

SURFACE TRANSPORTATION BOARD

07/16/97

FD #33388

71-135

2.

1 JUDGE LEVENTHAL: Leaving out the time
2 frame, we've already discussed that. Do we have any
3 objections to that?

4 MR. ALLEN: Yes, Your Honor.

5 JUDGE LEVENTHAL: All right.

6 MR. ALLEN: I think that's been part of
7 the discussion of the argument. The objection is
8 specifically for the documents concerning bids for
9 carriages hauled by unit train to every destination
10 served by Norfolk Southern at which 100,000 tons or
11 more of coal was consumed.

12 JUDGE LEVENTHAL: I would take that to be
13 100,000 tons per year.

14 MR. ALLEN: Per year, yes.

15 Now, that comprises the majority, and
16 probably the vast majority of Norfolk Southern's 500
17 or so coal customers, and that's the very breadth that
18 we have been objecting to.

19 JUDGE LEVENTHAL: Your objection though
20 goes to the destinations now, leaving out the time
21 frame?

22 MR. ALLEN: Yes, leaving out the time

1 frame, it goes to the scope of the request to every
2 destination. If it were limited to the destinations
3 involved and the shippers here, as I've indicated, I
4 think we would have little, if any, objection.

5 MR. McBRIDE: And if I may be heard, Your
6 Honor.

7 JUDGE LEVENTHAL: Yes.

8 MR. McBRIDE: Picking up on Mr.
9 Cunningham's theme, he tried to limit me to just
10 Delmarva, and then his partner got up and said, "But
11 the Delmarva file won't do Mr. McBride any good," and
12 by the way, it's not just limited to Delmarva.
13 Atlantic City Electric is sole served by Conrail
14 today, and its rates could go up as a result of the
15 acquisition of Conrail.

16 The Ohio Valley Coal Company serves sole
17 serve facilities on Conrail of Centerior Energy.

18 AEP has sole serve facilities, I believe,
19 of all three of these Applicants.

20 So we have facilities on all three of
21 these Applicants, and the point is that their rate
22 making practices are what are at issue. Some of our

1 clients have rates under contract -- most of them
2 do -- and some of those contracts have been in effect
3 for a long time, but they happen to be coming to an
4 end relatively soon, and we're concerned about what
5 the rate making practices will be of these carriers
6 after those contracts expire.

7 Some of them will expire before this
8 acquisition occurs, before the proceeding is over.
9 That's true, for example, with the Ohio Valley Coal
10 Company. I believe it's true of some of AEP's
11 movements.

12 Others of them will expire shortly after
13 the control date, that is, when the transaction would
14 be consummated under the Board's schedule. So we need
15 all the destinations to determine their rate making
16 practices, not just our own clients' destinations.

17 And as you've heard, our own clients'
18 destinations may not give us the information we need.

19 MR. CUNNINGHAM: Your Honor, again, the
20 request is really about rate making practices, not
21 about anti-competitive rate making practices.

22 The Board does not judge mergers on the

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1 basis of the legitimate rate making practices of
2 carriers, which except in the general proposition that
3 they're trying to maximize profits as they see it, is
4 not readily subject to easy generalization. Each
5 carrier approaches these things somewhat differently.

6 One of the reasons people have mergers is
7 they think they can do it better than the other
8 carrier, and they pay a lot for it so that they can
9 have the privilege of trying.

10 The question before the Board is: is
11 there an anti-competitive action. Mr. McBride hasn't
12 come close to suggesting one that would warrant this
13 discovery, which extends not only to the interline
14 movements which are the first part of an inquiry under
15 the one lump theory. He's asking for all the
16 movements on each of these individual carriers to and
17 from his destinations.

18 It's got nothing to do with the one lump
19 theory, and he has suggested no relevance to any
20 competitive inquiry, not any. The only thing he's
21 said in his papers and in his argument is that he
22 wants to test the theory that Dr. Kahn, among others,

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1 has endorsed as creating a reasonable presumption, and
2 that presumption is not something so complicated as
3 what happens in airline deregulation or how the
4 nation's economy works.

5 That presumption is that carriers will
6 seek to maximize profits wherever possible. That is
7 the presumption of the one lump theory. It's not a
8 big deal.

9 And the question is: is there some
10 peculiar reason due to anti-competitive behavior that
11 they wouldn't in this circumstance?

12 Mr. McBride is tossing all of that aside
13 and said he wants to look into the rate making
14 practices of carriers. It's absurdly overreaching,
15 and this request shows it by virtue of the fact that
16 it's not limited to any of the circumstances to which
17 the one lump theory would be applied.

18 JUDGE LEVENTHAL: You do know that
19 discovery is much more liberal than evidence albeit
20 adduced at the hearing in this matter, and it seems to
21 me that although he's asking for rate setting theories
22 and practices, it may very well lead to matters which

1 will be admissible at the hearing.

2 MR. CUNNINGHAM: Well, under that theory,
3 Your Honor --

4 JUDGE LEVENTHAL: So you have a much
5 broader --

6 MR. CUNNINGHAM: Well, under that theory,
7 there's no -- we should just ask for all of our
8 documents.

9 JUDGE LEVENTHAL: Well --

10 MR. CUNNINGHAM: There has to be some
11 plausible notion of --

12 JUDGE LEVENTHAL: He's willing to ask you
13 for that. Are you willing to give it to him?

14 (Laughter.)

15 MR. CUNNINGHAM: Well, it would be more
16 clear as to what we're doing here. I think the
17 railroads' principal activity is moving goods and
18 setting rates for them, okay, and as you know, it's a
19 lot more complicated than the utility business because
20 each movement has a rate.

21 There has to be a balance between the
22 information sought, some nexus between the information

1 sought and some goal that he would be trying to pursue
2 in the case, and the only goal that he has a statutory
3 right to pursue is to show that the transaction is
4 somehow anti-competitive, in general or with respect
5 to him.

6 There is no nexus between any theory of
7 anti-competitive behavior and this request, this very
8 particular request that's before you. There's none
9 whatsoever.

10 JUDGE LEVENTHAL: All right.

11 MR. OSBORN: Your Honor, if I may, and
12 again, I have no position on this particular
13 discovery, but I am concerned about protecting certain
14 issues that we have in this case, and I think Mr.
15 Cunningham and I may have a difference of opinion when
16 he seems to disassociate anti-competitive effects from
17 possible effects on rates.

18 The whole question here is whether the
19 transaction proposed will reduce competition, and if
20 the transaction would reduce competition, that might
21 result in an effect on rates. So I think that is part
22 of what we're concerned about in this case.

1 Whether you characterize it as an anti-
2 competitive effect or not, if you have a reduction in
3 competition, it could have a rate effect, and that, of
4 course, is a relevant issue.

5 MR. CUNNINGHAM: I don't think I disagree
6 with Mr. Osborn at all. I think that if there were
7 some theory that there were going to be a reduction in
8 competition here, then we might have some basis for
9 framing and structuring this massive request, but
10 there isn't.

11 JUDGE LEVENTHAL: All right. I think that
12 perhaps I've handled this argument area out of order.

13 Let's go off the record.

14 (Whereupon, the foregoing matter went off
15 the record at 12:04 p.m. and went back on
16 the record at 12:08 p.m.)

17 JUDGE LEVENTHAL: All right. Back on the
18 record.

19 In our off-the-record discussion, we
20 discussed whether we should treat the request
21 interrogatories prior to the document request. The
22 parties have indicated that the time for filing

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1 objections to the interrogatories has not run yet.
2 They have until July 19th, in accordance with the
3 discovery guidelines, to respond.

4 Mr. McBride has indicated he wants me to
5 rule on the document requests at this time.

6 Does anybody wish to add anything to my
7 summarization?

8 (No response.)

9 JUDGE LEVENTHAL: All right. Any further
10 arguments on Item No. 1 of the document requests,
11 which although as I read it applied to Conrail, it
12 applies to all three of the Respondents?

13 MR. NORTON: Your Honor, just a point
14 maybe of clarification, whether this is intended to
15 apply to situations where Conrail -- where it's a
16 destination carrier, where it is the only carrier, in
17 other words, a single line shipment as opposed to one
18 where there is a prior movement on another railroad.

19 It's just not clear whether he's intending
20 to encompass both. The theory that he's been talking
21 about, the one lump theory, applies in an interline
22 situation rather than the single line. That's why I

1 raised the clarification.

2 MR. McBRIDE: The theory applies in the
3 interline situation, but I think this abundantly
4 clear. We're not challenging the theory. We're
5 inquiring into their whole rate making practices, and
6 so, no, the question is not limited, as Mr. Norton
7 just requested. It's very clear that it applies to
8 all circumstances in which Conrail has made a bid for
9 the carriage of coal, whether for all or part of a
10 movement.

11 JUDGE LEVENTHAL: Your request is to every
12 destination served by Conrail. How many destinations
13 are involved?

14 MR. McBRIDE: To Conrail, that's my
15 request. To CSX, it's for every destination served by
16 CSX, and for Norfolk Southern, the same.

17 I don't have the exact number to Conrail,
18 but Mr. Crowley has probably seen some of these files.
19 Maybe he has the number in mind.

20 MR. CROWLEY: No, I don't.

21 JUDGE LEVENTHAL: All right. How many
22 destinations are we talking about if it's every

1 destination?

2 MR. HARKER: Your Honor, on behalf of
3 CSX --

4 JUDGE LEVENTHAL: We're only talking about
5 coal, correct?

6 MR. McBRIDE: Correct.

7 JUDGE LEVENTHAL: I'm not asking for an
8 exact number. Is it 100, 500, 1,000, two?

9 MR. HARKER: I'm not in a position to make
10 a representation to you on the exact number of
11 destinations. I can tell you though that I'm told by
12 CSX that they have over 350 current coal contracts.
13 I would represent to the Board or to the Judge that
14 that probably represents many more than that in terms
15 of destinations.

16 Between 1993 and 1996, there were over 900
17 coal contracts. So we're talking about many, many
18 hundreds, if not thousands, of destinations, it would
19 seem to me, and just for CSX.

20 MR. McBRIDE: Actually, Mr. Crowley
21 informs me that it's probably fewer destinations than
22 the number of contracts. Oftentimes they'll have

1 different contracts for different sources of coal to
2 one destination. So you may have -- AEP has many
3 contracts, for example, but we're talking about a
4 fixed number of power plants here.

5 Atlantic City Electric, for example, has
6 two. Delmarva has two. AEP has 20. Ohio Valley Coal
7 Company serves a handful.

8 I think that, in fact, if I remember
9 right, in a presentation that Conrail and CSX made to
10 my clients a long time ago, there was something like
11 140 coal-fired power plants in the Eastern United
12 States affected by these three railroads.

13 JUDGE LEVENTHAL: All right. Any further
14 argument?

15 (No response.)

16 JUDGE LEVENTHAL: I'm ready to rule. Now,
17 I'm not going to give you 1978 to 1997. I'm going to
18 limit you in the number of years.

19 You tell me what years, what number of
20 years you can live with.

21 MR. McBRIDE: Well, I --

22 JUDGE LEVENTHAL: You had to have a chance

1 to discuss this because this is what we recessed for.
2 I said two years before and after each of the mergers,
3 plus 1995, the base year in this proceeding.

4 MR. McBRIDE: Well, I can't -- just to be
5 very candid with Your Honor, and I hope you understand
6 that I have to protect my litigation position here, I
7 can't live with a limitation on this, but I'll work
8 with you in setting priorities. All right?

9 JUDGE LEVENTHAL: All right. The record
10 is clear on that.

11 MR. McBRIDE: All right. Thank you.

12 The CSX merger was in 1980. So it would
13 seem to me that we would need the years '78 to '82.

14 The Norfolk Southern merger was in '82, I
15 believe. So that --

16 JUDGE LEVENTHAL: Wait a minute. You're
17 going too fast. Norfolk Southern was '82?

18 MR. McBRIDE: Norfolk Southern was '82,
19 but I want to make clear Mr. Crowley believes very
20 strongly, and I'm here in support of the testimony he
21 would present --

22 JUDGE LEVENTHAL: The record is clear on

1 this. I'm telling you I'm going to deny your request
2 for the years. I'm going to grant you something
3 that's reasonable, and I'm inquiring what you can live
4 with under those circumstances.

5 MR. McBRIDE: I understand.

6 JUDGE LEVENTHAL: You have a crazy Judge
7 that's going to rule against you. What's the best you
8 can do?

9 MR. McBRIDE: I understood that. I was
10 not rearguing that issue.

11 JUDGE LEVENTHAL: Okay.

12 MR. McBRIDE: I was trying to deal with
13 the issue of --

14 JUDGE LEVENTHAL: I'm trying to protect
15 your record.

16 MR. McBRIDE: I appreciate that.

17 Mr. Crowley's point is that for the years
18 you are going to give him, we need the data from all
19 three of these railroads because the issue is
20 competition. So those years are '78 to '82 for the
21 1980 CSX merger; '80 to '84 for the Norfolk Southern
22 merger; and perhaps Mr. Cunningham or Mr. Norton or

1 somebody else in the room could inform the record
2 about the year in which Conrail acquired the
3 Monongahela.

4 JUDGE LEVENTHAL: All right. Let me go
5 off the record.

6 (Whereupon, the foregoing matter went off
7 the record at 12:14 p.m. and went back on
8 the record at 12:16 p.m.)

9 JUDGE LEVENTHAL: Back on the record.

10 In our off-the-record discussion, Mr.
11 McBride advised me, pursuant to my question, that with
12 respect to the CSX Railroad, they required the years
13 of '78, 1978 to 1982. With respect to Norfolk
14 Southern, 1980 to 1984. With respect to Conrail, 1988
15 to 1992.

16 Mr. McBride wanted the information from
17 all three railroads from the years 1980 to 1992. I
18 told him that that is not what I had in mind, but I'm
19 permitting him to make a further argument.

20 MR. McBRIDE: The point is, I think,
21 fairly simply this, Your Honor: that the issue is
22 whether those mergers, as Mr. Cunningham himself has

1 been arguing, have an anti-competitive effect, thereby
2 producing adverse impacts on our clients' rates.

3 These three railroads and their
4 predecessor railroads compete between and among the
5 three of them for business to utility plants in the
6 Eastern United States, and so what Mr. Crowley needs
7 is not apples and oranges from different years. He
8 needs the evidence about their competition to utility
9 plants during the same time periods.

10 Otherwise if you were hearing this case on
11 the record, you'd have him on the witness stand, and
12 he'd say, "Well, I looked at the marketing file for,
13 you know, the C&O Railroad in 1979, and this is how it
14 was setting rates in competition with the Norfolk &
15 Western, but I don't have the Norfolk & Western data."

16 And then he'd have the Norfolk & Western
17 data for some later period, but he wouldn't have the
18 CSX data for that time period, and you'd end up with
19 data that isn't comparable, doesn't match to show
20 whether there was competition or lack thereof, whether
21 rates went up as a result of these mergers for the
22 same destinations.

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1 So that's the problem. We need data from
2 the same time periods to show whether the effect of
3 these prior mergers has been anti-competitive and
4 therefore caused rates to go up.

5 JUDGE LEVENTHAL: All right. I feel that
6 I think it's -- I'm not letting you in on any secrets.
7 In the question of discovery, you have to weigh the
8 burden against the need to know. I feel that keeping
9 that in mind, your need to know is limited to the
10 competition for business involving each of these
11 railroads, involving the shippers of each of these
12 railroads, before and after the mergers that you have
13 put on the record.

14 So I'm going to order that the time frame
15 be limited to 1978 to 1982 for the CSX; 1980 to '84
16 for Norfolk Southern; and 1988 to 1992 for Conrail.

17 Now, we have the further question of the
18 base year, 1995 and 1996. Do I hear any objections to
19 furnishing the information? For 1995, I think it's
20 obvious you have to give them the information.

21 MR. ALLEN: Your Honor, do I understand
22 that you have not yet addressed the question of

1 limitations on destinations?

2 JUDGE LEVENTHAL: No, now we're talking
3 about years.

4 MR. ALLEN: Years. Apart from the
5 question of the destination limitation, as to which we
6 have a very serious problem, I don't believe the
7 Norfolk Southern has any objection to the base year,
8 information in the base year.

9 JUDGE LEVENTHAL: How about 1996?

10 MR. ALLEN: Or to 1996 either.

11 JUDGE LEVENTHAL: I think that's
12 reasonable.

13 MR. McBRIDE: And what about the tapes for
14 the first two quarters of '97?

15 MR. ALLEN: We're not talking about tapes
16 at this moment, I think, or the bids.

17 JUDGE LEVENTHAL: We're only talking about
18 the time frame.

19 MR. McBRIDE: What conceivable argument
20 could there be that the current is not as relevant as
21 the previous two years?

22 JUDGE LEVENTHAL: I was dealing with what

1 you asked for, Mr. McBride.

2 MR. McBRIDE: Your Honor, it does say '97.
3 I apologize.

4 JUDGE LEVENTHAL: All right.

5 MR. CUNNINGHAM: Pardon me, Your Honor.
6 I'm confused about what we're talking about.

7 JUDGE LEVENTHAL: We're talking only about
8 the time frame. We haven't touched the --

9 MR. CUNNINGHAM: The time frame for what?

10 JUDGE LEVENTHAL: We're approaching the
11 information --

12 MR. CUNNINGHAM: Request 1?

13 MR. ALLEN: Request No. 1.

14 JUDGE LEVENTHAL: Request No. 1.

15 MR. CUNNINGHAM: What is the meaning of
16 1996 to a merger? I don't remember one.

17 JUDGE LEVENTHAL: Well, he's asking for
18 current information. That's all. The base year,
19 1995, and he wants you to bring it up to date.

20 (Counsel conferred.)

21 JUDGE LEVENTHAL: My experience in these
22 cases is that parties generally don't object to

1 furnishing of current information.

2 All right. Anybody have any problem with
3 that?

4 (No response.)

5 JUDGE LEVENTHAL: All right. Then we'll
6 add the years 1995, 1996, and the first two quarters
7 of 1997.

8 Now, with respect to the destinations,
9 again, let's go off the record.

10 (Whereupon, the foregoing matter went off
11 the record at 12:22 p.m. and went back on
12 the record at 12:23 p.m.)

13 JUDGE LEVENTHAL: Back on the record.

14 In our off-the-record discussion, I
15 inquired whether the parties really wanted to limit
16 the furnishing of information to the movements in this
17 particular argument before me this morning, keeping in
18 mind that similarly situated shippers might very well
19 come in with the same request in subsequent weeks.

20 Mr. Allen responded that he'd be willing.
21 Whatever I rule, he'll abide with and will use it as
22 precedent with regard to other requests, but he

1 indicated he would furnish that information only to
2 the requesting parties.

3 Well, what do our guidelines say about
4 that?

5 MR. McBRIDE: The guidelines speak
6 directly to that, Your Honor, and they provide that
7 anybody who asks for responses to discovery that were
8 propounded by one party is entitled to them even if
9 they don't represent that party, and this is a very,
10 very crucial point.

11 JUDGE LEVENTHAL: I thought the guidelines
12 did so provide.

13 MR. McBRIDE: Yes, they do, and I was just
14 looking for them, and it may take me a moment to find
15 it. I've got them right here.

16 At 15, Your Honor, page 5, "discovery
17 responses shall be served only on the party that
18 propounded the discovery and any party requesting
19 copies of such responses in writing, except that the
20 documents produced by a party in response to a
21 discovery request shall be placed in the depository in
22 lieu of being served."

1 We'd all have access to them.

2 JUDGE LEVENTHAL: Mr. Allen?

3 MR. NORTON: Your Honor, there is a
4 problem that Mr. McBride is not addressing, and that
5 is there's a confidentiality issue that is raised
6 under the statute that prohibits disclosure of
7 information, certain kinds of information, to parties
8 other than the shipper or consignee, and that is
9 something that is not a problem when we're disclosing
10 it to the party who was in on the transaction and has
11 requested it and thereby implicitly consenting to
12 disclosure, but on a broader basis, that is something
13 that would have to be dealt with.

14 JUDGE LEVENTHAL: Well, how do we deal
15 with Section 15, which the discovery guidelines agreed
16 upon by the parties and I issued as an order based
17 upon the fact that you all agreed upon them? How are
18 you going to handle that?

19 MR. NORTON: The guidelines --

20 JUDGE LEVENTHAL: They're two separate
21 issues.

22 MR. NORTON: The guidelines can't override

1 the statute.

2 JUDGE LEVENTHAL: Well, those are two
3 separate issues. We're not treating with
4 confidentiality now. That's one of the arguments
5 raised in your answer, and we'll have to reach that at
6 the appropriate time in deciding it.

7 Right now we're dealing with Mr. Allen's
8 statement that he'd be willing to serve the responses
9 only upon the party requesting it, when your
10 guidelines require that they be furnished to anybody
11 asking for copies.

12 The confidential issue we'll have to treat
13 later on. I mean I'm sure you're well aware of my
14 recent ruling in the Grainland case.

15 MR. NORTON: Exactly.

16 MR. ALLEN: We are aware of that, Your
17 Honor, and that's what I was thinking of when I made
18 that response, but now that you remind me of the
19 guidelines, I think it is true that the guidelines
20 provide that anything we give Mr. McBride goes in the
21 depository and, subject to any constraints on
22 confidentiality, would be available to other parties.

1 So I will amend what I said earlier in
2 that respect.

3 JUDGE LEVENTHAL: All right.

4 MR. COBURN: Your Honor, just to
5 supplement that point, which I fully agree with, I
6 think the Grainland ruling would require that before
7 we put confidential documents or highly confidential
8 documents of this nature relating to bids for specific
9 shippers in the depository, we may have to redact from
10 those documents the confidential information.

