, etcetera that led
4 up to the entering of that contract and again, we've
5 limited our search from 1995 to 1997, so they really
6 only have to do two years' worth of --

7 JUDGE LEVENTHAL: Well, he's concerned
8 about the relevance of it. What would it lead to?
9 Suppose you saw all of those contracts?

10 MR. MULLINS: Well, then we can see, if we
11 saw all their contracts, and the communications that
12 led up to those contracts, which is 16, so it's again
13 14, 15 and 16 are combined, are the same sort of
14 issue, we're saying identify the ten that you ship,
15 give us your contracts and then give us the
16 communications going up to those contracts.

17 What that would show, and again, this is
18 not ACE, Your Honor, and I finally -- you probably had
19 to hit me over the head for me to figure out what you
20 were doing with your rulings with respect to ACE and
21 the fact that we could probably get some of the
22 information that we're wanting there, but what you've

1 ruled on ACE has to do with the interchange, the
2 picture that I drew with you here. What this is is
3 the exclusive where this is the upper end up my
4 picture, so to speak, forget CSX and NS there and
5 we're just talking about it. That was the coal mine
6 at the interchange point and that was either Conrail
7 or CSX or NS delivering to ACE or to NYSEG or
8 whatever.

9 What that will show us is how they treat,
10 precisely treat, the exact same shipper as NYSEG.
11 NYSEG is captive to one carrier, various coal mines,
12 all served by that carrier. We want to know if they
13 have similar such captive utility shippers on their
14 system. It's only going to be three or four because
15 according to their deposition that a lot of their
16 utility plants have two railroads or have rail truck,
17 whatever. So what we want to know is well, how do you
18 treat those shippers where you are the sole captive
19 person because we're going to be now captive. Our one
20 plant is going to be captive to CSX and our three
21 plants are going to be captive to Norfolk Southern.
22 So now we want to know --

1 JUDGE LEVENTHAL: You see, with respect to
2 the ACE situation and of course, your 1 through 5, we
3 limited it to a universe. Here, you're asking for any
4 place in the country where they operate?

5 MR. MULLINS: No, no, Your Honor. What
6 I'm asking is once they've identified the five or six
7 or ten, you've limited it now to ten. They're not
8 going to get up to ten. Trust me. They're going to
9 probably have five at max.

10 And then what we're saying is of the five
11 that you have now identified, give us your contracts
12 which is a simple matter of going to the shipper file
13 for the five that they've identified and pulling out
14 a contract and copying it. Then we're saying okay,
15 give us your marketing files which will be in the same
16 file as the contract in all likelihood or will
17 certainly will be in the file of the marketing guy
18 that negotiated that contract. We're saying okay, go
19 to the folder that says contract with one of the five
20 people that you've now identified, go to that folder
21 that has all the memorandums and e-mails and stuff
22 related to the negotiation of that contract, go and

1 copy it and give it to NYSEG. So this is not all over
2 the system. This is five, five -- maybe ten.

3 JUDGE LEVENTHAL: Are you willing to
4 reduce the ten say to five?

5 MR. MULLINS: I am absolutely.

6 JUDGE LEVENTHAL: All right. Mr. Edwards,
7 how about if we limit it to five. Is that such a
8 terrible burden?

9 MR. EDWARDS: Your Honor, the
10 identification of the top five, rather than the top
11 ten, certainly is much less of a burden. The question
12 is not burden necessarily with regard to 15 and 16.
13 It is, in fact, relevance and we believe that the ACE
14 discovery which does deal with some, I believe, sole
15 served plants gives them exactly what he's been
16 looking for, but he's now trying to broaden it out in
17 a way that doesn't --

18 JUDGE LEVENTHAL: But not really. We
19 don't know, I mean you can't tell me and I haven't
20 heard anything that says that there are any sole
21 servers in the ACE destinations.

22 MR. EDWARDS: Delmarva Power and Light is

1 served by Conrail solely.