11 Mr. McBride, of course, could see that
12 information for his clients, but what goes into the
13 depository open to other parties --

14 JUDGE LEVENTHAL: Well, the other parties
15 may waive their confidentiality if they so desire, but
16 in any event, Mr. McBride would have whatever
17 information is furnished in the depository. I mean
18 all parties would have it, not just Mr. McBride.

19 MR. McBRIDE: So we've dealt with the
20 discovery guideline issue. I gather we don't have a
21 dispute there.

22 JUDGE LEVENTHAL: That's right.

1 MR. McBRIDE: And the only remaining
2 dispute is on the confidentiality issue, and if --

3 JUDGE LEVENTHAL: Not yet. Not yet.

4 MR. McBRIDE: Oh, you won't hear that.

5 JUDGE LEVENTHAL: We're going to hear that
6 later.

7 MR. McBRIDE: Okay.

8 JUDGE LEVENTHAL: All right. Now, I'm
9 going to grant Document Request No. 1, with the time
10 frame limitations that I previously ruled on, and
11 limit the destinations to the parties involved in this
12 motion at this time, and that includes the American
13 Electric Power Service Company or Corporation.

14 All right? Is my ruling clear? Is there
15 anything that isn't clear?

16 MR. McBRIDE: It's clear.

17 MR. ALLEN: Just to clarify, Your Honor,
18 American Electric Power, as I understand, has numerous
19 locations, Florida, Alabama, maybe served by coal
20 mines from Alabama, has nothing to do with this
21 merger, couldn't possibly be affected, and we, as I've
22 said before, would object to producing or searching

1 our files for documents relating to power plants that
2 were not possibly going to be affected by this merger,
3 namely, power plants that are not either on Conrail or
4 on one of the other Applicants and served by origins
5 on Conrail.

6 So as long as your ruling -- I would seek
7 to clarify that your ruling is limited to destinations
8 that have some connection with this transaction.

9 MR. McBRIDE: Now, first of all, Mr. Allen
10 is mistaken as to his geography. American Electric
11 Power serves at least seven states, but it doesn't
12 serve Florida or Alabama. It's --

13 JUDGE LEVENTHAL: Do you have any argument
14 as to whether it should involve destinations other
15 than those involved in this proceeding?

16 MR. McBRIDE: Yes, absolutely. As I told
17 Your Honor before, CSX and Norfolk Southern, who would
18 be the surviving operating carriers for the most part,
19 although I would point out the transaction will
20 maintain Conrail apparently as an entity as well, are
21 serving coal-fired power plants, and they're all at
22 risk of rate increases to pay for that 10.2 or three

1 billion dollars that they borrowed to buy Conrail.

2 They're all at risk. It doesn't matter
3 whether they're served by Conrail or not. They're
4 going to raise their rates if they can get away with
5 it and --

6 JUDGE LEVENTHAL: You have to be served by
7 one of the railroads involved in this.

8 MR. McBRIDE: Yes, yes, that's right, and
9 Norfolk Southern, Conrail or CSX. That's who serves
10 American Electric Power, all three of them.

11 JUDGE LEVENTHAL: That's not what you're
12 objecting to, is it?

13 MR. CUNNINGHAM: I think the point is,
14 Your Honor, that Conrail, as far as we know, is not
15 currently providing any coal service to AEP, and
16 therefore, the effect of the transaction on Conrail's
17 coal service is going to be -- cannot exist.

18 Now, to the extent that we do provide
19 service to AEP, if I recall this morning, it was to a
20 source mistaken, obviously we would suggest that come
21 within the ambit of your order, but the question is:
22 if it's not served by an origin on Conrail and it's

1 not on Conrail, what does it have to do with this
2 transaction?

3 I think that's the question Mr. Allen was
4 asking, and therefore, to the extent that AEP is not
5 served from Conrail origins or served by Conrail
6 today, what difference does it make? If it were in
7 Florida or it were in Texas or Kansas, rather, and
8 were served by one of these carriers, what does that
9 have to do with the merger?

10 Nothing with respect to competition.
11 Again, it's just this rate theory, and they could
12 raise their rates tomorrow. They don't have to wait
13 for --

14 JUDGE LEVENTHAL: We're involved with this
15 merger. I'm not aware of what the needs are or what
16 the destinations are of American Electric Power.

17 MR. McBRIDE: Yes. He is mistaken, and
18 Mr. Crowley is here and can attest it. American
19 Electric Power does get coal from Conrail.

20 MR. ALLEN: To that extent we would not
21 object.

22 MR. McBRIDE: Well, I understand that, but

1 that's a very great limitation on what's really going
2 on here. What's really going on here is that they
3 spend so much money for Conrail that they're going to
4 have to raise the rates to all their shippers whether
5 they're served on Norfolk Southern and CSX or served
6 by Conrail today to pay for it, and that's what we're
7 concerned about as the effect of this transaction.

8 Because, if I may point out to Your Honor,
9 the statute provides, among other things, in Section
10 11-324(b) (3) that the Board must consider the effect
11 of the total fixed charges that result from the
12 proposed transaction on the public and on competition,
13 and that's the problem this proceeding is going to
14 raise in a more fundamental way than any railroad
15 acquisition or merger ever has. The money they've
16 spent is so great that all the shippers served by
17 these three applicants are at risk of rate increases
18 or the carriers that interline with them are at the
19 risk of losing revenues as a result.

20 MR. CUNNINGHAM: I think we've now got to
21 the heart of the matter, Your Honor. It seems that
22 maybe it isn't as patently obvious to others as it is

1 to me, but if there is room to raise rates on the
2 Norfolk Southern in Kansas City on coal that
3 originates on the Norfolk Southern, that possibility
4 will be undertaken by Norfolk Southern whether or not
5 there's this merger.

6 The question is whether, by virtue of this
7 transaction, if there is any plausibility to the
8 theory of this discovery at all, it's whether by
9 virtue of this transaction there is going to be some
10 change in the competitive structure such that rates
11 will go up in an anti-competitive way.

12 That can't happen ex Conrail because
13 Conrail is the only thing that's going to change, and
14 therefore, if Conrail is not involved, it seems
15 preposterous to propound a wild goose chase to satisfy
16 his prurient interest in this data.

17 MR. McBRIDE: He's just stated the theory,
18 and my point is, and Your Honor, I think, understands
19 this, that our discovery is for the purpose of testing
20 whether they're charging people all that they can
21 charge them right now, and that's true for origins
22 served by Norfolk Southern and CSX as well.

1 You can't just accept the fact Mr.
2 Cunningham says, "We're we charging everybody the
3 maximum." That's what the theory says. What we want
4 to find out is if it's true. That's what this is
5 about.

6 JUDGE LEVENTHAL: Anybody else?

7 (No response.)

8 JUDGE LEVENTHAL: All right, I'm going to
9 limit the discovery to destinations involved in this
10 proceeding. If there is some problem with regard to
11 American Electric Power at a later time, or any other
12 shipper, you'll have to bring it before me at that
13 time. Right now my ruling is limiting it to the
14 destinations involved in this proceeding.

15 All right. That was item number one.

16 Item number two. Identify and produce all
17 files --

18 MR. COBURN: Your Honor, I'm sorry. Just
19 to point out clarification. When you say destinations
20 involved in this proceeding, I take that to mean
21 destinations today served by Conrail, which either CSX
22 or N.S. would serve after the acquisition.

1 JUDGE LEVENTHAL: Right.

2 MR. COBURN: Thank you, Your Honor.

3 MR. EDELMAN: Well, having made an
4 appearance, is it okay if I leave at this time?

5 JUDGE LEVENTHAL: Sure.

6 MR. EDELMAN: Thank you.

7 JUDGE LEVENTHAL: All right. Item number
8 two, "identify and produce all files of the
9 departments responsible for establishing or
10 negotiating rates for the carriage of coal that relate
11 to the bid documents responsive to Document Request
12 No. 1, including subsequent or prior correspondence or
13 analyses."

14 Is there any objection subject to the
15 rulings I've already made with regard to Number 1?

16 MR. McBRIDE: You mean Number 2, I
17 believe.

18 JUDGE LEVENTHAL: No.

19 MR. ALLEN: Was there any objection --

20 MR. McBRIDE: Excuse me. I understand.
21 I apologize.

22 JUDGE LEVENTHAL: All right. Now the

1 rulings I've made with respect to Number 1 would apply
2 to Number 2. Are there any objections?

3 MR. CUNNINGHAM: We only object on the
4 same grounds, Your Honor, that we objected to Number
5 1.

6 JUDGE LEVENTHAL: All right, and I've
7 already ruled on that.

8 MR. CUNNINGHAM: Right.

9 JUDGE LEVENTHAL: All right.

10 MR. McBRIDE: The same for me.

11 JUDGE LEVENTHAL: All right. Everybody is
12 reserving their rights. Then I grant Number 2 subject
13 to the same conditions as Number 1, and we now can go
14 to Number 3.

15 Do we have any -- well, I'll read --

16 MR. NORTON: Your Honor, three may be
17 premature because that is one to which --

18 JUDGE LEVENTHAL: I'm sorry. I'm sorry.
19 I didn't hear you.

20 MR. NORTON: Three may be premature to
21 consider today because that is one which CSX and
22 Conrail have not yet responded to because they, unlike

1 N.S., were going to be providing at least a partial
2 response, and our deadline for objections isn't until
3 Friday.

4 So maybe that is one that should be
5 revisited.

6 MR. McBRIDE: Norfolk Southern has
7 objected altogether to Number 3, and therefore, I
8 believe I'm entitled to a ruling, and time is of the
9 essence here -- a ruling as to Norfolk Southern's
10 objection.

11 All they said was that it's neither
12 relevant nor reasonably calculated to leave to the
13 discovery of admissible evidence, and this is with
14 respect to their track.

15 JUDGE LEVENTHAL: Mr. Allen.

16 MR. ALLEN: Your Honor, the Number 3 asks
17 Norfolk Southern for it's 100 percent traffic tapes
18 from 1978 through the second quarter of 1997. That's
19 19-some years.

20 JUDGE LEVENTHAL: No, but the same -- the
21 time frame is going to apply to anything I rule on.

22 MR. ALLEN: But the traffic tapes are an

1 entirely different category than what we've been
2 talking about before. These tapes are for 100 percent
3 of Norfolk Southern's traffic, including traffic
4 having nothing to do with coal, having nothing to do
5 with his clients.

6 All of our traffic, our grain traffic, our
7 automobile traffic, and it's 100 percent of that
8 traffic, and it goes back 19 years.

9 In the application, Norfolk Southern --
10 the Board has ruled that 1995 is the base year, and
11 our application included market analysis, and traffic
12 impact studies based not on our 100 percent traffic
13 tapes, but on the Commission's one percent way bill
14 sample that the Commission maintains as permitted by
15 the Commission's -- the Board's rules.

16 CSX and Conrail provided their impact
17 analysis on the basis of their 100 percent tape.
18 Since our own analyses were based on the way bill
19 sample, we've objected to supplying the tapes.

20 However, we would certainly consider
21 providing the Norfolk Southern's traffic, 100 percent
22 traffic tapes, for 1995 even though we really don't

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1 think they're relevant. We'd consider it in the
2 interest of compromise.

3 But beyond 1995, it is simply
4 extraordinarily overbroad and burdensome to produce
5 and, we submit, neither relevant to anything Mr.
6 McBride legitimately wants or really needed by him.
7 It would take, as we've stated in our papers, we would
8 estimate some 1,000 man-hours to compile all these
9 tapes and provide them and clean them up, as it were,
10 in a way that made them producible.

11 They provide traffic information that is
12 certainly reflected in the Board's way bill sample,
13 which Mr. McBride has full access to. He could go
14 back and get the way bill sample back to 1978 and get
15 a sampling of all these movements that way.

16 But we see no basis for his request for
17 our 100 percent traffic tapes going back to 1978 or
18 even for the period that you've limited, which I guess
19 is what, maybe eight or ten years?

20 To go back and compile those tapes in a
21 way that were useful or producible would take an
22 enormous amount of time, and the marginal probative

1 value of those, we submit, is far outweighed by the
2 burden that would be imposed.

3 JUDGE LEVENTHAL: Mr. McBride.

4 MR. McBRIDE: Thank you, Your Honor.

5 First of all, let me say that the way bill
6 sample has two major problems with it, and again I'll
7 explain this the best I can, but Mr. Crowley is the
8 expert.

9 First of all, it's a sample. It's a one
10 percent sample, and what happens is that if you go and
11 only look at one out of 100 records, oftentimes
12 there's absolutely nothing in a key segment of the
13 data that needs to be analyzed. I mean like pulling
14 one volume of F.3rd off out of every 100, or F.2nd,
15 and if you didn't find any cases about the First
16 Amendment, the sampling technique would lead you to
17 the conclusion that there isn't a First Amendment.

18 But obviously that isn't so. So you have
19 to deal with the problem of a sample.

20 Mr. Crowley has been through this on a
21 number of occasions. We've discussed it before, and
22 if you come up with a null set, then you're right back

1 to asking for complete data. That's why we asked for
2 the traffic tapes. So we -- and because, again, time
3 is of the essence, we can't be relegated to the sample
4 and then come back here in a month and have lost that
5 amount of time, and then have some mind numbing
6 hearing before Your Honor explaining that there's
7 nothing in this segment and there's nothing in that
8 segment and nothing in that segment. It's going to
9 get very tedious.

10 The quick way to do this is to just get
11 the tapes and get on with it. They want to get on
12 with this proceeding. They got the Board to agree to
13 expedite the proceeding. They ought to expedite
14 providing us the data we need in the proceeding.

15 The second problem is this, which they
16 haven't told you. On the way bill sample, the actual
17 rate information is not there. They, with the Board's
18 approval, apply some sort of a multiplication factor
19 or adjustment factor to the actual rate base to mask
20 it, and as a result, then any time a shipper tries to
21 make an argument out of the one percent way bill
22 sample, they say, "Well, you can't rely on that

1 because that's not the actual rate."

2 So that's the other reason we went to the
3 traffic tapes, and they estimate 1,000 man-hours. It
4 doesn't sound like a lot compared to what they put
5 into compile 23 volumes and 14,810 pages. But year by
6 year, it sounds like 50 hours -- 50 man-hours worth of
7 work.

8 So we need those traffic tapes to be able
9 to get the actual data, not to deal with the problem
10 of not having information in a particular category,
11 and not having the actual rate information which is
12 what this is about.

13 That's what our clients are concerned
14 about, is what they're going to have to pay for this
15 transportation as a result of the acquisition of
16 Conrail. So that's why we need these tapes, and as
17 you know, Conrail and CSX haven't even objected
18 altogether to providing them, and I think we ought to
19 just get on with it.

20 JUDGE LEVENTHAL: How about the time
21 limit?

22 MR. McBRIDE: Well, I have the same

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1 concern. I mean, we were looking to test what's
2 happened here for the reasons that I've given you over
3 this entire time period. So my position's the same on
4 the time period, but I don't want to keep arguing with
5 you about the time period.

6 JUDGE LEVENTHAL: All right. You have
7 something you want to tell me, Mr. Allen?

8 MR. ALLEN: Well, I just want to make the
9 point that it is totally beyond me why -- how in any
10 way what Norfolk Southern charged for an automotive
11 shipper in 1984 or 1994 has any relevance to what we
12 might charge Delmarva Power or American Electric
13 Power. It's totally irrelevant.

14 JUDGE LEVENTHAL: When you filed with the
15 Board, you had a one percent way bill sample. Was
16 that of all your traffic?

17 MR. ALLEN: Yes.

18 JUDGE LEVENTHAL: There's 100 percent
19 traffic. You took a one percent sample?

20 MR. ALLEN: Yes. I think actually the
21 sample is two and a half percent. They call it a one
22 percent sample, but it actually samples two and a half

1 percent of the traffic.

2 And under the Board's rules, that's the
3 way, until very recently, merger cases were always
4 done based on the way bill sample. It's a sample, but
5 there's a large volume of traffic here, and the Board
6 has quite properly concluded that given the volumes of
7 it, it's a reasonably accurate sample.

8 JUDGE LEVENTHAL: And what would 100
9 percent traffic tapes do for you? What information
10 would you get from that?

11 MR. McBRIDE: Note, if I could ask you to
12 skip ahead to our interrogatories, we first asked
13 questions about coal rate making practices, and then
14 we asked about other commodities.

15 Because the Court of Appeals in the
16 Lomoile Valley case back in 1983 said it best, they
17 said you can't rely on the self-serving statements of
18 railroad pricing officers.

19 So we're going to first find out what they
20 say are the rate making theories and practices, and
21 then we're going to test them against the actual
22 evidence on the tapes for coal and for everything

1 else, and if they say they have a different rate
2 making practice for coal and other commodities and the
3 tapes show otherwise, that goes to the weight to be
4 given to their testimony.

5 And if they say they're the same, and the
6 tapes show otherwise, that goes to the weight to be
7 given to their testimony. But you can't escape the
8 fact that we're going to get coal and non-coal rate
9 making evidence here because whether we use the sample
10 or the traffic tapes, we're going to get that.

11 It's just that the traffic tapes will be
12 sure to give us what we need, and the way bill sample
13 will not.

14 MR. CUNNINGHAM: Your Honor.

15 JUDGE LEVENTHAL: Just one minute. We'll
16 get to you.

17 Well, why do you need them going back more
18 than the more recent years?

19 MR. McBRIDE: Oh, because of the same
20 reason why the earlier stuff was relevant. We need to
21 test not only what the bids may show and what the
22 competitive process looked like, but what they

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1 actually charged. We need to see whether what they
2 actually charged with respect to the various
3 information that's set forth on these tapes is in
4 accordance with the one lump theory or departs from
5 it.

6 JUDGE LEVENTHAL: Yes, but prior to this,
7 you were talking about the shipment of coal?

8 MR. McBRIDE: Yes, sir.

9 JUDGE LEVENTHAL: Now, you're asking for
10 100 percent of their shipment.

11 MR. McBRIDE: Well, yes, but they don't
12 have tapes that only have coal rates on them. That's
13 the point. The maintain this on one set of data as we
14 understand it.

15 So we just -- rather than make them go to
16 work of breaking it all out, we said just give us the
17 tapes. We're subject to confidentiality here, and
18 they are making broad claims here, Your Honor. They
19 want you to just believe that they maximize their
20 prices on every commodity.

21 We're not so sure that's so, but if they
22 characterize their rate making theory for all --

1 practices for all commodities same, and the tapes show
2 otherwise, that's pretty relevant, and if they say
3 they're not the same, and the tapes show otherwise,
4 that's pretty relevant. And if, in fact, the tapes
5 corroborate what they say, then we also have an
6 argument before the Board under the statute of whether
7 they're properly raising revenue from all commodities,
8 which the statute requires the Board to consider.

9 JUDGE LEVENTHAL: All right.

10 MR. CUNNINGHAM: Your Honor, I'm appearing
11 here not for Conrail, but for my colleague, Mr. Allen,
12 is Co-applicant's counsel.

13 I don't know what I had for breakfast this
14 morning that made me feel so direct, but that's a
15 crock. There is absolutely no way that they can
16 ascertain the correlation between our rate making
17 theory and our rates from our way bill sample, or from
18 our 100 percent tapes because our 100 percent tapes
19 tell what we charge. They give no information about
20 the demand curve against which we charge.

21 The theory is that we charge against the
22 demand curve and not on some other basis. So until

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1 Mr. McBride can demonstrate that he has acquired the
2 demand curve, something no one, in fact, he himself
3 has plead before before the Board is impossible to
4 find, he has no use for this except for some other
5 purpose.

6 And, again, I come back to the matter that
7 he has made so clear in having three or four theories
8 here this morning. There is something else going on
9 here, and I think we've got two or three parts of it,
10 and I don't think we understand at all.

11 There is no basis within the theories that
12 he's articulated so far that he can use the 100
13 percent tape. The only data he's going to get about
14 our rate making practices pertains to our origins and
15 destinations -- our destinations. Pardon me.

16 And with respect to those destinations, he
17 has not sought the information. He's seeking
18 information about movements of hay, movements of
19 petroleum products, movements of lumber, blah, blah,
20 blah. His clients have no knowledge, and his industry
21 has no knowledge, about the demand curve of those
22 commodities. He can, therefore, not test this theory

1 about whether we are pricing against the demand curve.

2 This is a hunting party, and Mr. Allen is
3 absolutely correct. It took us at Conrail forever to
4 get the tapes ready for the '95 way bill sample so
5 that we could exchange it with our potential merger
6 partners, much less under which we had a
7 confidentiality agreement, a great economic incentive
8 to get it ready, much less getting it ready for them
9 so that they will say that we gave them accurate data,
10 blah, blah, blah, blah, blah, blah.

11 So there is a huge burden here, and there
12 is no plausible theory that we've heard so far that
13 would rationalize giving them this breadth of
14 information for one year, much less for a whole series
15 of years, which would multiply the burden
16 substantially.

17 JUDGE LEVENTHAL: You're not saying that
18 it's easy to break out the coal traffic from the rest
19 of the traffic, are you?

20 MR. CUNNINGHAM: I'm not saying that it's
21 easy, but I'm saying that there is no basis in his
22 theory for --

1 JUDGE LEVENTHAL: No, but if the request
2 was limited to coal, shipments of coal --

3 MR. CUNNINGHAM: To and from these
4 destinations.

5 JUDGE LEVENTHAL: Yeah.
6 -- would that make it more palatable to
7 you?

8 MR. CUNNINGHAM: It's a lot easier, I have
9 to admit, to get a particular commodity out, but we
10 still have to go through a huge process, and the
11 question of whether you need the series or not is
12 really questionable, but at least he has the theory.

13 JUDGE LEVENTHAL: Mr. McBride is saying
14 that he thought it would be easier if they asked for
15 100 percent of your traffic tapes so you wouldn't have
16 to review them and pick out the traffic in coal.

17 MR. CUNNINGHAM: I think we would
18 automatically take the easier of those two paths, Your
19 Honor.

20 JUDGE LEVENTHAL: I'm sorry. You would
21 take automatically?

22 MR. CUNNINGHAM: We would take the easier,

1 whichever it turned out to be. I don't think any of
2 us is enough of an expert sitting here to answer that
3 question.

4 JUDGE LEVENTHAL: All right. Any further
5 argument?

6 Mr. Osborn?

7 MR. OSBORN: Thank you, Your Honor.

8 I heard something different from Mr.
9 Cunningham than what I heard from Mr. Allen. With
10 reference to Mr. McBride's request, again, I take no
11 position, particularly as to the breadth of it, but
12 with respect to 1995, I heard Mr. Allen volunteer that
13 a full traffic tape could be made available, and I
14 think I heard Mr. Cunningham take a contrary position.

15 And if that's the case, my sense is that
16 if a party is inclined to request a full traffic tape
17 for the study year that has been designated here, that
18 we don't want to foreclose that kind of request, even
19 though the Applicants chose to rely upon the same in
20 their applications.

21 So if there's a difference between the
22 position of those Co-applicants, I'd like to clarify

1 that.

2 MR. ALLEN: There is no difference, Your
3 Honor. I agree entirely with Mr. Cunningham. I see
4 no way in which the traffic tapes could be relevant to
5 any theory that I've heard this morning from Mr.
6 McBride, and I think I made clear that while we would
7 dispute the relevance of the 1995 tapes, we would in
8 the interest of accommodation certainly consider
9 providing them, but beyond that, the burden just
10 vastly outweighs any marginal relevance they might
11 have.

12 JUDGE LEVENTHAL: Well, why do you think
13 the Board requires you to file a way bill sample if it
14 has no relevance to the merger?

15 MR. ALLEN: Well, the Board permits
16 parties to provide their analyses on the basis of the
17 way bill sample rather than the 100 percent tape. So
18 the Board does not require any submission of
19 information based on the 100 percent tapes.

20 JUDGE LEVENTHAL: No, but you told me that
21 the sample was of the 100 percent tapes. You didn't
22 limit it to coal, did you?

1 MR. ALLEN: No. The one percent way bill
2 sample is a sample of all of a railroad's traffic.

3 JUDGE LEVENTHAL: Well, is that relevant
4 to the Board's determining whether or not to approve
5 the merger?

6 MR. ALLEN: Well, that's a good question.
7 It certainly is information that is generally required
8 by the Board in terms of the Board's rules require you
9 to provide a market -- an analysis of the impact of
10 the merger on movements of traffic, and so we do that
11 and we've done that, and to do that, you need to look
12 at at least a sampling of all of your traffic.

13 Does that answer your question?

14 JUDGE LEVENTHAL: You were telling me it
15 wasn't relevant. It would seem to me that it must be
16 relevant.

17 MR. ALLEN: Well, it's not relevant to Mr.
18 McBride's clients' situations, to Delmarva as to, you
19 know, what our grain traffic might have been in
20 Illinois. That's my point.

21 JUDGE LEVENTHAL: Mr. Osborn?

22 MR. OSBORN: Well, again, Your Honor, I

1 think we're talking about more than coal now, and the
2 question of whether the full traffic tapes are needed
3 for Mr. McBride's theory is a question that he can
4 address, but more generally, for purposes of merger
5 analysis, it's true that in prior years the consistent
6 practice was to rely upon the sample.

7 More recently the practice in some of the
8 more recent mergers has been for the Applicants to use
9 full traffic tapes. It so happens that these
10 Applicants, as I understand it, have predominantly
11 relied upon just the sample. That was their choice,
12 as I understand the way they put their studies
13 together, and the only point I'm making is that we
14 have not yet determined whether we would need the full
15 traffic tape for purposes of further merger analysis.

16 And I don't want any ruling that you might
17 make here to foreclose that possibility because it has
18 certain attributes above and beyond the sample. So I
19 would just ask that whatever ruling you make here be
20 confined to the need or lack thereof for the full tape
21 vis-a-vis Mr. McBride's theory and not more generally.

22 MR. MASER: Your Honor, may I be heard, as

1 well?

2 JUDGE LEVENTHAL: All right.

3 MR. MASER: Picking up on Mr. Osborn's
4 point, I believe I heard you say earlier that the
5 ruling that you would make with respect to the motion
6 before you would be limited to the parties and the
7 motion that is before you.

8 JUDGE LEVENTHAL: And that's absolutely
9 correct.

10 MR. MASER: -- the broad application we're
11 not purporting to define or prejudice anybody else who
12 may come in with other commodities or other reasons
13 why discovery is appropriate for various years and for
14 various commodities and various degrees of detail.

15 So I guess I'm seconding Mr. Osborn's
16 point and assuming, as a matter of clarification, that
17 what you rule today will be limited to these parties.

18 JUDGE LEVENTHAL: I said that earlier.
19 I'll repeat it.

20 MR. MASER: Thank you, sir.

21 JUDGE LEVENTHAL: I'm only ruling on the
22 motion that's before me. That's all my ruling applies

1 to.

2 MR. MASER: Thank you, sir.

3 MR. COBURN: Your Honor, just two simple
4 points of clarification.

5 First, CSX did rely on the 100 percent
6 traffic tape in preparing its application, and that
7 traffic tape is in the depository and has been in the
8 public depository since the day we filed the
9 application, June 23. As far as I'm aware, the
10 movants have not asked for a copy of that tape or
11 otherwise. I'm not sure that they visited the
12 depository, but in any event, they have not seen a
13 copy of that tape, which is available to them.

14 JUDGE LEVENTHAL: What is that, the year?
15 1995?

16 MR. COBURN: That's the 1995 CSX traffic
17 tape.

18 Just one other point. I --

19 JUDGE LEVENTHAL: He wants it going back
20 to '78. What have you got to say about that?

21 MR. COBURN: Well, we'll say what we have
22 to say about it on Friday, but I can tell you that

1 we're certainly not agreeable to going back to 1978,
2 and I don't think we're going to be agreeable to going
3 back beyond 1995, which, again, is already available
4 to them, because we don't think it's relevant to
5 anything, and I haven't heard anything from Mr.
6 McBride yet.

7 JUDGE LEVENTHAL: Well, he says the same
8 arguments that he made with respect to Document
9 Request No. 1 apply to Document Request No. 3.
10 Leaving out your argument, do you agree with him that
11 the same principles apply?

12 MR. COBURN: I'm not sure that the traffic
13 tapes give him information that he needs to make --

14 JUDGE LEVENTHAL: Well, he says --

15 MR. MASER: -- test the one lump theory.
16 As I read his motion, he wants to test despite what
17 we've heard this morning; he wants to test the one
18 lump theory. I'm not sure the traffic tapes give him
19 any information he needs to do that. They certainly
20 don't give him information that he needs to rebut the
21 theory as to his particular clients.

22 JUDGE LEVENTHAL: No, but he said -- and

1 we're leaving out whether or not he is trying to
2 overturn the one lump theory or not. I take it he's
3 trying to show that it doesn't apply to this
4 particular situation.

5 He made certain arguments with respect to
6 his need for the information in Document Request No.
7 1, and he now says if he gets the information with
8 regard to Document Request No. 1, he wants to see if
9 those rates were actually charged, and he would see
10 that from the traffic tapes.

11 Do you disagree with him?

12 MR. COBURN: Well, he'll see what rates
13 were charged from the traffic tapes. I think what he
14 was saying is that he wants to see if the traffic
15 tapes measure up to what our answers may be to
16 Interrogatory No. 1.

17 Interrogatory No. 1, which, again, we
18 haven't answered yet, probes our rate making practices
19 or theories, the principles we use in adopting rates,
20 and he wants to measure that against the traffic
21 tapes.

22 I concur fully with Mr. Cunningham's views

1 that the traffic tapes will not give him the
2 information that he needs to measure the accuracy of
3 our answer to Interrogatory No. 1. Of course, he will
4 have opportunity at depositions to question the
5 witnesses that each Applicant will present with
6 respect to coal pricing, and he will have full
7 opportunity there to question the veracity of our
8 answers, if he has any reason to doubt them, which I
9 don't think he should.

10 But beyond that I don't think the traffic
11 tapes really serve any purpose. Again though the 1995
12 tape for CSX is available to him in the depository.
13 He hasn't yet looked at it, notwithstanding the
14 urgency that we've heard of this morning.

15 Just another point of clarification. I
16 detected, Your Honor, from one of your earlier
17 questions to Mr. Allen that you might think -- and
18 pardon me if I misstate your position -- that the way
19 bill sample was filed in connection with the merger or
20 has some direct relationship to the merger or
21 acquisition application, and just to clarify that
22 point if I understood you right, the way bill is filed

1 annually, and it has nothing to do with the --

2 JUDGE LEVENTHAL: No, I picked up on that.

3 MR. COBURN: Okay.

4 JUDGE LEVENTHAL: What Mr. Allen had told
5 me, perhaps incorrectly, I thought he said that they
6 did file this sample, one percent sample, with respect
7 to the merger.

8 MR. COBURN: Norfolk Southern relied on it
9 -- correct me if I'm wrong -- Norfolk Southern relied
10 on the sample in putting the application together, but
11 the sample is something that's file at the Board by
12 virtue of a rule that's been in place for many years
13 that requires that a sample be filed.

14 MR. NORTON: Your Honor, as to Conrail,
15 we're in the same situation as CSX. Our traffic tape
16 for 1995 or the data from it was placed in the
17 depository, and as far as I know, has not been
18 requested by Mr. McBride or his parties. So we're in
19 the same situation as distinct from N.S.

20 JUDGE LEVENTHAL: Mr. McBride, he says you
21 won't get the information you're looking for even if
22 I grant your motion.

1 MR. McBRIDE: It's not true, and I'm sorry
2 Mr. Cunningham chose to denigrate me. I don't know
3 what he had for breakfast either, but he's told you
4 that what I told you was a crock, and that --

5 JUDGE LEVENTHAL: Oh, I didn't take him as
6 being --

7 MR. McBRIDE: Well, let me tell you that
8 we need this for more than one purpose. I mean he
9 constructs his own theory here and then responds to
10 it. He says that the only basis on which to test the
11 one lump theory is whether you're charging the shipper
12 the highest amount that the shipper will pay, but
13 that's true.

14 There's a crucial limitation in Dr. Kahn's
15 affidavit and in the Court of Appeals opinion. It
16 says subject to regulatory restraints. That's the
17 theory.

18 So we would need the actual rate
19 information for Mr. Crowley to test whether the rates
20 that are being charged are at the limits that the
21 Board would allow under its rate making practices,
22 which I've resisted telling you much about today, as

1 well as the shippers' demand.

2 And Mr. Coburn is incorrect when he says
3 the only purpose that we're asking for these traffic
4 tapes is to test the veracity of the responses or the
5 answers.

6 So there's more than one reason for
7 requesting this tape, and Your Honor had it right when
8 he said we're requesting the information on the tapes
9 because it goes along with the bid information and the
10 documents associated with the bids that we asked for
11 in the first two requests.

12 So we need the information, the coal rate
13 information on the traffic tapes for a variety of
14 reasons, and then I will say that we were only
15 interested in getting the coal rate information, but
16 what I don't want to do is be limited to coal rate
17 information and then be limited to one or two and a
18 half percent of the coal rate information.

19 Then we may get nothing that applies to
20 our clients, and since CSX and Conrail have both
21 admitted that they relied on the 100 percent traffic
22 tape for the base year, I think it's an implied

1 admission that those 100 percent traffic tapes are a
2 relevant source to test what's in the application.

3 And the only issue then is how many years'
4 worth of it we have, but I am representing to Your
5 Honor that we asked for those because we thought it
6 was a simpler way to get at all the coal rate
7 information.

8 I am not here today for any moving party
9 seeking non-coal rate information.

10 JUDGE LEVENTHAL: All right. Let's go off
11 the record.

12 (Whereupon, the foregoing matter went off
13 the record at 1:04 p.m. and went back on
14 the record at 1:04 p.m.)

15 JUDGE LEVENTHAL: All right. Back on the
16 record.

17 All right. Any further argument?

18 (No response.)

19 JUDGE LEVENTHAL: All right. Let's go off
20 the record one more time.

21 (Whereupon, the foregoing matter went off
22 the record at 1:04 p.m. and went back on

1 the record at 1:06 p.m.)

2 JUDGE LEVENTHAL: Back on the record.

3 All right. Off the record I merely
4 inquired of the parties that if I made a ruling with
5 respect to the traffic tapes, would they prefer me to
6 limit it to coal or go along with the 100 percent
7 traffic tapes requested. I decided that I would put
8 it in the alternative.

9 I am going to grant the motion with
10 respect to Document Request No. 3 with the same
11 limitations as I placed on Document Request No. 1 and
12 2. The parties may produce either the 100 percent
13 traffic tapes for the years designated earlier or
14 limit it to the coal shipment traffic tapes for those
15 years.

16 MR. CUNNINGHAM: Coal shipments to --

17 JUDGE LEVENTHAL: To the destinations
18 involved. The same limitations, one, two, and three,
19 both as to destination and years.

20 All right. Now, with respect to the
21 interrogatories, I assume we'll have to adjourn until
22 next week.

1 MR. ALLEN: Well, we will file our answers
2 on Friday, Your Honor, and hopefully there will be no
3 objections to them.

4 JUDGE LEVENTHAL: Oh, all right.

5 MR. McBRIDE: And if I may inform the
6 record, Your Honor, of something for you.

7 JUDGE LEVENTHAL: Yes.

8 MR. McBRIDE: We never, of course, had a
9 chance to respond to their responses received last
10 night, and they all three cited your ruling in the
11 Grainland case, and I wanted you to be aware that the
12 issue is vastly different here than it was there
13 because the law of this case is different, I
14 respectfully submit to Your Honor, and I wanted you to
15 be aware of it.

16 In Decision No. 1 in this case, the Board
17 granted their request to exchange shipper specific
18 information among one another, relying on its
19 authority under Section 11-904. This is a decision
20 served on April 16th, and it stands to reason that the
21 Board, therefore, has the authority to give me the
22 information if it had the authority under that section

1 with respect to them, and far more so where a shipper
2 is asking for it and not carriers agreeing to exchange
3 shipper specific information.

4 So I respectfully submit to Your Honor
5 that your ruling does not limit production of data in
6 this case because the Board has already addressed that
7 issue.

8 JUDGE LEVENTHAL: We haven't reached that
9 issue.

10 Do you think the Board is going to reverse
11 me on the appeal?

12 MR. McBRIDE: I'm afraid to say I think
13 they are, and you probably aren't unhappy about that
14 since you were so candid in your order in indicating
15 what your preferences would have been.

16 JUDGE LEVENTHAL: All right. As Judges,
17 you get a thick skin.

18 MR. McBRIDE: As lawyers, you do, too,
19 Your Honor.

20 JUDGE LEVENTHAL: I'm sure.

21 MR. McBRIDE: You've ruled against me on
22 a few things here today, and I don't take it

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1 personally.

2 JUDGE LEVENTHAL: I'm sure.

3 All right. Then we're going to conclude
4 the oral argument today. I'll put out a rule
5 confirming the things I've ordered today, but of
6 course, you'll proceed in accordance with my rulings
7 made on the record.

8 Let's go off the record.

9 (Whereupon, the foregoing matter went off
10 the record at 1:09 p.m. and went back on
11 the record at 1:16 p.m.)

12 JUDGE LEVENTHAL: Back on the record.

13 All right. I have ruled on the discovery
14 requests that have been brought before me. We are
15 passing on the interrogatories because the parties
16 still have until July 19 to reply, and if necessary,
17 we'll proceed with our discovery guidelines and have
18 further conferences if needed.

19 Is there anything else before us this
20 morning or now this afternoon with regard to the
21 motion?

22 MR. NORTON: Your Honor, just to clarify,

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1 CSX and Conrail haven't responded to Document Request
2 No. 3 either. Our deadline is Friday for that, as
3 well.

4 MR. McBRIDE: I think they ought to be
5 informed though by your ruling, Your Honor.

6 (Laughter.)

7 MR. NORTON: As we would be.

8 JUDGE LEVENTHAL: All right. If they
9 haven't responded because of the time limit, I can't
10 force them. So my ruling then applies to Norfolk
11 Southern on Document Request No. 3, and I assume there
12 won't be a problem with the other two applicants, but
13 if there are, we'll treat it next week.

14 All right. The oral argument this morning
15 then is closed.

16 (Whereupon, the proceedings went off the
17 record at 1:18 p.m.)

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ORAL ARGUMENT

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

Finance Docket
No. 33388

Wednesday,
July 30, 1997

Washington, D.C.

The above-entitled matter came on for oral
argument in Hearing Room 4 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

(2:00 p.m.)

JUDGE LEVENTHAL: All right, we'll take appearances at this time.

(Whereupon, the attorneys present identified themselves for the record.)

JUDGE LEVENTHAL: Any more appearances? All right.

Before we get to the oral argument, there are a few things I'd like to clear up. Number one, my fax number is (202) 219-3289.

MR. COBURN: Can you repeat that, please, Your Honor?

JUDGE LEVENTHAL: Anybody else have my number?

(Laughter.)

It's (202) 219-3289. If I gave you the wrong number, you'll have to find out another way.

MR. COBURN: You got it right, Your Honor.

JUDGE LEVENTHAL: I got it right, yes.

MR. COBURN: But we'd like to correct the record if you didn't.

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1 JUDGE LEVENTHAL: All right, so 3289 is
2 right.

3 All right, from now on, I am not going to
4 issue, as a matter of course, confirming orders. I'm
5 going to rule on oral argument at the oral argument as
6 I have always done. I have followed up with
7 confirming orders, but I think that causes confusion.
8 So that, from now on, my order on the record will
9 suffice.

10 Incidentally, I understand that's the way
11 Judge Nelson ran it with you last time, isn't that
12 right?

13 The STB has advised me there's some
14 confusion over that. And you see, we're required to
15 issue confirming orders when we rule orally at an
16 argument. But evidently, that's not the policy that
17 you've been following, and I guess the STB does
18 whatever I want them to do.

19 But as long as we adopted Judge Nelson's
20 procedure with this Wednesday oral argument, I think
21 we'll leave it at that. My ruling on the oral
22 argument will be it.

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1 The second thing, I -- on the oral
2 argument this morning -- this afternoon, I had my law
3 clerk advise Mr. McBride to tell all the other parties
4 that we're going to have the argument at 2:00 p.m.
5 Unfortunately, I forgot that our guidelines provide
6 that the Applicants will advise all parties.

7 So I apologize for the added
8 inconvenience, but --

9 MR. McBRIDE: Well, in fact, Your Honor,
10 we worked it out because I just called Ms. Bruce and
11 she agreed to send out the notice.

12 JUDGE LEVENTHAL: Okay, all right.

13 I didn't mean to give you extra work. I
14 just felt that part of you causes the problem should
15 be the one has the burden.

16 MR. McBRIDE: I'm in a hole already. This
17 is where we started last time.

18 JUDGE LEVENTHAL: All right, and I also
19 want to tell you that my law clerk, Jennifer, will be
20 on leave between August 25th and August 29th. So at
21 that time, I think that -- I think you're better off
22 calling me. Actually, you can speak to my secretary.

1 Actually, she's my legal tech. We don't
2 have secretaries. Their official title is legal tech.
3 And if she can handle it, fine. If not, she'll put
4 you through to me.

5 I notice in the answer to the appeal of --
6 filed by Mr. McBride to my last ruling there is some
7 discussion of whether or not there was a conversation
8 between Mr. McBride and me that constituted an ex
9 parte communication. What we spoke about was strictly
10 procedural. There was nothing ex parte about it at
11 all.

12 I prefer things to go through my law
13 clerk, but this got a little complicated, I thought,
14 so I thought I would handle Mr. McBride's call myself.
15 Although, he originally spoke to my law clerk. I
16 don't think there's any problem with it, but I just
17 wanted to assure you that we didn't speak about
18 anything other than procedural matter.

19 And in connection with Mr. McBride's
20 letter to me, I didn't wait for responses because
21 we're on an expedited schedule. However, I published
22 his letter. And if something like this happens in the

1 future, if anybody has a problem with the letter that
2 is attached to anything I issue, you know, you're
3 always free to make a motion or object in any way
4 you'd like.

5 But in order to move things along, I can't
6 wait for answers to things like that. And actually,
7 what Mr. McBride wanted clarified was in accordance
8 with my ruling. It was just clarifying the ruling.
9 There was no -- nothing additional. There was no --
10 I didn't think it was substantive.

11 I hope you agree with me. If you don't
12 agree with me, too bad.

13 (Laughter.)

14 All right, back on the record.

15 On our off the record discussion, I merely
16 handled some procedural matters that I thought needed
17 clarification. Incidentally, with respect to the
18 rulings on -- made during the course of an oral
19 argument, my understanding is that the STB is going to
20 issue an order on that. It's their order, so I assume
21 it's going to be clarified in accordance with what we
22 discussed off the record.