2 JUDGE LEVENTHAL: And who else?

3 MR. NORTON: Conrail has as the sole
4 destination carrier for Delmarva, also for Atlantic
5 City Electric and I believe others that --

6 JUDGE LEVENTHAL: No, you're saying
7 Conrail is. He's looking for NS and CSX. Isn't that
8 what you're looking for?

9 MR. MULLINS: Yes, Your Honor. Exactly.

10 JUDGE LEVENTHAL: I think we've had, I
11 don't know, four or five of these conferences. I
12 think I've been a very reasonable Judge. I try to
13 find out what is really needed and I'm not telling you
14 that I'm infallible and I don't tell you you can't
15 appeal my rulings, although I don't give you
16 permission to do so --

17 (Laughter.)

18 -- but I don't get annoyed at you if you
19 do. It doesn't bother me one bit. I think that Mr.
20 Mullins makes reasonable argument. Whether or not
21 this really can lead to admissible evidence before the
22 Board, I can't tell honestly. It seems to me to be

1 reasonable that maybe he can and I think in discovery
2 that's what he's entitled to. I'm trying to fashion
3 the request to make it the least burdensome that it
4 can be to you and still be of some use to your
5 adversary.

6 So I think if we limit it to five, I think
7 that's very reasonable. I think you can live with it
8 and Mr. Mullins would have to live with it, whether he
9 can or not.

10 MR. EDWARDS: Thank you, Your Honor.

11 JUDGE LEVENTHAL: All right, before I make
12 this a final ruling, do you have anything you want to
13 tell me, Mr. Denis?

14 MR. DENIS: A question, Your Honor,
15 whether you're addressing both 16, as well as 15 or
16 are we just talking about 15.

17 JUDGE LEVENTHAL: 15 and 16. They're the
18 same. Well, they're --

19 MR. DENIS: Well, if I could, Your Honor,
20 Mr. Mullins told us he wants to understand how CSX and
21 NS treat utilities similarly situation to this client.
22 That is in the contractual terms.

1 The names of the participants who were
2 involved in negotiating the matters discussed and the
3 reasons why we entered into a contract, I don't see
4 are relevant to that. Following your approach of
5 trying to find a way to accommodate the request that
6 you believe may be reasonable, I would suggest, Your
7 Honor, that the contract terms would suffice and the
8 information required in 16 which is much more
9 burdensome to gather because it's not a single
10 document. We all know where our contracts are. We can
11 go find them.

12 It's a much more difficult and a much more
13 burdensome exercise. And I would request --

14 JUDGE LEVENTHAL: Well, take 16. Suppose
15 you gave him all the documents you had relating to the
16 dealings between these five large shippers and your
17 railroad. Doesn't that satisfy his request?

18 MR. DENIS: Well, Your Honor --

19 JUDGE LEVENTHAL: I don't think you have
20 to go into the substance. Your documents will speak
21 for themselves.

22 MR. DENIS: If 16 is understood to be

1 limited solely to producing documents, it would be
2 correct. I was interpreting it as asking us to
3 identify various communications and therefore calling
4 us for our written response that would go beyond
5 documents.

6 MR. MULLINS: I will stipulate that as
7 long as they produce documents that reflect the
8 communications and the people that were involved in
9 the negotiations, the file that led up to the
10 negotiation then that's all we want. They don't have
11 to do another --

12 JUDGE LEVENTHAL: All right, is that
13 clarification sufficient?

14 MR. DENIS: That does, thank you, Your
15 Honor.

16 JUDGE LEVENTHAL: Then so ordered. Does
17 that dispose of the dispute? We handled all the
18 items. We just have one or two items --

19 MR. MULLINS: We did.

20 JUDGE LEVENTHAL: We all speak rapidly,
21 but that's fine. Except for the matter that we
22 deferred, to see what the other side has, everything

1 is disposed of?

2 MR. MULLINS: Yes, Your Honor, that's
3 correct. We're going to go with respect to your
4 rulings one 1 through 5, we're going to look through
5 the ACE documents that you've ordered to be produced
6 and we'll see if it produces the relevant information.

7 JUDGE LEVENTHAL: All right, anything else
8 before us this morning?

9 MR. EDWARDS: No, Your Honor.

10 JUDGE LEVENTHAL: All right, very well.
11 The conference stands closed.

12 (Whereupon, at 11:21 a.m., the conference
13 was concluded.)
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