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1 And on the record, the clarification is
2 going to be whether or not the STB issues an order
3 regarding this. The ruling I'm making is that my
4 rulings made at oral argument will be final. There
5 will be no confirming order after that with the
6 possible exception if, at some time, I reserve
7 decision, of course, that will follow up with a
8 written order.

9 And your time to appeal my order runs from
10 the date of the oral argument.

11 All right, what we have before us is the
12 motion made by American Electric Power, Atlantic City
13 Electric Company, Delmarva Power & Light Company,
14 Indianapolis Power & Light Company, and the Ohio
15 Valley Coal Company requesting this discovery
16 conference.

17 MR. McBRIDE: If Your Honor please, I
18 represent those parties, and some of my colleagues
19 here who are here for other -- one other matter.
20 They're here for the matter of the Applicant test,
21 Your Honor, to hear them on it. And they asked me, as
22 an accommodation, if you might go forward first with

1 the Applicant's matter.

2 Apparently they don't want to necessarily
3 be -- feel obligated to stay hear the argument. So if
4 Your Honor would be willing, I'd be willing to defer
5 mine -- let the Applicant's issue go first.

6 JUDGE LEVENTHAL: All right, sure.

7 I think the matter that Mr. McBride was
8 referring to is a letter dated July 28, 1997 from
9 counsel for the Applicant, from Mr. Norton, suggesting
10 a change to the procedural -- to the discovery
11 guidelines.

12 Everybody have a copy of the letter so we
13 all know who we're talking about?

14 All right, anybody wish to be heard on
15 this?

16 MR. McBRIDE: Your Honor, if I may start
17 since the Applicants have laid out their position, I'm
18 very much -- we were willing to try to solve that
19 problem, and that was to accommodate the court
20 reporter and calling off the court reporter.

21 You were concerned that if you didn't know
22 until the end of the day Tuesday whether we were

1 having a conference Wednesday morning, you had a
2 problem. And obviously, the parties are willing to
3 work that out. And I've had discussions with
4 Applicant's counsel, and I think there is a way to
5 resolve that.

6 But this has now mushroomed into a larger
7 request, and that is that they want to take a two day
8 process of turn around on discovery motions and make
9 it a six day turn around. The motions would have to
10 come in on Friday and not be heard until Thursday.
11 And you'll recall, of course, that it's the Applicants
12 -- their clients who asked that this proceeding be
13 expedited, and we're trying to move this along.

14 And as Your Honor knows, on the matter
15 you're going to hear next, my discovery problems, I
16 propounded discovery on July 3rd; it's now July 30th
17 and we're still working on getting what I'm entitled
18 to under that discovery. So this is a very tight time
19 frame that we're all working under.

20 And I, for one, am opposed to turning what
21 ought to be prompt resolution of issues into a six day
22 briefing process. In fact, under the guidelines, we

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1 don't even have to make a motion. We can just ask to
2 be heard on a particular item without discussion, as
3 I did in my letter of listing six items and only
4 really elaborated on one or two, and they don't have
5 to file anything in response, just show up and argue

6 But as an accommodation, on most weeks,
7 I'd be willing to move this conference from Wednesday
8 to Thursday, first to address Your Honor's problem.
9 And I think that there's some willingness on the
10 Applicant's part to do that so that they could --
11 you'd have some ability to notify the court reporter.

12 I'm not sure there's general agreement on
13 the rest of it. But I did want to ask, as a personal
14 accommodation, that we not make Thursday, August 14
15 such a conference date. Stick to Wednesday that week
16 because in reliance on the discovery guidelines, I
17 agreed to speak out of town at a conference on
18 Thursday.

19 And I can show Your Honor the program if
20 you need proof since they seem to call me on
21 everything around here. But I have it. And you know,
22 they might even want comments about representing

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1 shippers and railroad mergers, what works for
2 utilities.

3 (Laughter.)

4 JUDGE LEVENTHAL: Is there a charge for
5 this conference?

6 MR. McBRIDE: Well, actually they told me
7 today I could bring one person for free. If you want
8 to come along, it's in Colorado Springs.

9 JUDGE LEVENTHAL: That sounds real nice.
10 I don't think the STB would pay my way though.

11 MR. McBRIDE: It's free.

12 Anyway, so I think we could move from
13 Wednesday to Thursday. But I think there's generally
14 unanimity on this side of the aisle that we ought to
15 keep Monday for the requests for these conferences and
16 not turn a rediscovery dispute into a six day process.

17 And that's my general concern with this.
18 We're obliged to move this along at their request, and
19 I think they have to understand that they have to live
20 by the same rules that they wrote.

21 JUDGE LEVENTHAL: I think the problem is
22 that I -- it seems that I'm the cause the problem. I

1 don't think -- as I say, my purpose really was in
2 concern for the reporter and a concern for the budget
3 of STB. Because if we don't cancel on time and the
4 reporter shows up on the morning, he or she gets paid
5 for the day.

6 Of course, it's a minimum payment, but
7 there is a payment. However, I can't consider the
8 plight of the reporting company to the detriment of
9 the parties. So far as I'm concerned, I have no
10 problem with the current schedule. I'm here every day
11 anyway. And whether I'm conducting an oral argument
12 or not, I'm still here.

13 So that if this -- it really is a problem
14 for the parties, we can dispense with it.

15 MR. COBURN: Your Honor, I think perhaps
16 if we went off the record for a few minutes we might
17 be able to constructively resolve this issue.

18 JUDGE LEVENTHAL: Sure, all right.

19 MR. COBURN: Thank you, Your Honor. We
20 haven't had a chance to talk to -- this would be the
21 day for our response. The hearing would be Thursday.
22 But if there is a court reporter --

1 (Whereupon, the foregoing matter went off
2 the record briefly.)

3 JUDGE LEVENTHAL: Off the record we had a
4 discussion regarding the amendment to the discovery
5 guidelines. Rather than my repeating it, Mr. Coburn,
6 why don't you repeat what the agreement is?

7 MR. COBURN: Yes, Your Honor.

8 We would amend the guidelines to provide
9 that on Monday, the party seeking a hearing or filing
10 a motion to compel or motion of that nature would
11 notify the Judge's chambers and file any papers that
12 they might want to file in support of their position.

13 By the close of business Tuesday, the
14 parties would notify the Judge's chambers whether or
15 not the issue has been resolved. By the close of
16 business Wednesday, or 5:00 p.m. on Wednesday, the
17 party opposing the motion would file its papers.

18 And the hearing would be held at 9:30 on
19 the following Thursday, the next day, with the
20 exception of the week of August 11th when the hearing,
21 if any, would be held on Wednesday. And I suppose we
22 would stick to the guidelines as currently written for

1 that week.

2 JUDGE LEVENTHAL: All right, very well.

3 All right, so ordered.

4 Now on my letter of July --

5 MR. McBRIDE: On that matter -- excuse me
6 just for adding this one last point. I know Your
7 Honor doesn't want to issue confirming orders, but I
8 think on this one you're going to have to issue a
9 piece of paper.

10 JUDGE LEVENTHAL: Yes, all right; very
11 well.

12 I really don't dislike issuing confirming
13 orders. I just think that -- I've been advised by the
14 STB that there's some confusion because of this. And
15 they told me that Judge Nelson didn't do it, and I'm
16 willing to abide by that.

17 MR. McBRIDE: Well, nobody's going to
18 appeal this. It's just a question of getting the
19 notice out to everybody on the list so that they know
20 of the change.

21 JUDGE LEVENTHAL: Right, sure.

22 MR. COBURN: Right; and to keep the

1 process neat and to make it easier on Your Honor, we
2 would be prepared to submit to your chambers, and of
3 course to other counsel, a revised version of
4 paragraph 18 of the guidelines, which is the paragraph
5 we're talking about.

6 And that could then be served together
7 with an order amending the guidelines.

8 JUDGE LEVENTHAL: All right, I think
9 that's a good proposal. Thank you. I'll accept it.

10 All right, now Mr. Osborn, in a letter
11 dated July 29th, indicated there's some problem with
12 regard to the depository. Have the parties resolved
13 this, Mr. Osborn?

14 MR. OSBORN: We started, Your Honor,
15 although just this morning I had a conversation with
16 Ms. Bruce, and I was about to have a side bar with Mr.
17 Edwards before we started this conference. But
18 basically the problem is that not all of the work
19 papers have been in the depository from the beginning.

20 And for Mr. Williams in particular, some
21 of the back up computer data for his traffic study,
22 which is a very important part of the application,

1 apparently just came into the depository last Friday.
2 And we just found out about it by accident because our
3 person was over there.

4 Otherwise, we wouldn't have known that it
5 had been added to the depository. And we requested it
6 -- we didn't get it until this morning. There's some
7 question as to whether we have a missing record lay
8 out for that, but we'll work that out with Ms. Bruce
9 in terms of what we're specifically looking for.

10 But I thought in terms of a procedure, if
11 things are still coming into the depository, we need
12 to know when something is coming in because we can't
13 be going over there every day to check and see if some
14 work paper has been added. So I think we need some
15 sort of a procedure for notifying people and providing
16 an updated index now for what has been put into the
17 depository.

18 JUDGE LEVENTHAL: Well, is there any
19 dispute or --

20 MS. BRUCE: Well, Your Honor, I don't
21 believe there's a dispute about that, and I was trying
22 to work with Mr. Osborn to rectify the situation. But

1 due to time constraints and inability to hook up with
2 him prior to the hearing, we haven't had any
3 resolution.

4 There is a process in the depository in
5 which, if you go over there and look, you can see
6 what's updated. It's highlighted, new additional
7 material, and the index is dated. But as to address
8 his concern, we discussed faxing some information over
9 to him to give him an update, but we haven't come to
10 any resolution on that.

11 JUDGE LEVENTHAL: Well, do you want to see
12 if you can reach a resolution on an amicable basis?
13 And if you can't, then I'll rule on it. We can do it
14 two ways. You can -- we can recess after we finish
15 the rest of the oral argument and I'll be available.
16 And if you could reach a resolution, we can resume
17 with the reporter present.

18 Or you can reach a resolution informally
19 and give it to me in writing and if you want me to
20 formalize it, I will by order. Or we can dismiss the
21 reporter at the end of the oral argument. You can see
22 if you can reach a resolution. If you can on an

1 informal basis, fine.

2 If you want a formal ruling, you can come
3 up to my office and I'll listen to your argument
4 without a record being made and issue an order.
5 Whatever you want me to do, I'm willing to go along
6 with.

7 MR. OSBORN: I think the latter would be
8 fine with me. I think we're going to be able to work
9 it out as to what's in there right now. I hope that,
10 you know, we can get a clear index and -- I was
11 somewhat concerned for other parties. I don't know
12 that other parties are concerned about this
13 themselves.

14 But if documents are still coming in
15 there, it doesn't seem that we should have to, you
16 know, keep going back to find out about it. But that
17 is something I think, you know, we can talk about it
18 --

19 MS. BRUCE: I think we can work it out.

20 JUDGE LEVENTHAL: All right. So why don't
21 we -- if you need my help, you can come up to see me.
22 You know, I'm here until 5:00. If not, I'm here all

1 day tomorrow, you know, and the following day and so
2 forth.

3 So if there's a problem, you can bring it
4 to my attention. And as I say, I can determine this
5 off the record and issue an order.

6 MS. BRUCE: I think we can work something
7 out, Your Honor.

8 JUDGE LEVENTHAL: All right, good.

9 MR. OSBORN: Thank you, Your Honor.

10 JUDGE LEVENTHAL: All right, then we're up
11 to -- do you have any other preliminary matters other
12 than the motion made by Mr. McBride?

13 MR. WOOD: If I may ask permission, Your
14 Honor, to be excused from the remainder of the
15 conference. I'm sure Mr. McBride will be able to move
16 forward without my assistance. The issue that I was
17 particularly interested in has been resolved.

18 JUDGE LEVENTHAL: All right, very well.

19 MR. WOOD: Thank you.

20 MR. McBRIDE: May I report to Your Honor
21 on where we are?

22 JUDGE LEVENTHAL: Yes.

1 MR. McBRIDE: In fact, we, I think, had
2 narrowed our differences considerably. On numbers one
3 and two, I think the Applicants are going to make some
4 statements for the record about when they might have
5 information -- the documents available to respond.
6 And I would like to await hearing that for the record
7 and then tell Your Honor what our position is.

8 I just want to get this nailed down very
9 specifically so we don't have to keep coming back to
10 Your Honor. But I think we've reached agreement on
11 those, subject to what I hear.

12 Number three and number four, we've talked
13 about it, and I think we've agreed to -- how to
14 resolve those kinds of problems at least for now. And
15 I don't expect, frankly, that they're going to be a
16 matter that we have to come back to Your Honor on. So
17 we won't need a ruling on three and four.

18 Five, we're going to need a ruling. And
19 just as you were walking in, Mr. Coburn was going to
20 offer me something on number six. And perhaps we
21 could take a moment to do that and then find out
22 whether there's any dispute there remaining.

1 But we are going to have to argue number
2 five.

3 JUDGE LEVENTHAL: All right, you want to
4 recess now and see --

5 MR. COBURN: I think it won't take more
6 than a minute.

7 JUDGE LEVENTHAL: Yes, all right; why
8 don't we do this. Do you mind if I don't move, but
9 you can go outside? You know, we have conference
10 rooms all around. We have a lounge and we have a
11 cafeteria.

12 All right, on the record, we'll take a
13 short recess at this time.

14 (Whereupon, the foregoing matter went off
15 the record at 2:26 p.m. and went back on
16 the record at 2:37 p.m.)

17 JUDGE LEVENTHAL: All right, back on the
18 record.

19 MS. BRUCE: Your Honor, regarding Mr.
20 Osborn's request about the depository, we've agreed
21 that every Tuesday I will fax to all persons on the
22 restricted service list an updated index if any

1 additions to the evidentiary files have been
2 submitted, ie. additions to the work papers.

3 JUDGE LEVENTHAL: All right.

4 MS. BRUCE: And that's been agreed to.

5 MR. OSBORN: And this updated index will,
6 I guess, have bold type to show --

7 MS. BRUCE: Yes, it will show what has
8 been added through the use of bold type.

9 JUDGE LEVENTHAL: All right, very well.

10 MR. McBRIDE: I also believe that on my
11 matters the Applicants have made an offer to me which
12 I find acceptable on number six. And so I don't think
13 we need a ruling from Your Honor there either unless
14 they feel they have any reason to want to put
15 something on the record.

16 JUDGE LEVENTHAL: All right.

17 All right, then it's resolved.

18 MR. McBRIDE: So I think number five is
19 the only remaining item unless Mr. Osborn had
20 something he wanted to be heard on first.

21 MR. OSBORN: Just before we go back to Mr.
22 McBride, on what we were discussing before with

1 respect to the work papers, Your Honor, I just want to
2 say that we -- the problem with this -- the reason we
3 have this concern is in part because work papers have
4 been trailing in.

5 And the procedure is supposed to be that
6 the work papers should go into the depository when the
7 evidence is filed. And I do understand that
8 applicants have had a little bit of a problem with
9 some things trailing in. But hopefully that's going
10 to be curbed and we won't be getting up close to the
11 depositions and still have work papers trailing in.

12 So I will appreciate an effort to make
13 sure that they've all been captured and put in the
14 depository.

15 MS. BRUCE: Yes, Your Honor. In regard to
16 that, what Mr. Osborn is referring to was a CD ROM
17 that we originally had a bit of difficulty with and we
18 tried to get it in as soon as we could. And I
19 deposited it in the depository, I believe, last Friday
20 as soon as I got it. So, just for the record.

21 JUDGE LEVENTHAL: All right, very well.

22 Didn't we have one and two -- didn't you

1 want the Applicants to set forth their position?
2 You're in agreement on one and two?

3 MR. McBRIDE: I want to hear it first and
4 be sure that it is what I think it is, and then I'll
5 -- I'd like to state my position once I've heard their
6 commitment.

7 JUDGE LEVENTHAL: All right, why don't we
8 take one. Who's going to address it?

9 MR. HARKER: I'll address it on behalf of
10 CSX, Your Honor, and I'll let my colleagues speak for
11 their own clients.

12 With respect to paragraph number one of
13 Mr. McBride's July 25th letter, CSX is in a position
14 to produce documents responsive to Atlantic City's
15 document request numbers one and two by the end of
16 this week.

17 With respect to document request number
18 three in Atlantic City's first request for documents,
19 I can report to the Judge that CSX will produce the
20 necessary record lay outs, field descriptions and
21 documentation related to the tapes produced under
22 document request number three also by this coming

1 Friday, August 1st.

2 And with respect to the tapes themselves
3 requested in request number three as modified by your
4 order of July 18th, the tapes themselves will be
5 produced no later than August 8th, a week from this
6 coming Friday.

7 JUDGE LEVENTHAL: All right.

8 Mr. McBride, do you wish to be heard on it
9 or do we want to hear all their answers first?

10 MR. McBRIDE: I'll respond to that one.

11 I want to just say, Your Honor, that I'm
12 not going to ask Your Honor to try to force anything
13 faster because apparently that's as fast as they can
14 go, and Mr. Harker's made that presentation or that
15 statement to me, and I accept it.

16 But I also want the record to reflect that
17 we propounded these requests on July 3rd and this
18 would be about 36 days since we propounded them. And
19 I'm not asking for any extension of this schedule in
20 this case at this time, but I want the record to
21 reflect that this was quite a period of time.

22 And if, at some point, I do have to ask

1 for an extension, I want the record to be clear as to
2 what created this period of time that's elapsed since
3 we got the documents. And I also want it understood
4 that if my appeal is acted upon favorably to me, we
5 may have a larger problem.

6 So I just wanted the record to be clear as
7 to what the cause was for the responsive time that
8 it's taken to get that.

9 JUDGE LEVENTHAL: All right, with respect
10 to your appeal if it's granted, we'll have to make
11 further arrangements if it's not done amicably.

12 MR. McBRIDE: I just want Your Honor to
13 know that I don't do anything in this case just to
14 have fun. And my consultant advised me that the end
15 of next week was absolutely outside that he thought he
16 could possibly live with. And we're going to have to
17 push very hard from there to October 21.

18 And if the tapes are not in the right
19 condition or if we have further problems or whatever,
20 I just want the record to be clear as to the fact that
21 I wasn't the cause of this delay.

22 JUDGE LEVENTHAL: All right.

1 MR. HARKER: Your Honor, I just wanted to
2 say one more thing in response to what Mr. McBride
3 said and clarify something with respect to request
4 number three.

5 As we indicated at the hearing that you
6 held on July 16th, CSX's tapes for 1995 are in the
7 depository, have been in the depository since the
8 application was filed. And they are available now to
9 Mr. McBride. Although, it's my understanding that he
10 has not made a request for those tapes.

11 So the tapes that I'm talking about that
12 will be available on August 8th are the tapes for 1996
13 and the first half of 1997, 1995 having already been
14 available to Mr. McBride. With respect to the tapes
15 for the earlier years covered in your order from 1978
16 to 1982, the client informs me that they have no
17 information going back that far, almost 20 years.

18 JUDGE LEVENTHAL: All right.

19 MR. McBRIDE: My consultant has been to
20 the depository, Your Honor. Just to respond to what
21 Mr. Harker said, '95 was too limited to be of any
22 value to us, so that's why we asked for what we asked

1 for and why we're waiting for what Your Honor said we
2 would get.

3 JUDGE LEVENTHAL: Well, he says he doesn't
4 have the older tapes. You have no --

5 MR. McBRIDE: I can't make him produce
6 something he doesn't have. But I do expect a
7 continuing search here. And if they do turn up, I'm
8 sure Your Honor would continue to rule that I'd be
9 entitled to it.

10 JUDGE LEVENTHAL: All right.

11 MR. HARKER: That's an easy commitment to
12 make, Your Honor. As I told Mr. McBride, in fact, we
13 are continuing as we speak to assure that we don't
14 have anything between 1978 and 1982 that would be
15 responsive to request number three.

16 JUDGE LEVENTHAL: All right.

17 MS. BRUCE: Your Honor, for Norfolk
18 Southern, in regard to the document request one and
19 two as modified by your order, Norfolk Southern
20 estimates that they'll have the documentation in
21 response to that up to me by the beginning of the week
22 of August 11th.

1 In regards to the tape request, Mr.
2 McBride has requested that we give him a field
3 description and record lay out which we would have by
4 the end of this week for him. And the documentation
5 regarding the tapes would be to him by the beginning
6 of next week.

7 We also are looking -- that's as to the
8 1995 through 1997 tapes. And as again to the 1995
9 through 1997 tapes, we expect to have them to Mr.
10 McBride by the 8th of August. We have done a search
11 of the records at Norfolk Southern and it appears that
12 we have some information that spans the earlier
13 period, which is 1980 through '84.

14 However, they're still trying to determine
15 the extent of that information and the format that
16 it's in so they know how they can proceed on complying
17 with the ordered production. And I think that would
18 cover it.

19 Is that correct?

20 MR. McBRIDE: You said document request
21 one and two would be by what date?

22 MS. BRUCE: By the beginning of the week

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1 of August 11th. Is that Monday?

2 MR. McBRIDE: Yes, but the tapes and all
3 that --

4 MS. BRUCE: The tapes --

5 MR. McBRIDE: -- material would be --

6 MS. BRUCE: The tapes as to 1995 through
7 1997 -- through the first, of course, of 1997, would
8 be August 8th also.

9 MR. McBRIDE: Well, my position on that,
10 the commitments she's just made for '95 to '97 is the
11 same as I made to Mr. Harker. August 11th is getting
12 awfully late for the one and two, but -- and if they
13 could be speeded up or given some of it and completed
14 by the 11th, I'd appreciate that.

15 But I'm not going to object to getting all
16 the tape material this week and next if it's finished
17 by next week. But I am concerned about the earlier
18 period because I don't hear any commitment on that.
19 So I'm not quarreling with what she said about the
20 later period, but the earlier period -- I don't know
21 when I'm going to get anything.

22 MS. BRUCE: Well, Your Honor --

1 JUDGE LEVENTHAL: Do you have an outside
2 date on that?

3 MS. BRUCE: I don't have an outside date
4 on that because we don't know the scope of what we
5 have. I checked with them again this morning and they
6 told me they were still -- as of yesterday, they
7 weren't even sure if they had anything. And this
8 morning they told me that they did have some
9 information, but they weren't sure of the format and
10 to the extent of it.

11 And I can just continue to check. And
12 when I get something more firm, I can let you know.

13 MR. McBRIDE: And at that time, I hope
14 that Applicants would agree that if Ms. Bruce calls me
15 and I'm not satisfied, the two of us can call Your
16 Honor. We aren't following procedures if we do that.

17 JUDGE LEVENTHAL: All right.

18 MR. McBRIDE: Now I did want to say on the
19 earlier one -- I want to advise Mr. Harker of
20 something.

21 I have been advised that it may be that
22 the problem for the earlier period and why he's not --

1 his client isn't finding those tapes is that the so-
2 called L&M 22% case, which I'm sure some of the
3 veterans in the room will recall -- that was when it
4 was known as the Louisville and Nashville before all
5 these mergers.

6 22% case was a place where these tapes
7 were used, and there must be a file on that case and
8 those tapes may be in that file. So if you'll -- I
9 appreciated your earlier commitments and I accepted
10 them, but if you would make the commitment to ask your
11 client to look there, we might find those tapes.

12 MR. HARKER: Yes, I will do so.

13 Do you know the basic date of the case?

14 MR. McBRIDE: It started in 1978.

15 What was the docket number?

16 We can look it up if it's important, but
17 I think it's gone into the history books.

18 MR. HARKER: Well, let me --

19 MR. McBRIDE: They'll know it.

20 MR. HARKER: Yes, let me see if I can get
21 something from my client.

22 MR. McBRIDE: All right.

1 MR. NORTON: Your Honor, for Conrail, we
2 are certainly consistent with those projections. We
3 would expect to have the responses by early next week.
4 On the responses to number three on the coal data, we
5 should have that as well by the end of next week. On
6 the field descriptions and lay outs, the record lay
7 outs, we hope to have that by the end of this week.

8 And as to -- with the possible exception
9 of some of the earlier period like '78 to '80, around
10 there. We don't know whether that's available still
11 or whether it's different from the later period. But
12 that's --

13 MR. McBRIDE: Did you mean '88 to '90?

14 MR. NORTON: What did I say?

15 MR. McBRIDE: '78.

16 MR. NORTON: Yes, '88 to '90.

17 JUDGE LEVENTHAL: Are you satisfied with
18 this, Mr. McBride?

19 MR. McBRIDE: Sounds like they're on the
20 same schedule, and my position is the same as what I
21 said with respect to CSX. I can't ask Your Honor
22 apparently to order it any sooner, but I just want the

1 record to be clear what's going on here.

2 JUDGE LEVENTHAL: All right. We have no
3 problem now with the condition that no appeal be
4 filed, is that right?

5 MR. McBRIDE: That's correct.

6 JUDGE LEVENTHAL: That's gone?

7 MR. McBRIDE: That's gone.

8 As I understand it, Conrail is not --
9 Conrail just made it's commitment without that
10 qualification. If I could just ask Your Honor --

11 MR. NORTON: That's correct.

12 JUDGE LEVENTHAL: All right, then we're up
13 to number five.

14 MR. McBRIDE: Yes, Your Honor.

15 If Your Honor please, on number five, I
16 want to begin by saying that shippers have as much of
17 an interest in confidentiality oftentimes about
18 specific rate information or terms of service as
19 carriers do. They agree to that in the contracts.
20 They think they get competitive advantages sometimes
21 depending on how good they are at negotiating or given
22 their circumstances.

1 So there's common ground at the outset
2 here that if specific rates were what were getting in
3 response here, I wouldn't be standing before Your
4 Honor. We'd be in agreement with them that those
5 should be maintained on a highly confidential format.

6 JUDGE LEVENTHAL: Before you go, perhaps
7 we should read the item five into the record.

8 MR. McBRIDE: Sure, I will.

9 What I wrote to Your Honor on July 25th
10 was that Applicant's designations of their very
11 generalized responses to our interrogatories about
12 their rate making practices as "highly confidential"
13 (courtesy copies enclosed), even though the statements
14 are consistent with public statements the Applicants
15 have made elsewhere.

16 In other words, that is the item I want to
17 be heard on. Such "highly confidential" designations
18 deny us the opportunity to discuss Applicant's
19 responses with our clients and their decision, number
20 one, in this proceeding, even though our clients need
21 to understand Applicant's position in order to
22 authorize litigation efforts on their behalf.

1 The generalized responses could not
2 possibly be harmful to Applicant's commercial
3 interest, which is the only reason for protecting them
4 from public disclosure. The "highly confidential"
5 designation has been seriously overused in previous
6 merger proceedings. And we fear a repeat of that
7 here, which triggers the need for closed hearings,
8 redacted pleadings, and the like, all of which are
9 unnecessary if the designations are rejected.

10 So we have common ground. And there is no
11 information in any of these discovery responses that
12 in any way resembles what I just conceded would be
13 highly confidential -- the terms of a confidential
14 transportation contract or otherwise the rate or terms
15 of service that the parties might agree to.

16 What concerned me about the responses that
17 we got was that I hadn't even, for example, although
18 it came in today, gotten signed undertakings because
19 there hadn't been time or the opportunity physically
20 to get from Alfred Kahn his signatures on those
21 undertakings.

22 The man was in the hospital and had

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1 surgery on the shoulder, and I was reluctant to ask
2 him to be signing anything more than I absolutely had
3 to. So I haven't even been able to tell Dr. Kahn,
4 even though we talk, about what these responses say
5 given these designations.

6 The other gentlemen have been on the road.
7 I'm hoping to get the undertakings. When I get them,
8 I'll give them to you. But I haven't been able to
9 tell my clients what these responses say even though
10 they have to understand what it is that we're doing
11 with Dr. Kahn and Dr. Crowley in this case to
12 authorize what's happening.

13 And Your Honor has a copy of the
14 application, I believe. You've seen it. Twenty-three
15 volumes I think it is, 14,810 pages or thereabouts,
16 and not a word of it is confidential or highly
17 confidential. The moment I asked them, however, how
18 they set rates, out comes the stamp.

19 And I didn't ask them about a particular
20 rate or a particular shipper. I want to be able to
21 try this case without dual pleadings and things under
22 seal and whatever to the extent that I can. Now I can

1 see there may end up being some things that go into
2 our final finding, although it may not happen, but it
3 could well happen that we'll have to have two versions
4 anyway.

5 But I don't want it to look any more like
6 swiss cheese than necessary. I'd like it to be
7 readable. And I'd like to have the same opportunity
8 to try my case in the public forum, if need be.

9 I'm not running around calling the press
10 all the time, but in the public forum because these
11 are supposed to be public proceedings as they decide
12 it should be true of their case when they filed that
13 application without a word of it being treated as
14 confidential.

15 So under the protective order number one
16 which was entered before any of us were even involved
17 in this or could be heard, they've got the right to
18 stamp anything and then we have to try to get it un-
19 designated, if you will.

20 And so that's why I'm standing before Your
21 Honor. Now, I also want to remind Your Honor of what
22 they told you two weeks ago. Mr. Allen was there, who

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1 is not here today. But he accused me of being a
2 member of the Flat Earth Society, you'll recall.

3 He said I'm running around trying to prove
4 the world's flat by telling Your Honor that we think
5 we can prove out of their records that they don't
6 maximize their profits. He said that was ridiculous.
7 Of course that's what they'd try to do.

8 Well, first of all, they didn't say
9 anything different there in a public hearing with a
10 member of the press in the audience that they said a
11 few days later in these responses which are now highly
12 confidential or at least confidential. I don't know
13 where we're going to be on that.

14 But beyond that, Mr. Allen was in a
15 deposition with me last year when we were on the same
16 side in the Union Pacific/Southern Pacific proceeding
17 when I deposed the chairman of the board of Union
18 Pacific, Mr. Davidson.

19 And I asked him about this one lump
20 theory, Your Honor, or argument about how they set
21 rates and whether the destination carrier, when it has
22 a bottleneck, gets all the profit and the origin

1 carrier gets none.

2 And you know what his answer to me was?
3 That's ridiculous. And so I don't think I'm a member
4 of the Flat Earth Society here but, you know, they're
5 entitled to their position. That's what they argued
6 publicly two weeks ago. And now the very same sort of
7 responses, which I think Your Honor has seen, that
8 they try to maximize the profits on all their rates
9 and that the bottleneck carrier tries to use its
10 leverage -- suddenly this is highly confidential.

11 It's the most generalized possible
12 response. Now of course, as you know, the discovery
13 that you've ordered and that I'm seeking in my appeal
14 is an effort of testing, although this is in fact the
15 way they set the rates and that kind of discovery and
16 information may be a very different matter.

17 But they said publicly what is in these
18 responses. Furthermore, Mr. Sharp, who is a witness
19 in the application, the Vice President of Coal for
20 CSX, came to a meeting of my client. I represent the
21 Edison Electric case, Conrail, Mr. Norton's client,
22 requested that I set up a meeting last December with

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1 the utility members of the Edison Electric Institute
2 to make a presentation by CSX and Conrail who, at that
3 time, were trying to merge and fighting off Norfolk
4 Southern.

5 And I said sure. And we set it up. And
6 we invited Norfolk Southern in in the afternoon. CSX
7 and Conrail people came in. There were 20 or 25
8 utilities there. We rented a hotel room because we
9 were expecting a big enough crowd.

10 And at one point during that presentation,
11 Mr. Sharp answered a question by telling those
12 utilities that his job was to set the highest rate
13 that he could, charge the highest rate that he could,
14 without losing their business.

15 Now that's what he said. That's no
16 different in substance than what these responses are
17 to interrogatories. So there's nothing highly
18 confidential. He said it to the customers. I was a
19 little astonished that he was that direct, but that's
20 what he said.

21 They say elsewhere that they're in the
22 profit maximizing business. That's what they say.

1 We're going to find out from our discovery how they
2 set rates. But if they say all those things publicly,
3 how can these responses be highly confidential?

4 And let me suggest, Your Honor, what the
5 answer may be. First of all, these are good lawyers,
6 but they represent clients who get to tell them what
7 to do unless it's -- there's no question about the
8 answers. The clients are concerned -- they hear a
9 question about rate making, that's highly
10 confidential.

11 Nothing wrong with it or frivolous, so
12 lawyers presumably go along with it. Or they're
13 worried about some kind of a slippery slope. Well, as
14 Your Honor knows, I've at least drawn a line
15 somewhere. It's not a slippery slope all the way.

16 They're not going to have to disclose
17 their confidential contracts on the public record of
18 this proceeding unless the Board decides otherwise.
19 So they've got legitimate concerns, but about
20 different questions and different kind of information.
21 Not about these questions and these responses.

22 And I think what we're just seeing here is

1 overly cautious, either counsel or clients who don't
2 know where to draw the lines, but that's where the
3 judges come in. And there has to be something about
4 their rate making practices on a level this general
5 when we're talking about economic theory that's not
6 confidential or highly confidential.

7 And I submit to Your Honor there could not
8 be responses to interrogatories more general or more
9 clearly in the category that the public has heard this
10 sort of thing from these railroads and is entitled to
11 seek. And that's why I came before Your Honor on
12 these responses.

13 JUDGE LEVENTHAL: All right, who wishes to
14 answer?

15 MR. McBRIDE: All right, who --

16 MR. HARKER: Your Honor, once we received
17 Mr. McBride's July 25th letter, we sent it to our
18 client and we asked them to consider their markings on
19 the various interrogatory answers that CSX gave. And
20 I participated in those discussions with the client,
21 and I can report to you on what the results of those
22 conversations were.

1 But I can tell you, and I'll just start
2 off by saying, that this was not a knee jerk reaction
3 either on the part of the lawyers or the clients.
4 They considered L6. We went through them in detail
5 with respect to the particular answers.

6 And I think they adopted a very reasonable
7 approach in light of Mr. McBride's objections. And
8 maybe what we should do is I could go through each
9 interrogatory and tell you where CSX is currently on
10 each interrogatory and then I can talk about some of
11 the reasons why CSC is where it's at.

12 The first interrogatory asks for a
13 description of the rate setting theory and practices
14 of CSX with proposing or establishing rates on
15 shipments of coal to electric utilities and other
16 major coal consumers served by only a single
17 railroaded destination.

18 Upon reflection, CSX is prepared to
19 downgrade that answer to confidential. And I'll come
20 back to why we think that's important in a minute.

21 With respect to interrogatory number two
22 which asks whether or not the carrier serving the sole

1 served destinations referred to in interrogatory
2 number one obtains most or all of the profit
3 associated with any movement in which two or more
4 carriers are involved, CSX is prepared to reduce the
5 level of confidentiality on that one to public.

6 And then with respect to number three
7 which asks whether, for the movements of coal referred
8 to in interrogatory number one, CSX has a minimum
9 required level of profitability for each such
10 movement, and if so, how that level is calculated or
11 defined, CSX believes that that level of -- this
12 interrogatory response should be highly confidential
13 and doesn't propose any change to that.

14 With respect to interrogatory number four
15 which basically asks whether or not the rate setting
16 theory and practices of CSX for coal furnished in
17 response to interrogatory number four is the same as
18 or different from the rate setting theory and
19 practices used for all other commodities, CSX, in its
20 answer, refers to much of the same information
21 contained in the response to interrogatory number one.

22 And so we propose that that answer be

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1 treated similar to interrogatory number one or treated
2 as confidential.

3 Number five refers again to interrogatory
4 number two and says -- well, I think the interrogatory
5 refers to interrogatory number two, but we assume that
6 it was really meant for interrogatory number four.
7 But in any event, it asks whether or not the rate
8 setting theory and practices for coal differ from
9 those for one or more commodities; and if so, state
10 the commodity and describe the appropriate rate
11 setting theory and so on.

12 We refer in our answer to the response to
13 interrogatory number four. And so, on that basis,
14 we're prepared to downgrade the answer to number five
15 also to confidential.

16 Number six asks whether or not, for each
17 commodity referred to in interrogatories number four
18 and five, CSX has a minimum required level of
19 profitability for each such movement; and if so, how
20 that level is calculated or defined.

21 Our response again is a reference to
22 interrogatory number three. And on that basis, we

1 view the response as highly confidential consistent
2 with our response on interrogatory number three.

3 So that gives you a sense of where we are
4 now. Let me tell you how we got there.

5 Basically what I was told by CSX is
6 talking about rate setting and the like is really
7 talking about some of the most sensitive information,
8 commercial information that certainly a railroad or
9 any commercial entity gets involved with.

10 You know, how prices, how rates are set to
11 customers. And this is a very highly, highly
12 sensitive area, as I'm sure you can imagine. And the
13 -- quite honestly, the company is concerned about not
14 only other shippers getting access to this
15 information, but also other railroads as well.

16 It's a highly competitive environment.
17 And with respect to the kinds of negotiations and the
18 like that take place with respect to these rates, any
19 leakage of information about how CSX sets its rates, in
20 CSX's view, could do it commercial harm.

21 Point of fact, when CSX prepared the
22 answers to these interrogatories, they did not expect

1 that they would read about them in the *Wall Street*
2 *Journal* or in one of the trade press that cover this
3 proceeding.

4 I just received a trade press from just
5 this past week reporting on Your Honor's hearing from
6 about three weeks ago where the reporter went into
7 great detail on what was discussed at the hearing.

8 And this would be the kind of information
9 -- you know, should any of this information be cited
10 either in context or out of context as the official
11 CSX position taken in the litigation, this could do
12 damage to CSX.

13 And point of fact, we would have probably
14 -- well, let me back up. The protective order and the
15 protection of the protective order allowed us to
16 prepare an answer that we were confident of its
17 accuracy in this proceeding, but yet we didn't have to
18 run by the spin doctors in the PR department to see
19 how -- you know, how's the *Wall Street Journal* going
20 to spin this?

21 How are the coal -- how's the coal shipper
22 trade press going to spin this? We could prepare an

1 answer that -- as I said, we had confidence in its
2 accuracy, but we didn't have to worry about whether or
3 not it was going to get repeated against us or against
4 the company in the *Wall Street Journal*.

5 I should say that with respect to the
6 majority of the answers, we have reduced the level of
7 confidentiality to confidential, the level of
8 protection -- to confidential. What that means, as a
9 practical matter, is it basically addresses the very
10 problem that Mr. McBride raised and discussed in his
11 July 25th letter about his inability to discuss CSX's
12 or Applicant's responses with his clients.

13 He could do that with respect to
14 confidential information. Under the protective order,
15 the protective order does allow access to in house
16 people to confidential information assuming that they
17 sign the undertaking. And so he can make his case.
18 He can consult with his clients and let them know
19 exactly what CSX said in response.

20 And I think Mr. Norton later will talk
21 about the standard here for protection of protective
22 -- or confidential information under the protective

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1 order.

2 And on that basis alone, given the fact
3 that Mr. McBride can prosecute his case, can discuss
4 the information in our response with his clients under
5 existing Board precedent, that's enough to deny his
6 request which, as I understand it, is that all six of
7 CSX's answers here be downgraded to public.

8 You know, with respect to Mr. McBride's
9 comments about what officials in CSX are saying before
10 various, you know, groups, I don't know if this was on
11 the record or off the record. Mr. McBride raised this
12 with us earlier.

13 I asked him if he had a transcript or any
14 kind of notes from the meeting that he referred to
15 where Mr. Sharp apparently made some statements.
16 Well, my reaction to that is these interrogatories are
17 official company statements about policy. These have
18 much greater weight and are given much greater weight
19 than statements of a company official.

20 Apparently -- I don't know if those
21 comments were reported in the press or not, but given
22 the great press interest in this particular proceeding

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1 and given the weight given to official documents filed
2 in court, these answers, it seems to me, are of much
3 more interest to the company than what a company
4 official might say at -- perhaps at an off the record
5 -- I don't know if it was off the record or on the
6 record and if there was press there.

7 But in any event, a meeting with shippers.
8 So I would ask that the -- that CSX, as I say -- with
9 respect to CSX, that its responses be downgraded, to
10 the extent they're downgraded at all, consistent with
11 my earlier remarks as to what CSX's offer was.

12 I'll be glad to answer -- respond to any
13 questions.

14 JUDGE LEVENTHAL: No, I don't have any
15 yet.

16 Mr. McBride, what exactly is it that you
17 want me to do with respect to --

18 MR. MCBRIDE: I want you to rule that they
19 should be public because the fact of the matter is
20 that I think Your Honor could probably almost take
21 judicial notice of the fact that the commissioners of
22 the Surface Transportation Board are not likely to sit

1 down and read 14,810 pages from cover to cover, let
2 alone however many feet of pleadings and comments and
3 whatever get filed on October 21 and thereafter.

4 And I mean, it's just no secret here that
5 these commissioners are most likely not going to read
6 every single pleading that's filed with them. And
7 yet, the media has a great impact on this entire
8 process. And counsel for CSX just has been very
9 candid in conceding that.

10 What they want to do is they want their
11 case to be tried in public, and they don't want my
12 case to be tried in public. And I think it's a public
13 proceeding. And I also don't want to have to be
14 running around worrying constantly about whether I can
15 tell somebody something that's this general.

16 I know what's confidential in this world,
17 and I treat it as confidential. And I don't tell the
18 press or other clients or the public about what's in
19 confidential contracts or that sort of information,
20 but economic theory and the general descriptions of
21 what they try to do in setting rates doesn't come
22 close to it.

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1 And I've got to have another compartment
2 in my brain for every little document that they
3 stamped here like this that this is the way we're
4 going to have to try this case, and then we're going
5 to have to keep trotting down here and arguing every
6 one of these before Your Honor.

7 And we need some rules of the road that
8 something this general is not in any way confidential.

9 So the direct answer to your question is
10 I would like Your Honor to rule that these documents
11 are not entitled to designation as either confidential
12 or highly confidential and ought to be treated as
13 public.

14 JUDGE LEVENTHAL: Well, how about the
15 offer to downgrade four of these designations?

16 MR. McBRIDE: It's an improvement, but
17 it's still confidential. He wants it still marked as
18 confidential, and I don't see that it merits it. It's
19 not the kind of information that shouldn't be in the
20 press. Their own statements like this were reported
21 in the press. He said so two weeks ago to Your Honor.

22 They made argument to Your Honor that was

1 identical to what's in these responses and that's been
2 reported in the press, and now they say these
3 shouldn't be in the press.

4 JUDGE LEVENTHAL: Well, how are you
5 injured in any way by the confidential designation
6 which allows you to discuss it with your principals?

7 MR. McBRIDE: Well, first of all, the
8 clients have to sign, and they're not accustomed to
9 having this kind of litigation information and having
10 to treat it separately. So now you go outside of a
11 law firm into a utility or coal company and then
12 they're into this kind of litigation mode with all
13 this stuff stamped and everything else.

14 But secondly, as I was trying to say
15 perhaps too delicately, the fact is, to some extent,
16 this case, like prior big railroad mergers, is to some
17 extent being presented in the press and debated in the
18 press and the confidential designation doesn't allow
19 that.

20 And the commissioners read these
21 materials. They're concerned about the *Wall Street*
22 *Journal* and the *Rail Merger Intelligence* and the *Coal*

1 *Transportation Week* because they know that these
2 things have an influence on people. And yet, they
3 don't want me to be able to participate in that
4 dialogue.

5 And we have a First Amendment in this
6 country.

7 JUDGE LEVENTHAL: Are you saying the Board
8 is influenced by what they read in the *Wall Street*
9 *Journal*?

10 MR. MCBRIDE: I am sure they are.

11 JUDGE LEVENTHAL: All right, Mr. Coburn.

12 MR. COBURN: Your Honor, the notion that
13 this case is appropriately tried in the press I submit
14 to you is -- I think it's insulting to the Board, and
15 I think it's insulting to the whole process, and I
16 think it's patently absurd.

17 For the record, Commissioner Morgan has
18 said that she intends to read every page of the
19 application, and I fully expect that she will. But be
20 that as it may, the staff is going -- is working --
21 the staff is certainly going to read every page.

22 The case is going to be decided on the

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1 basis of the record, not on the basis of the press.
2 And the notion that we should basically throw away the
3 protective order so that we can argue this case in the
4 press is an anathema to the whole procedure.

5 But putting that aside, let's focus for
6 purposes of discussion, if we may, on interrogatory
7 number three which asks whether we have a minimum
8 level of profitability when we negotiate coal rates.
9 We don't want his client to know whether or not we do.
10 We don't want NS to know whether or not we do.

11 That is fundamentally sensitive, highly
12 commercial information. I mean, the answer is what it
13 is. It could have been something else. But whatever
14 it is, it's highly confidential. Certainly we don't
15 want the *Wall Street Journal* to report it.

16 JUDGE LEVENTHAL: But the answer to
17 interrogatory number three with respect to CSX -- I
18 didn't read yours -- they say they have no specific
19 minimum level of profitability. What's confidential
20 about that?

21 MR. COBURN: That is what we said for CSX.
22 The answer could have been \$300. It could have been

1 \$500.

2 JUDGE LEVENTHAL: No, but the answer is we
3 have no specific level.

4 MR. COBURN: The fact that we have no
5 specific level of profitability -- minimum level of
6 profitability is in and of itself something that his
7 client would love to know when they sit down across
8 the table from us and negotiate rates.

9 They don't know that we don't have a
10 minimum level of profitability. So the fact that it's
11 zero as opposed to \$300 is neither here nor there.
12 It's the fact -- I recognize we say we don't have a
13 minimum level. That, in and of itself, is
14 confidential information.

15 Our clients would be very upset if his
16 clients knew -- Mr. McBride's clients knew what our
17 position is. They'd be very upset if NS knew what our
18 position is with respect to a minimum level of
19 profitability.

20 MR. McBRIDE: May I just respond to the
21 accusation? It seems like there's an accusation
22 that's made about once a week or day around here. I

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1 did not say I'm going to try this case in the press.
2 In fact, I think I said I'm not interested in doing
3 that.

4 What I said is it's being reported and
5 debated in the press. And do I think that people are
6 influenced by what they read even if they're the
7 chairman of the Surface Transportation Board? Yes.
8 I'm influenced every day by what I read in the *Wall*
9 *Street Journal* and all these trade press, and I don't
10 expect Linda Morgan not to be.

11 I don't think there's anything wrong with
12 that. But what is fundamental in the American
13 jurisprudence is not the protective order in this
14 proceeding. There seems to be a suggestion to that.
15 What's fundamental is that proceedings are public
16 unless there's a darn good reason why not.

17 And what I suggest Your Honor may want to
18 do, because I don't think that the three applicants
19 necessarily have a consistent position here on this,
20 is hear from all three of them.

21 JUDGE LEVENTHAL: All right.

22 MR. McBRIDE: And maybe now they do. I

1 don't know.

2 JUDGE LEVENTHAL: Mr. Norton.

3 MR. NORTON: Your Honor, Mr. McBride
4 referred to the rules of the road and there's
5 something that's been missing from his argument, which
6 is surprising because he's a careful lawyer. And if
7 there were a standard he could invoke that helped him,
8 he would.

9 There is a standard. And in a decision
10 served just yesterday, the Board addressed this very
11 question. This is a decision in the case of Arizona
12 Public Service Company against the Hutchison-Beacon
13 Santa Fe, Number 41185.*

14 And at page four and five, there was a
15 question raised in that case about a request to
16 declassify information that was confidential or highly
17 confidential. And what the Board said, and if I might
18 just read two sentences -- three, "We resolve any
19 doubts as to the need for confidentiality in favor of
20 protecting the asserted confidentiality unless the
21 opposing party can show that the removal of the
22 designation is necessary for it to make its case to

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1 argue an appeal adequately or to satisfy a statutory
2 goal.

3 "Santa Fe made no such showing here.
4 Santa Fe's counsel should ordinarily -- should not
5 ordinarily need to share such information with its
6 management in order to make its case."

7 Accordingly, they denied the very kind of
8 request for relief that has been made here. Mr.
9 McBride has not even come close to making a showing of
10 that kind of need or necessity. And the choice he
11 poses is a start point. It's either all or nothing.
12 It's either highly confidential or it's not
13 confidential.

14 We designated all three of our -- all six
15 of our answers highly confidential. We did -- we
16 think we did so appropriately. These questions go to
17 the process of rate setting which is a highly
18 competitive process. It is not the same as particular
19 prices to particular customers, but it is sensitive in
20 a different but equally vital way.

21 It is something that, as the customers,
22 each railroad is concerned they will maintain the

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1 confidentiality of its standards and approach to rate
2 setting and also as to its competitors, as has been
3 indicated by Mr. Coburn's comments a moment ago.

4 It is not just Mr. McBride and his clients
5 who are a matter of concern, although they are; it is
6 the other parties as well. And our concern here is
7 not motivated by -- we may be in a somewhat different
8 position from the other parties. We are obliged to
9 continue during this proceeding as an independent
10 competitor and compete as vigorously as we can while
11 this proceeding is going.

12 And we are required to be -- proceed
13 independently, and we are not under the control of the
14 allegations that have been made to that effect. And
15 as for CSX or both of them, we have to be in the
16 position to -- during the pendency of the proceeding,
17 to gain the benefits of the independent and vigorous
18 competition, and also in a position, should the
19 application be denied, for the company to continue as
20 an independent, vigorous competitor.

21 So any disclosure or action that would in
22 any way create a risk to the ability of Conrail to

1 compete vis à vis its dealings with the shippers or
2 with its competitors is very significant and raises
3 questions that are particularly significant as to
4 Conrail.

5 Now the questions are substantial and this
6 information is substantive even though the answer to
7 the question may seem simple or complex. Whichever
8 way, the fact that it is a simple answer or a less
9 simple answer or A versus B is less important or -- in
10 some cases, maybe less important than the fact that
11 the other side or the other parties don't know what it
12 is.

13 And I think that's been indicated here.
14 The uncertainty about another party's position for
15 lack of information is a critical factor in the
16 competitive process. And that is undercut if the
17 information is made known to shippers or to
18 competitors.

19 In the nature of things, the questions
20 raised here go to inherently sensitive and important
21 matters. Mr. McBride said something about statements
22 made by CSX personnel and maybe Conrail at a

1 presentation last winter.

2 If they said something that is useful to
3 him there, he's free to use it. There's no prejudice
4 from keeping this information or these answers
5 confidential because he has whatever it is they said
6 there. If they said the same thing, so be it. If
7 they didn't, then his argument is undercut.

8 JUDGE LEVENTHAL: No, but he's really
9 saying that if you made any of this material public,
10 you waive the confidentiality of it.

11 Isn't that your argument, Mr. McBride?

12 MR. McBRIDE: That was -- in that part of
13 the argument, it was the CSX Vice President for Coal
14 who was standing there who said it. And Mr. Norton's
15 client, the Vice President for Coal I think is his
16 title at Conrail, Mr. Dwyer, was standing right there
17 and he didn't act shocked.

18 He didn't say well, we do it differently
19 at Conrail. They were arm in arm. It was that --

20 JUDGE LEVENTHAL: Conrail made no public
21 statement?

22 MR. McBRIDE: Conrail did not make the

1 same statement at the meeting. It was CSX's Vice
2 President who did it.

3 MR. NORTON: And I'm quite confident that
4 what they said was not cast in the light of these
5 answers or to these questions. It may have been a
6 description in a certain context of what they do, but
7 it was not a definitive statement of this is the
8 company's practice or policy with respect to rate
9 setting.

10 And that is again an important
11 distinction. There's no significant harm shown here.
12 As Your Honor indicated, with a confidential
13 designation and the highly confidential designation,
14 either one, his consultants were the ones who probably
15 really have the greatest need to know this
16 information.

17 There's no hindrance there. He is free to
18 use it. There's no hindrance there. The Board and
19 the decision in the Arizona case indicated that it was
20 not a need to be able to disclose confidential
21 information to a client itself, to the management of
22 the company, in order to deal with the litigation.

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1 And we all deal with that in various
2 respects. This question is going to come up on both
3 sides. There's going to be an abundance of highly
4 confidential information. We're all going to have to
5 do that. We're going to be in a position where we
6 have to explain things to our clients in ways that
7 present the issue for litigation and judgements
8 without disclosing the particulars of the confidential
9 information.

10 Everyone seems to do it. They know how to
11 do it. It's not a problem. Everyone's learned how to
12 work around that. There's no pattern here either of
13 overuse of the confidential and the highly
14 confidential designation. There's only been a
15 relatively few answers that have been treated in that
16 way.

17 And certainly, on the face of it, given
18 the subject matter, is it highly appropriate
19 designation. I should mention that a loose statement
20 about overuse in past cases -- well, the issue was
21 raised in the UP/SP merger. A claim was made by
22 Kansas City Southern, I believe, and it was flatly

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1 rejected by the Commission as being unsubstantiated.

2 So it's a loose claim. It is not a claim
3 with any foundation.

4 The other -- the only other practical
5 problem you mentioned is the problem of dealing with
6 Dr. Kahn. You told us about the problem. You
7 probably could have done what we've done to people who
8 didn't sign the papers today. We could have
9 accommodated the problem.

10 He was able to get papers to them to
11 review the file. We certainly could have dealt with
12 that kind of problem. So all of the practical
13 rationales on a problem analysis are very far away.

14 Now we too have considered as a fall back
15 or an alternative to the position that all of the
16 answers have to kept highly confidential that if the
17 answers to one and three and the corresponding
18 questions, four and six, remain highly confidential,
19 we could downgrade two and four to confidential.

20 But that was not something that Mr.
21 McBride would accept because of his own position.

22 JUDGE LEVENTHAL: Well, wait a minute. I

1 thought the proposal was to downgrade one, two, four
2 and five. Isn't that correct?

3 MR. NORTON: On behalf of CSX, Your Honor

4 --

5 JUDGE LEVENTHAL: Yes, yes, yes.

6 MR. HARKER: Conrail --

7 JUDGE LEVENTHAL: Wasn't that your
8 position too?

9 MR. NORTON: For CSX.

10 JUDGE LEVENTHAL: Yes, CSX position is the
11 same.

12 MR. NORTON: Correct.

13 JUDGE LEVENTHAL: Right. And now your
14 position is?

15 MR. NORTON: That one, three, four and six
16 should remain highly confidential. And two and four
17 could be changed to confidential. I should say, Your
18 Honor, that the resolution does not have to be the
19 same as to each party.

20 JUDGE LEVENTHAL: Oh, no; of course I
21 realize that.

22 MR. NORTON: Unless Your Honor has any

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2.

1 questions, that's all.

2 JUDGE LEVENTHAL: No, we'll get to that.

3 Well it seems to me you have a reasonable
4 proposal here.

5 MR. McBRIDE: Does Your Honor have in
6 front of him what Mr. Norton's been talking about?

7 JUDGE LEVENTHAL: Yes, I have it right
8 here.

9 MR. McBRIDE: It's all on that one page.

10 JUDGE LEVENTHAL: Mr. Norton, in his
11 response, doesn't tell me what his response is.

12 MR. NORTON: Sir?

13 JUDGE LEVENTHAL: It says Conrail is
14 placing the response into the depository.

15 MR. NORTON: Oh, no; you need a separate
16 sheet of paper I gave you. It's a separate highly
17 confidential status. If Your Honor would put that in
18 front of him. That was another problem we had that
19 was resolved.

20 JUDGE LEVENTHAL: Oh, I see.

21 MR. McBRIDE: Those are the responses that
22 he considers to be highly confidential. And if Your

1 Honor please, it all says one thing -- Conrail tries
2 to maximize the economic benefit to rail services
3 which is precisely what Mr. Norton and Mr. Cunningham
4 spent three and a half hours arguing to Your Honor two
5 weeks ago in public.

6 MS. BRUCE: Your Honor, Norfolk Southern
7 hasn't been heard for the record on this.

8 We originally designated all of the
9 interrogatory responses highly confidential. And we
10 can downgrade all of those responses to confidential
11 with the exception of number three, which we would
12 like to remain at highly confidential.

13 JUDGE LEVENTHAL: All except three?

14 MR. NORTON: Your Honor, one thing I just
15 wanted to add. Our willingness to change the level as
16 to two and four assumes something which we hadn't
17 talked about with Mr. McBride in advance, and I think
18 he is -- we can agree upon it in principle.

19 But that would not preclude us from, if
20 there were follow up questions based on those answers
21 that we thought did warrant a higher level of
22 confidentiality on the answers, it would be not

1 precluded from us. The agreement would not prejudice
2 us to a different position on the follow up.

3 MR. McBRIDE: No, what I said was if we
4 could reach agreement, then I wouldn't cite the
5 agreement -- the settlement as -- but we didn't reach
6 an agreement. But I'm not asking them to make -- or
7 Your Honor to make a ruling on what their next
8 response will be.

9 You don't have it in front of you. I was
10 simply offering in the spirit of compromise yesterday
11 to say that if we agree, I will not cite that
12 agreement as precedent when we have the next argument
13 before Your Honor.

14 JUDGE LEVENTHAL: I think, regardless of
15 my ruling on these specific interrogatories in the
16 future, you can make whatever claim you'd like as to
17 any further response. You're not precluded because I
18 made a ruling this morning -- this afternoon. And my
19 ruling in the future might be the same, but then it
20 might not be, fact depending.

21 All right.

22 MR. McBRIDE: Your Honor, may I response

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1 on Norfolk Southern since we've now heard that. Let
2 me give you an example, Your Honor. One and three in
3 Norfolk Southern, for example, say essentially exactly
4 the same thing the Conrail statements say. All they
5 say is they try to maximize the revenues.

6 And I don't understand how that's any
7 different than enumerable public statements they've
8 made in SEC filings and what have you. I just cited
9 the example of what they said -- CSX said to our
10 clients as a fairly vivid one saying right to the
11 client.

12 On number two, Norfolk Southern is asking,
13 I guess, that you should treat as confidential at
14 least -- I lost track of what she said about which one
15 is which -- that NS does not have sufficient knowledge
16 of other carriers' cost and other profitability with
17 respect to such movements.

18 She wants that treated as confidential?
19 Is that what I understand?

20 MS. BRUCE: That's correct, Your Honor.

21 And that answer, while on its face may
22 seem bland and public to Mr. McBride, there are

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1 certain implications in that answer that could go
2 forward from that, and that's what we're asking that
3 the confidentiality -- the level of confidentiality be
4 confidential on that and that it not be downgraded to
5 public.

6 And I'd just like to add for the record in
7 addition to everything -- I don't think I can add to
8 everything that my colleague said, but there is really
9 no harm to Mr. McBride's client in the confidentiality
10 level -- number two being confidential. He's free to
11 share it with his client. It's just that it won't be
12 public.

13 And I don't understand his logic on saying
14 that the confidentiality level is -- being
15 confidential is not adequate for him to make his case
16 because it certainly is. He has every opportunity to
17 give this information to his client at a confidential
18 level.

19 JUDGE LEVENTHAL: Let me make sure I
20 understand. You're going to downgrade everything
21 except three, is that right?

22 MS. BRUCE: Correct. We'd like three to

1 be highly confidential.

2 JUDGE LEVENTHAL: All right.

3 MR. COBURN: Your Honor, if I can add just
4 one other thought that you might want to consider,
5 which is that I certainly have the experience, I
6 suspect my colleagues have had the experience, of
7 explaining to officials at our -- at CSX what the
8 protective order is all about.

9 A lot of them are very familiar with it
10 because it's used in any major rate proceeding. And
11 I'm sure Mr. McBride's clients have seen protective
12 orders before. But there are certain officials who
13 have not seen them before, and I've spent a lot of
14 time on the phone explaining to them that if we
15 designate it highly confidential, it won't be known to
16 our opposing counsel's client and it won't show up in
17 the *Wall Street Journal* because sometimes we're
18 dealing as here, with very confidential, very
19 sensitive material.

20 And the client's attitude is often well,
21 I'm not sure about that, you know, human nature is
22 what it is and I'm afraid if I give you this

1 information, it's going to come out. And you know, we
2 have to -- it's difficult.

3 It's difficult, as you might imagine,
4 sometimes convincing our own clients to give us highly
5 confidential information and assuring them that the
6 protective order will protect the information. And we
7 do offer them that assurance.

8 And we offer them the assurance that -- as
9 far as I'm concerned, I don't know of any situation
10 where protective orders have been breached. And I
11 think the system works very well.

12 If we set a precedent here that allows a
13 downgrading to public of information that is as
14 sensitive as this, then we're making our job more
15 difficult in responding to future interrogatories
16 where again highly confidential information is sought
17 and we have to convince our own clients to allow it to
18 be set forth as it sometimes needs to be in
19 interrogatory answers and document responses.

20 JUDGE LEVENTHAL: All right, anything
21 else?

22 All right, --

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1 MR. McBRIDE: Your Honor, I was just
2 commenting seriatim. But I just wanted to say a
3 couple of things about what Mr. Norton had to say
4 because I was just letting them finish and all state
5 their positions.

6 First of all, as to Arizona Public Service
7 and the decision he read yesterday, and I don't have
8 it in front of me. I didn't get through that stack
9 yet, but I take his word for it that that's what was
10 said. But remember what I said at the outset of this
11 hearing.

12 I concede that confidential rate in terms
13 of service kinds of information is treated as highly
14 confidential. That is a rate case. Service
15 Transportation Board decided yesterday with a comment
16 -- had to be in the context of the kind of
17 demonstrably sensitive information that they were
18 talking about there and doing what they call
19 constructing a stand alone railroad in putting
20 together specific shippers in terms of service and
21 rates and what have you to construct the rate that
22 ought to apply to that particular shipper.

1 And secondly, in the major proceedings
2 before the Surface Transportation Board that have some
3 relationship, some very clear relationship to some of
4 the things we're arguing about now in this proceeding
5 such as the so-called bottleneck proceedings that
6 were just argued last fall, these -- counsel or their
7 partners stood before the Surface Transportation
8 Board, the press, and everyone else and blared for
9 everyone to hear that they're entitled to maximize
10 their economic grants for profits on their movements
11 or the bottleneck portions of the movements and that
12 that's just the way the world has to be in railroad.

13 And the Surface Transportation Board
14 accepted their argument in that proceeding. And
15 that's exactly the same thing that we're now being
16 told is highly confidential or at least confidential
17 here. This is the most general possible statement
18 here, and yet now they're saying that it's highly
19 confidential or confidential information.

20 And it's entirely consistent with
21 enumerable public statements they've made over the
22 years. And I don't understand the distinction. I

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1 think they laid this a long time ago.

2 JUDGE LEVENTHAL: Thank you. Anything
3 further?

4 All right, we're only in the discovery
5 phase now. What we're concerned with is not impeding
6 unnecessarily the construction of a case by the
7 parties intervening in this case. The eventual ruling
8 on whether something is highly confidential or
9 confidential will be made by the STB at an appropriate
10 time if the issue is placed before them.

11 I think at this time I don't see the
12 injury to the movements given the concessions made by
13 the other parties to this. I'll go along with the
14 suggestions made by CSX, NS and Conrail.

15 With respect to CSX, of the answers to the
16 -- responses to the interrogatories, only item number
17 three and item number six will remain highly
18 confidential. The others will be downgraded to
19 confidential.

20 With respect -- I'm sorry, did I say with
21 respect to -- that's with respect to CSX.

22 With respect to NS, all of the responses

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1 except number three will be downgraded to
2 confidential. Number three will remain highly
3 confidential.

4 And Conrail has agreed to downgrade
5 responses two and four to confidential, and the rest
6 will remain highly confidential.

7 With respect to the future to any
8 individual arguments over whether or not the
9 designation is properly assigned, I'm leaving to
10 future arguments if needed.

11 All right.

12 MR. McBRIDE: Your Honor, may I just
13 inquire if you're in any position to give us some sort
14 of guidance because it may mean we either do or don't
15 need to bring some more of these matters before you
16 what it is that you found persuasive in retaining the
17 designations that they've retained?

18 JUDGE LEVENTHAL: What I found persuasive?
19 I don't see the harm to you, Mr. McBride. For
20 instance, let's take Conrail's response. Let's take
21 interrogatory number three. I don't see how it will
22 help you if your client -- that the principals of your

1 client have this answer in hand.

2 MR. McBRIDE: Do you want me to respond or
3 are you just explaining?

4 JUDGE LEVENTHAL: No, you asked me to tell
5 you -- explain my ruling. I'm explaining it to you.

6 MR. McBRIDE: No, you were looking at me
7 and I appreciate that.

8 JUDGE LEVENTHAL: No, no; I don't see how
9 it will harm you. With respect to your experts, of
10 course, they have access to this information. And
11 that's true to each one of these other answers that
12 each of the parties have given to you. I don't see
13 any injury to you.

14 All right.

15 MR. NORTON: Your Honor, just a
16 housekeeping question. Since there was discussion of
17 the answers themselves and some quotations from them
18 -- I don't know whether this was addressed earlier.
19 But the transcript itself should be highly
20 confidential, I believe.

21 JUDGE LEVENTHAL: Mr. McBride?

22 MR. McBRIDE: I got distracted. I didn't

1 hear what he said. I'm sorry.

2 JUDGE LEVENTHAL: He wants this transcript
3 of this oral argument today held highly confidential
4 basically because I read some portions of the answer
5 into the record.

6 MR. NORTON: Well, and I think Mr. McBride
7 must have assumed that it would be because he was
8 saying that the answers to some of the responses were
9 -- the responses to some of the interrogatories were
10 the same as other statements.

11 JUDGE LEVENTHAL: We'll hear from you, Mr.
12 Osborn.

13 Mr. McBride?

14 MR. McBRIDE: I was under the
15 understanding that we were operating under those
16 rules, but I -- maybe I'm missing something here. And
17 that may be what Mr. Osborn is stating.

18 MR. OSBORN: Your Honor, I was not under
19 the impression that the entire hearing was highly
20 confidential today and that's another matter. So --

21 MR. NORTON: Just the part dealing with
22 this issue.

1 MR. OSBORN: So you're talking about a
2 redacted --

3 JUDGE LEVENTHAL: Wait, wait. Let's go
4 off the record.

5 (Whereupon, the proceedings went off the
6 record briefly.)

7 JUDGE LEVENTHAL: Anything else?

8 All right, then the oral hearing stands --
9 oral argument stands closed.

10 (Whereupon, the proceedings were adjourned
11 at 3:43 p.m.)

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SURFACE TRANSPORTATION BOARD

08/12/97

FD #33388

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Before the
UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

IN THE MATTER OF:

CSX CORPORATION & CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION, and
NORFOLK SOUTHERN RAILWAY COMPANY

Finance
Docket
33388

--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONTRAIL, INC. & CONSOLIDATED RAIL
CORPORATION

Tuesday,
August 12, 1997

Hearing Room 4, Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JACOB LEVENTHAL,
Administrative Law Judge

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None

CLOSING STATEMENT

None

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9:05 a.m.

JUDGE LEVENTHAL: The oral argument will come to order. This is an oral argument in STB CSX Corp., Norfolk Southern Corp., Control and Operating, et. al., Docket No. 88-988.

We'll take appearances at this time.

MR. McBRIDE: Yes, good morning, Your Honor, Michael F. McBride, LeBoeuf, Lamb, Green & MacRae, for American Electric Power, Atlantic City Electric Company, Delmarva Power & Light Company, Indianapolis Power & Light Company and The Ohio Valley Coal Company. We thank you for accommodating us on such short notice.

JUDGE LEVENTHAL: Sure.

MR. McBRIDE: Good morning, Your Honor, John Maser, Donelan, Cleary, Wood & Maser, appearing this morning on behalf of Niagara Mohawk Power Corporation.

JUDGE LEVENTHAL: Thank you.

MR. MULLINS: William Mullins, Your Honor, with Troutman Sanders, representing New York State

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1 Electric and Gas.

2 JUDGE LEVENTHAL: Are there further
3 appearances?

4 MR. COBURN: David Coburn with Steptoe and
5 Johnson, Your Honor, for CSX Transportation.

6 MR. DENMAN: Good morning, Your Honor,
7 Jeffrey Denman with Arnold & Porter, on behalf of CSX
8 Corporation.

9 MR. EDWARDS: Good morning, Your Honor,
10 John Edwards with Zuckert, Scoutt, for Norfolk
11 Southern.

12 MR. NORTON: Gerald Norton, Harkins
13 Cunningham, for Conrail, and with me is James
14 Guinivan, also of Harkins Cunningham.

15 JUDGE LEVENTHAL: Any further appearances?

16 All right. This is an oral argument on a
17 discovery dispute. It's your motion, Mr. McBride.

18 MR. MCBRIDE: Thank you, Your Honor.

19 I have two matters to bring before you this
20 morning, and I wish, frankly, we didn't have to keep
21 doing this, but because of the responses I'm getting
22 from the applicants I don't have any choice in the

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1 matter.

2 Your Honor will recall that we propounded
3 discovery for Atlantic City Electric, et. al., on July
4 3rd of this year, and it occasioned a first oral
5 argument before you, and the day before that argument
6 American Electric Power joined in the discovery
7 requests and in the Motion to Compel, and Your Honor
8 ruled on July 16th that the hearing, I have the
9 transcript here in case we need reference to it, that
10 American Electric Power was entitled to do that by
11 letter, joining in the prior discovery. And, as we
12 saw it, that was consistent with the discovery
13 guidelines which contemplated that we avoid redundant
14 discovery.

15 And, Your Honor ruled that we were entitled
16 to some, but not all, of the discovery that we sought,
17 and that it was to be limited to the destination
18 served by Conrail.

19 So in that spirit, and after getting the
20 client's approval, and, in fact, that's what happened
21 here, the reason that Indianapolis Power & Light
22 Company didn't join in these requests previously is

1 because I didn't have the client's authorization. I
2 went up to the Chairman of the Board, but I was
3 authorized on August 1st of this year to do so, and so
4 I sent a letter to discovery counsel for the
5 applicants. Your Honor has a copy of that before him,
6 asking that they give me the same discovery
7 information that Your Honor ruled I was entitled to
8 for the other four clients, for Indianapolis Power &
9 Light Company, for those destinations served by
10 Conrail.

11 The company has more than two power plants,
12 but not all of them are served by Conrail, so I
13 identified in the letter the two plants that are
14 served by Conrail.

15 The response I got back from Mr. Norton on
16 behalf of Conrail and the other applicants raised a
17 whole host of issues, and I'm not sure what he is
18 seriously pressing here, whether it's the informality
19 of the letter, the fact that we didn't join in this
20 until August 1, or what have you, but I'm not sure any
21 of that is really his point.

22 He has some point. I gather it's to

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1 reargue the merits of the matter Your Honor already
2 ruled on, and I don't intend to do that. I've had to
3 abide by Your Honor's ruling, I wasn't entirely
4 satisfied with it as you know, neither were they, but
5 that's the way it is.

6 My appeal went up to the Board, as I think
7 Your Honor knows. The appeal was denied, but the
8 important point in the denial of the appeal is that
9 the Board understood very clearly what it was that we
10 were arguing. And, in decision number 17, issued on
11 August 1, same day as my letter, the Commission
12 understood that we were seeking discovery that had to
13 do with the possible impact on destinations served by
14 Conrail of the acquisition of Conrail by CSX and
15 Norfolk Southern.

16 So, the Commission didn't say the discovery
17 was inappropriate. The Commission upheld Your Honor's
18 order. So, I believe that Indianapolis Power & Light
19 Company is entitled to the same discovery. I believe
20 Your Honor has already ruled on this, in the context
21 of American Electric Power, and I don't intend to
22 argue the point any further, unless Your Honor has any

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1 questions.

2 I can get to the second matter, but if you
3 want me to while I'm standing up, I'll very simply say
4 that there's a protective order in this case, as you
5 well know, for both confidential and highly
6 confidential material, and it was certainly my
7 understanding, and I never heard a word about this
8 previously, that when documents would be put in the
9 depository and marked confidential or highly
10 confidential, of course, the protective order applied
11 with whatever sort of limitations that it has, and we
12 all understand them and we abide by them, and I can't
13 share highly confidential material, for example, with
14 my clients, and I don't, but rather than go through
15 all these documents I'll just show you that when I got
16 out of the depository documents that were the
17 documents that were put in the depository were
18 supposed to be responsive to our discovery requests
19 that Your Honor ruled we were entitled to, and marked
20 highly confidential, were, nevertheless, redacted all
21 over the place, several of these documents.

22 Now, I did, as Your Honor knows, just

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1 before we went on this morning, discuss this briefly
2 with counsel for CSX, and he or they apparently have
3 some concerns, but it seems to me the protective order
4 addresses them. Apparently, their concerns relate to
5 the fact that some of my clients are in ongoing
6 negotiations with them. And, that's true, I haven't
7 been much a party to them, but I can't say I'm
8 totally unaware of what's going on. I occasionally
9 get a report. I haven't been at any of the
10 negotiations, but I don't share this material with the
11 clients. This material is going to me and it's going
12 to the consultants, and that's how the protective
13 order is supposed to work.

14 And, we can't afford anymore delay here, we
15 need these documents, and I don't think they have a
16 right, once Your Honor rules that we are entitled to
17 the information, to not give it to us, and to not put
18 it in the depository under the terms and conditions of
19 the protective order.

20 And, we wouldn't have to keep doing this if
21 they weren't asserting unilateral rights that I don't
22 know that they have. I don't know under what

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1 provision of what order they are deciding for
2 themselves that they can withhold from me information
3 that Your Honor ruled that I was entitled to.

4 JUDGE LEVENTHAL: All right.

5 Who is going to address this? Mr. Norton?

6 MR. NORTON: Your Honor, before we get to
7 the protective order issue, we need to make sure that
8 everyone in the room has signed the highly
9 confidential protective order.

10 JUDGE LEVENTHAL: All right.

11 MR. KHERA: Yes.

12 MR. PETERSON: I have not.

13 MR. NORTON: That only bears on the
14 discussion of the redactions, not on the question of
15 the requests made by Indianapolis Power & Light.

16 JUDGE LEVENTHAL: Why don't we handle
17 Indianapolis Power & Light first, and then we'll get
18 to the redacted material.

19 MR. NORTON: Fine.

20 JUDGE LEVENTHAL: At that time, anybody who
21 hasn't signed the certificate would have to leave the
22 hearing room.

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1 MR. NORTON: That's fine.

2 JUDGE LEVENTHAL: All right.

3 MR. NORTON: Your Honor, let me just
4 explain briefly, Mr. McBride referred to some question
5 raised about the formality or informality of his
6 request. Our concern there, that isn't the prime
7 issue, obviously, the merits of the request are what
8 we addressed in our letter, which I assume you've had
9 a chance to see.

10 JUDGE LEVENTHAL: Yes.

11 MR. NORTON: But, there is a point to be
12 made about the informality, and we think that it isn't
13 too much to require parties, if they are going to
14 request new discovery, to set it forth in their own
15 terms so that we have something that clearly focuses
16 and requires them to focus on what they are asking
17 for.

18 It's so easy just to write a letter saying,
19 we want the same stuff, without really even thinking
20 through whether you are in the same position, or
21 whether the rationale fits, or whatever. And, if
22 discovery is to be tailored, as the guidelines

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1 require, it requires some modest level of discipline
2 at a minimum, and that's part of why we raised that
3 issue.

4 And, it's quite a different situation from
5 when AEP joined in the original request, because that
6 was a global request that blanketed everyone, so
7 adding AEP at that point didn't change the scope of
8 it.

9 Adding these parties at a later date, and
10 the delay has been another factor here, means we have
11 to go back and do a lot of the same kind of searching
12 for the same kinds of records that if this had been
13 done timely we might have been able to do more
14 efficiently at an earlier stage.

15 JUDGE LEVENTHAL: Let's deal with that
16 first, let's deal with the formality of the request
17 now.

18 MR. NORTON: Sure.

19 JUDGE LEVENTHAL: Have you finished with
20 your comments on that?

21 MR. NORTON: Yes.

22 JUDGE LEVENTHAL: All right.

1 How about it, Mr. McBride.

2 MR. McBRIDE: I simply abided by what Your
3 Honor had previously said I was entitled to do.

4 JUDGE LEVENTHAL: No, that's not the point.
5 He's saying that he thinks that discovery requests
6 should be made formally.

7 MR. McBRIDE: Well, the ruling was
8 previously that, having made formal discovery
9 requests, which I did, we were simply adding another
10 company and two more destinations to it. So, I've
11 made formal discovery requests.

12 He just admitted that when American
13 Electric Power joined them it didn't change them, and
14 it doesn't change them when Indianapolis Power & Light
15 joins them, or for that matter, Niagara Mohawk or New
16 York State Electric & Gas.

17 JUDGE LEVENTHAL: All right, wait.

18 MR. McBRIDE: It just adds destinations,
19 because Your Honor will recall, and he stated this
20 correctly, we asked for all the destinations, for all
21 the utilities, and the other coal consumers, and Your
22 Honor held we were entitled only to those for the

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1 companies that I represent.

2 So now, we are expanding that on behalf of
3 parties who are now before you, asking for that
4 information. It's within the scope of the original
5 formal discovery request.

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

7 (Whereupon, at 9:16 a.m., a discussion off
8 the record until 9:20 a.m.)

9 JUDGE LEVENTHAL: Back on the record.

10 In our off-the-record discussion we decided
11 that future discovery requests will be made formally
12 in the usual manner.

13 All right. Now, do you wish to address the
14 next issue?

15 MR. NORTON: Yes, Your Honor, and that is
16 the point that Mr. McBride says he was not arguing,
17 and that is really the guts of the matter, whether he
18 is entitled, on behalf of these clients, or whether
19 the other utilities here are entitled to the same kind
20 of information that Your Honor ruled on July 16 in
21 response to the Atlantic City request that those
22 companies should get.

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1 Now, you made clear then that you were
2 ruling in the context of only the parties before you
3 and the circumstances existing at that time, and
4 there's been a significant intervening development,
5 which is the Board's rejection of the Atlantic City
6 appeal. We think decision number 17 made clear that
7 the whole rationale for Mr. McBride's requests, and
8 all of these requests today, which was asserted then
9 as to the entirety of the vast discovery requests, and
10 also the justification for the particular ones, that
11 that rationale lacked merit.

12 The Board went through each of the points
13 that was raised, each of the significant points, and
14 said, for example, as to the attack on the -- or, the
15 argument based on the Board's decision in BN/SF, and
16 the Court of Appeals decision in Western Resources,
17 they were simply wrong in their characterization of
18 what burdens or limitations that imposed.

19 They went on to say that the evidence that
20 was being sought, the kind of evidence being sought,
21 would not be much help at all in looking at the
22 questions of potential adverse impact, competitive

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1 impact of a merger, or any question about the
2 consequences of the financial obligations that CSX and
3 NS were undertaking in connecting with a merger.

4 They pointed out that the rationale
5 asserted didn't even apply to several of the utilities
6 that were getting the discovery under that rationale,
7 because they were not in the one lump situation that
8 was put forward as the principal rationale for the
9 discovery. Only one of them, Delmarva, was in that
10 situation. And so, right down the line the Board
11 found that the arguments being made were not
12 sufficient.

13 Mr. McBride said the Board upheld Your
14 Honor's ruling as to the particular documents for
15 these particular utilities or particular clients of
16 Mr. McBride's. Well, that's not exactly the case.
17 The issue wasn't presented whether they should uphold
18 that ruling. We did not appeal at that time. What
19 they said was that the rationale for broadening it to
20 cover everything else that he asked for was simply
21 without merit.

22 And, if you look at the rationale that's

1 been asserted for this kind of discovery and the
2 Board's ruling, it just completely pulls the rug out
3 from under those arguments.

4 Then, if you turn to the particulars of the
5 companies that are here, I think it's even clearer,
6 because in the case of Indianapolis Power & Light,
7 where two utilities, two destinations in Indianapolis
8 that are in issue, one of them is not directly served
9 by Conrail at all. The rationale he asserted was that
10 the focus here is on what's going to happen to
11 destinations that are sole served by Conrail, when
12 Conrail is replaced by either CSX or NS, that's what
13 he called the central issue here.

14 Well, as to the Stout plant in
15 Indianapolis, Conrail doesn't serve that plant
16 directly, it's served by Indiana Railroad, and Conrail
17 has access only through switching by Indiana Railroad,
18 so it is not even in the paradigm situation that is
19 the whole rationale for this discovery.

20 As to the Perry K plant, Conrail does serve
21 that, but Conrail will be replaced by CSX, and in
22 addition, by virtue of one of the transaction

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1 agreements, NS will also have access to that plant.
2 So, Perry K is going to go from having sole service by
3 Conrail to service by both CSX and NS so it is plainly
4 not in the situation that was addressed by the
5 rationale for the discovery.

6 The facts, I think, and I may be mistaken
7 on this, and I'm sure I will be corrected by Mr.
8 Mullins or Mr. Maser if I am, that the situations
9 concerning the other lines are much the same. New
10 York State Electric & Gas, there are four plants
11 involved, again, there's no excuse for why they waited
12 so long before seeking this request. They had been
13 represented by Mr. McBride until July 29th, but in
14 each of these cases there's no vertical integration
15 involved, they are single line service by Conrail now,
16 as I understand it, and that will be after the
17 transaction is implemented, if it's approved, they'll
18 be single line service by NS, three of the four, and
19 by CSX at the other. So, again, it is not the
20 situation that was put forward as the rationale for
21 this discovery.

22 And then, as to Niagara Mohawk, again we

1 have -- this is a discovery that could have been
2 served a long time ago. There's no vertical
3 integration. Again here, it's single line service by
4 Conrail, well, there are two variations as I
5 understand the principal service to these plants.
6 It's either single line service by Conrail, which will
7 be replaced by CSX, or it is Conrail service from the
8 mine to barges, which then deliver to the utility, and
9 there again, Conrail will be replaced by CSX.

10 And, as to some of the origins of coal for
11 those plants, it may be that NS will also be able to
12 serve by virtue of the agreement concerning the
13 Monongahela coal area. So, they will be going, at
14 worst, from service by one to service by a different
15 railroad, or from one to two. And, none of these
16 situations presents the vertical integration and the
17 one lump situation that was the whole rationale of the
18 central issue as Mr. McBride described it of the prior
19 request, and the rationale for the rulings that you
20 made.

21 So, basically, we, you know, Mr. McBride
22 previously justified what he was seeking by the one

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1 lump theory, we'd like to invoke the one bite theory.
2 He's had the one bite, it was more than he was
3 entitled to, and there is no justification for getting
4 anymore.

5 Thank you.

6 JUDGE LEVENTHAL: All right.

7 Do you wish to -- by the way, before I hear
8 your reply, I took the Board's decision as affirming
9 my ruling. They did say that in some instances it
10 probably didn't apply, however, there was no ruling
11 that said that I was wrong. As a matter of fact, they
12 called my ruling reasonable under the circumstances.
13 So, I don't think we have to hear argument on that.

14 And, if you didn't like that, you can still
15 appeal it.

16 MR. NORTON: No, no.

17 JUDGE LEVENTHAL: I took the ruling as
18 being a complete affirmance of my order.

19 MR. NORTON: I can't --

20 JUDGE LEVENTHAL: You are entitled to your
21 opinion.

22 MR. NORTON: -- I can't impose my views,

1 obviously.

2 I would only note this, Your Honor, it was
3 reasonable under the circumstances then presented, but
4 that doesn't mean it would be necessarily reasonable
5 under these circumstances, which are now illuminated
6 by the analysis of the Board's own decision.

7 JUDGE LEVENTHAL: I'm not precluding you
8 from any action at all, Mr. Norton.

9 All right, Mr. McBride.

10 MR. McBRIDE: I can tell him, Your Honor,
11 too, that if he appeals your ruling today it might be
12 good for his soul, since I have a feeling what the
13 Board would do with any appeal from Your Honor's
14 ruling.

15 But, I want to just bootstrap on what you
16 said. I agree with your reading of the Board's
17 decision, that they held that your decision was
18 reasonable. At the bottom of page two and the top of
19 page three, the Board correctly understood our
20 arguments, despite all of the protestations and
21 confusion that I would submit the applicants have been
22 trying to inject into this for over a month now. ACE

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1 is asserting that Conrail has some as yet unexercised
2 market power that either CSX or NS will exercise if we
3 permit the acquisition of Conrail's lines. NS and CSX
4 will allegedly raise their rates, et cetera. That's
5 precisely what we're concerned about, and it applies
6 at Indianapolis Power & Light, because you've now
7 heard, Conrail is the sole transporter into the Perry
8 K plant, and CSX will replace it, and NS, they say,
9 will be able to provide service there as well.

10 Whether it's effective or not is another
11 matter and one we may have to litigate, but the fact
12 of the matter is that by conceding that he's conceded
13 my point at the other plant, because the only way NS
14 is going to get to the Perry K plant is through
15 switching, via CSX.

16 Now, that's what happens at the Stout
17 plant, the second of the two plants Indianapolis Power
18 & Light has in Indianapolis. It gets coal off of a
19 Short Line that used to be a line owned by Conrail,
20 and when the contract that the company has with
21 Conrail was executed Conrail owned that line, and
22 there was an agreed upon rate. The contract is still

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1 in effect. And so, when the line was sold to the
2 Short Line there had to be some arrangement made for
3 divisions between the Short Line and Conrail, and
4 Conrail then charged -- there was a switching charge
5 that was applicable in the area to get the coal to the
6 Stout plant if that's where it was intended to go, and
7 that's how Conrail gets access, and it pays a small
8 fee to the Indiana Railroad, which actually has the
9 tracks into the plant, but Conrail serves the plant
10 via a switching charge.

11 The Board and the ICC have always treated
12 access via switching charge as the equivalent of
13 physical access. They did in the UP/SP case, and Mr.
14 Norton has, in effect, conceded it here by saying that
15 NS would have access into Perry K. So, the issue is
16 really very simple, we have two plants that are served
17 in whole or in part by Conrail today, and we're going
18 to lose that service, and they propose some
19 replacement of the Conrail service under terms and
20 conditions that we don't have to argue about here, but
21 they will be an issue in the proceeding.

22 And, we're concerned that the loss of

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1 Conrail will allow Norfolk Southern and CSX to raise
2 our rates, precisely what the Board understood we were
3 seeking as discovery to determine. So, that's why we
4 are entitled to it. It has nothing to do with all
5 these economic theories, it has to do precisely with
6 what the Board said, precisely within the scope of the
7 prior request. These are Conrail served plants.

8 Now, they keep talking about timeliness.
9 I hope, now that Your Honor has ruled on this issue of
10 formality so we can get that out of the way, so you
11 don't have to keep hearing about that again, you might
12 also rule on timeliness, since the discovery
13 guidelines say that you can propound discovery until
14 F+105, which is October 6th by my calculations. It's
15 almost two months from now. So, somebody could come
16 in here next month with the same discovery for yet
17 another utility or ten of them, and it would be
18 timely. So, just because all these parties didn't
19 join in this discovery on July 3rd is not anything
20 that they can be criticized for under the schedule
21 that's controlling here. And, I don't control them,
22 they control me, they tell me when I'm authorized to

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1 ask for discovery, or these gentlemen.

2 So, I don't know what the issue is, quite
3 frankly. I know Mr. Norton doesn't want me to have
4 the information, but that's not the standard. The
5 standard is, are these plants served by Conrail, and
6 is there information in their files that we're
7 entitled to see to provide to our consultants to make
8 our case, and that's all we are trying to do.

9 And, we're not trying to give it to the
10 clients. I'm just intruding slightly into the second
11 issue, but just so Your Honor knows for emphasis.

12 JUDGE LEVENTHAL: All right.

13 MR. MASER: Your Honor, if I may, on behalf
14 of Niagara Mohawk, first as to the timing of it, we
15 were just retained earlier this month. Notices to
16 participate under the existing schedule are not due
17 until the 7th of August, so, I mean, the notion of
18 discovery by Niagara Mohawk should have been filed
19 July 3 or whatever is just nonsense, frankly, Your
20 Honor, because we weren't retained, they weren't a
21 party, they are now. We were trying to get the same
22 information in good faith in an expeditious --

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1 certainly within the spirit of the discovery
2 guidelines as we read them, and that's the reason we
3 took the approach we did.

4 However, on the merits of it, Your Honor,
5 again, I agree with Mr. McBride, and I won't belabor
6 this, the two plants of Niagara Mohawk, the Huntley
7 and the Dunkirk plants, served by Conrail today, will
8 be served by CSX when the acquisition goes through,
9 assuming it does, and so we fall within the scope of
10 the discovery questions as permitted by Your Honor, as
11 upheld by the Board, and I agree, I think it was an
12 upholding of your ruling.

13 The Board may have its own views as to what
14 persuasive value it may or may not have, but we are
15 entitled to make our case to fall within the
16 exceptions or the application of the one month theory,
17 even if you are limiting the focus to that, which I
18 don't think is proper, as Mr. McBride said, and I
19 don't think Your Honor's ruling on this so limited it,
20 and the Board did not so limit the discovery.

21 So, I think we fall within the -- clearly,
22 within the scope of what had been asked for before.

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1 I think we are entitled to it. The applicants may not
2 like the information that is requested, but it's
3 clearly designed to lead to admissible evidence, I
4 think it's relevant, and it's been upheld by the
5 Board, Your Honor.

6 So, as I say, I don't want to belabor this,
7 I'd be happy to answer any questions if you have them,
8 sir, but other than that I think we fall within the
9 framework that has been presented, and we are entitled
10 to it, and we ask Your Honor to authorize it.

11 Thank you.

12 JUDGE LEVENTHAL: How will your clients be
13 harmed if Conrail is replaced by NS or CSX?

14 MR. MASER: Well --

15 JUDGE LEVENTHAL: How would the information
16 you are seeking help you to show the Board?

17 MR. MASER: -- the information would help
18 to show that there is -- that in the framework of the
19 so-called "one lump theory," that Conrail was not
20 extracting the highest level rates that it could for
21 these movements and, therefore, after the acquisition
22 goes in CSX will have the incentive potentially and

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1 theoretically, certainly at least, to extract higher
2 rates, and what we are trying to get this information
3 to show is that that is certainly a potential and,
4 therefore, the Board should be receptive to conditions
5 designed to address that and correct that.

6 Now, I'm not saying, Your Honor, that is
7 the sum and substance of the position that Niagara
8 Mohawk is going to take in this case, it is not, we
9 have other issues, but as to this phase of it, it's
10 information that I think would be very helpful to get
11 to show if that is a possibility, and I might say,
12 Your Honor, that while CSX does not now serve the
13 facility as we've said, they have sourced -- Niagara
14 Mohawk has sourced coal from CSX in years past. So,
15 there is some potential information there that I think
16 would be helpful to analyze to see if we fall within
17 the potential exception as to the applicability of the
18 one lump theory, in other words, that is Conrail
19 really extracting as much as it can currently, or is
20 there potential at least that post-transaction taut
21 CSX will have the incentive to, and the ability to,
22 extract additional monopoly rents as to this movement.

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1 So, we are not sure at this point exactly
2 what that evidence may show, what's in their files,
3 but I think, Your Honor, under the discovery that has
4 been authorized by Your Honor, and upheld by the
5 Board, we are entitled to see it.

6 And, we're limiting it to -- Niagara Mohawk
7 has a number of other power plants, but we've limited
8 it just to the Huntley and to the Dunkirk facilities,
9 which are served -- sole served by Conrail today, and
10 would be sole served by CSX after the transaction goes
11 through, unless it's conditioned differently.

12 Thank you.

13 JUDGE LEVENTHAL: All right.

14 Mr. Mullins.

15 MR. MULLINS: Judge Leventhal, we
16 appreciate the opportunity to appear in front of you.
17 It is true that New York State Electric & Gas was
18 represented by Mr. McBride earlier in this proceeding,
19 they just retained us July 29th.

20 New York State Electric & Gas is not really
21 interested in the one lump theory as such, and,
22 indeed, as I'll agree with Mr. Norton, that the one

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1 lump theory is not really applicable to the situation
2 of New York State Electric & Gas. That theory deals
3 with whether or not you have vertical integration, if
4 you have CSX serving a coal mine, and NS serving a
5 coal mine, but the destination carrier is Conrail, and
6 CSX is going to merge with Conrail, whether there's
7 vertical foreclosure there, so as to cause economic
8 harm. That is not the situation New York State
9 Electric & Gas is in.

10 Mr. Norton is entirely correct that we are
11 -- all of our coal mines are served by Conrail today,
12 and all of our plants are served by Conrail today.
13 He's also entirely correct that one of our plants will
14 be served by CSX under the proposal, and three of our
15 plants will be served by Norfolk Southern under the
16 proposal.

17 We are also the only utility we can find in
18 this case where their plants were divided between CSX
19 and NS. Every other utility, as they've indicated and
20 as they've indicated, is either having CSX replace all
21 of the service or NS replace all of the service.
22 That's not the situation with us. They've taken our

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1 plants and divided them in two. We were one carrier
2 before, we are two carriers now. And, that creates a
3 whole host of other problems that are really unrelated
4 to the issues that we're here today for.

5 Now, the reasons why we are interested in
6 the issues that we are here today is, we got
7 interested when we read the language from the Board
8 that said that ACE is going really beyond the one lump
9 theory, that what they are really arguing is that
10 Conrail has as of yet unexercised market power that
11 either CSX or NS will exercise if we permit the
12 acquisition of Conrail's lines.

13 This really is more simple than the one
14 lump theory, Judge. What we are trying to establish
15 is, Conrail has a certain pricing policy when it comes
16 to coal, movement of coal. We want to know what CSX's
17 pricing policies are. We want to know what NS's
18 pricing policies are when it comes to coal. We want
19 to know whether or not, on a per unit basis, or per
20 mile, whatever measuring unit you want to use, whether
21 or not CSX and NS have a different pricing policy, or
22 on average price their coal movements higher than

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1 Conrail does.

2 Now, there may be a whole host of reasons
3 why that occurs, but in order to make that analysis,
4 in order to see whether on average CSX and NS' rates
5 are higher than Conrails, we, of course, need this
6 information. You need to look at what the rates are
7 charged to other utilities, what NS charges to its
8 utilities, what CSX has charged to its utilities, and
9 these are very relevant considerations.

10 And so, when we read that and then
11 conferred with Mr. McBride and got a better
12 understanding that it's not just the one lump theory
13 that is applicable here, but a broader issue of
14 unexercised market power, that's when we joined in on
15 this request, and we wholly support the studies that
16 Mr. McBride -- I think he'd be the first to tell you
17 it's not just a one lump theory study, that he's going
18 well beyond that issue.

19 And, it's very relevant to New York State
20 Electric & Gas, and, in fact, probably, like I say
21 it's not the key issue, because our key issue is
22 having our plants split between the two carriers, but

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1 it is certainly an issue that the Board statutorily
2 recognizes as an economic harm, and one that you have
3 to establish to prove. You have to establish there's
4 going to be harm, and this is one way in which we can
5 do that.

6 JUDGE LEVENTHAL: All right.

7 Mr. Norton.

8 MR. NORTON: Mr. Maser referred to
9 something that he was entitled to make a case under
10 the exception to the one lump theory, but, again, as
11 Mr. Mullins points out, the one lump theory doesn't
12 apply to the situation presented there.

13 And, it's also quite different, Mr. McBride
14 at least made a proffer of some kind of evidence with
15 respect to Delmarva, one case where the one lump
16 theory was potentially presented, of evidence that
17 would show that there was a basis for thinking that
18 they were exercising some benefit from having
19 competition at the origin.

20 There's no proffer from any of these
21 parties as to similar evidence as to why what they
22 are looking for here is going to prove the points that

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1 they are seeking to prove.

2 With respect to the Board's decision, in
3 response to the comment that Mr. Mullins just noted
4 about that Conrail has some as yet unexercised market
5 power that CSX or NS will exercise in the future, the
6 Board said, and this is a question of increased market
7 power, we are not convinced that the material that ACE
8 seeks, which is the same kind of material that is
9 being sought here, would in any aid our resolution of
10 those issues.

11 They also went on to point out that the
12 petitioners, which are the utilities comparable to the
13 utilities here, are in the best position to know what
14 amount of their coal would have been shipped had
15 Conrail attempted to set its rates any higher. So,
16 the proposition they are attempting to probe here,
17 whether there is some unexercised market power, is one
18 that they are in the best position to support,
19 according to the Board, and they have not even
20 suggested remotely that they could do so.

21 Mr. Mullins is quite correct and forthright
22 in acknowledging that the one lump theory is not

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1 presented here. That was the pivotal rationale for
2 the prior request. What is suggested now is something
3 quite different, they want to ask about NS and CSX
4 pricing policies. Well, Mr. McBride already asked
5 about that. They may not like the answers, and we
6 can't go into them because they are highly
7 confidential, we don't have to for the moment, but
8 there are ways you can probe pricing policies. You
9 can ask questions that are directly addressed to that
10 issue.

11 This kind of all-encompassing documentary
12 discovery into anything relating to bidding for these
13 various periods of years is the most roundabout and
14 burdensome way to try to get at that kind of issue,
15 which, if that's really what they are looking for, and
16 not just an attempt to kind of bail out a failed
17 theory, that's the kind of request that they should
18 make.

19 Unless Your Honor has any questions.

20 JUDGE LEVENTHAL: No, I'd like to go to Mr.
21 Mullins. Taking request number one, identify and
22 produce all documents and departments of Conrail

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1 responsible for marketing coal concerning bids for the
2 carriage of coal by unit train or train load movement
3 to every destination served by Conrail of which
4 100,000 tons or more of coal was consumed. We leave
5 out for the years, because that wouldn't apply to my
6 ruling.

7 How would getting this information help you
8 with what you say your issues are in this proceeding?

9 MR. MULLINS: It's my understanding that
10 one of the ways in which they can produce this
11 information, and, in fact, a key way, is by producing
12 their 100 percent traffic tapes, that has the data
13 that indicates what the pricing movements are for this
14 transportation.

15 And, I know Mr. McBride asked for those 100
16 percent traffic tapes for a broad range of years, in
17 order to conduct the study, and you've limited those
18 to a certain number of years, but, certainly, those
19 traffic tapes and the information contained within
20 those traffic tapes will absolutely go straight to the
21 issue of what is NS's policies and what are CSX's
22 policies on pricing. And, you'll be able to -- he'll

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1 be able to take those tapes, give it to the
2 consultants, and they'll be able to look at it and
3 they'll be able to say, well, okay, for a 500 mile
4 move from a given region to a given destination CSX's
5 price is X, NS's price is Y, and Conrail's price is Z,
6 and they will be able to conduct an economic study, a
7 econometric model, whatever these consultants would
8 like to do, in order to prove that the pricing
9 policies of CSX and NS are different than the pricing
10 policies of Conrail.

11 You know, Mr. Norton probably makes a
12 legitimate point of, well, maybe you could have asked
13 for the information in just a slightly different way,
14 but we could do that, we could all sit here, we could
15 reformulate all this information, you know, into the
16 technical way that he wants it asked, and then we'll
17 be right back in front of you, Judge, two weeks from
18 now asking for the same exact thing.

19 So, the information that Mr. McBride has
20 asked for covers exactly the types of information that
21 we would request.

22 JUDGE LEVENTHAL: The argument Mr. McBride

1 made in our previous oral argument was that they
2 needed this information to compare the pricing policy
3 of these railroads before a merger and after a passed
4 merger. You are not making that argument.

5 MR. MULLINS: Well, it certainly is a part
6 of that, that is a broader underlying theory in which
7 my client, NYSEG, would like to be part of. It is
8 relevant, as to how CSX priced before a merger and how
9 they priced after a merger, as well as it is relevant
10 as to NS how they priced before and after a merger,
11 because that goes to the heart of the matter, which
12 is, what are they going to do with these lines when NS
13 and CSX take over these lines.

14 Well, one way that you can look at that is
15 by looking at what they did with the lines when NS was
16 formed and when CSX was formed. That was why you
17 needed that information. I admit, I wasn't here, and
18 we are sort of new to this game, but upon reviewing
19 the record, and looking at the Board's decision, we
20 agreed wholeheartedly with the Board's discussion in
21 there about the fact of the unexercised market power.
22 And, yes, it may not be exactly precisely the same as

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1 what Mr. McBride said, but it all has to do with what
2 is the pricing policy before a merger and what is the
3 pricing policy after a merger, what are their pricing
4 policies for, you know, given coal movements, even
5 with or without a merger, but all of that information
6 is contained within the traffic tapes. It is also
7 contained within the document depositories and within
8 the -- maybe I'll take Mr. Norton's advice and file
9 some more information requests, and I'd be happy if
10 he'll produce it, instead of being in front of the
11 Judge here. But, this would certainly help short cut
12 that method, if we can get those tapes. The tapes are
13 not, in and of themselves, and, perhaps, we will be
14 back in front of you asking for more than tapes,
15 there's certainly documents, memos, E-mails and those
16 kind of information that is also relevant to this
17 issue, and I will probably be requesting that
18 information, Judge, and I hope that we are not in
19 front of you having a fight over that information.

20 But, we will not be requesting the 100
21 percent traffic tapes, because that was covered by Mr.
22 McBride's request, and so, in trying to avoid

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1 duplicative discovery, yes, we are bootstrapping on
2 Mr. McBride's requests.

3 MR. McBRIDE: Your Honor, may I just add to
4 something you said about my prior arguments?

5 JUDGE LEVENTHAL: Yes.

6 MR. McBRIDE: I just want to correct the
7 record. My argument was not limited to rate setting
8 policies pre and post mergers, that was my argument to
9 justify going back to the earlier years, but we were
10 also seeking the more current information when there
11 hadn't been any mergers, because we were asking for
12 information that went precisely to what each of the
13 rate setting policies of these three railroads are, so
14 that we could determine whether the replacement of
15 Conrail by CSX and Norfolk Southern puts our clients
16 at risk.

17 So, there were two rationales in my prior
18 argument, not just the one that Your Honor just
19 stated.

20 JUDGE LEVENTHAL: On the second rationale,
21 are you going back to 1978?

22 MR. McBRIDE: No, that was the -- the

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1 argument about pre and post merger was the argument to
2 justify going back that far. My point was that the
3 justification for the more current information had
4 nothing to do with mergers, it has to do merely with
5 what their rate setting policies are today.

6 JUDGE LEVENTHAL: And there, you asked for
7 the information for 1975 and '76, was it?

8 MR. McBRIDE: No, I'm sorry, we are not
9 communicating. I asked for 1978 to '97. Your Honor
10 will recall, you asked me why going back so far, and
11 I explained to you that in 1980 CSX had a merger, in
12 '82 Norfolk Southern, in 1990 Conrail acquired the
13 Monongahela. So, Your Honor then gave me some limited
14 periods of those earlier years, because of the
15 argument you just now repeated, that it was related to
16 the mergers.

17 My point is that for the more current time
18 period, in the 1990s, and Your Honor gave me the data
19 for '95, '96 and the first half of '97, that has
20 nothing to do with mergers because there hasn't been
21 any. My sole point was the rationale for you ordering
22 that was on the basis of a different argument that I

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1 made, which is that I want to see, from their files,
2 what their rate setting policies are, so that I can
3 know whether my clients are at risk when they replace
4 Conrail.

5 JUDGE LEVENTHAL: And, that was for the
6 period from 1995 through the first half of the year of
7 1997.

8 MR. McBRIDE: Correct. I was just trying
9 to correct the record.

10 JUDGE LEVENTHAL: That's not what Mr.
11 Mullins is seeking, though, is it?

12 MR. McBRIDE: Yes.

13 MR. MULLINS: Your Honor, absolutely that's
14 what we are seeking.

15 JUDGE LEVENTHAL: And, you are seeking --
16 the information you are seeking is for the years 1995
17 through the first half of 1997?

18 MR. MULLINS: Well, we'd prefer probably to
19 go back to '94, if we had a perfect world, because '97
20 data is not 100 percent available right now, and,
21 really, you are looking at two years instead of three,
22 but, yes.

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1 JUDGE LEVENTHAL: So, what you are seeking
2 is limited to the current years, the 1995 and so
3 forth.

4 MR. MULLINS: Well, it's not, it also goes
5 to the issue -- yes, the answer is yes, but it's not
6 limited to those years, we would also like to add on
7 to Mr. McBride's request for those years '78 through
8 '82, is that --

9 MR. McBRIDE: For CSX.

10 MR. MULLINS: For CSX, NS and that merger,
11 because that's relevant, as to what they priced before
12 a merger and what they priced after a merger.

13 MR. MASER: Your Honor, if I may briefly,
14 for Niagara Mohawk, we are seeking information for
15 both categories, and the earlier time period, the
16 merger related, which is very important to us, and the
17 current time for the reasons that have been addressed,
18 and I won't reiterate that. But, as to Niagara
19 Mohawk, which takes -- currently takes its coal from
20 the Monongahela fields, the situation prior to
21 Conrail's taking over the Monongahela and after is
22 very relevant to us.

1 And, as I mentioned earlier in response to
2 Mr. Norton, as to the application or inapplication of
3 the one lump theory, while we are going beyond that,
4 it does have potential application here because, as I
5 mentioned, Niagara Mohawk did take coal from CSX back
6 in the same time period that we are talking about.
7 So, getting that information from our point of view
8 would be, I think, very relevant and very helpful, and
9 we join in the full request for the period of time
10 involving the mergers, including the Monongahela, and
11 also the current time, Your Honor.

12 JUDGE LEVENTHAL: All right.

13 Mr. Norton, do we have a problem with the
14 information running from 1975 to the present time?

15 MR. NORTON: I'm sorry, do you mean 1995?

16 JUDGE LEVENTHAL: What did I say, 1975?

17 MR. NORTON: Yes, 1975.

18 JUDGE LEVENTHAL: 1995, I'm sorry.

19 MR. NORTON: Well, yes, Your Honor, that
20 probably the bulk of the documents sought would fall
21 in that category, because the older periods the
22 documents are not necessarily still available. I

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1 mean, you still have to search for them, but, you
2 know, often there's less that remains from that
3 period.

4 JUDGE LEVENTHAL: Let's go off the record
5 for a few moments.

6 (Whereupon, at 9:58 a.m., a discussion off
7 the record until 10:03 a.m.)

8 JUDGE LEVENTHAL: At this time we'll take
9 a short recess, ten minutes?

10 MR. MULLINS: Yes, sir.

11 JUDGE LEVENTHAL: All right.

12 (Whereupon, at 10:03 a.m., a recess until
13 10:15 a.m.)

14 JUDGE LEVENTHAL: The oral argument will
15 come back to order.

16 Mr. Mullins?

17 MR. MULLINS: Your Honor, I appreciate the
18 opportunity to confer and to consider the discussions
19 that we've had about limitations of NYSEG's discovery
20 and all that.

21 I will be honest with you, I didn't come
22 here today propounding -- where NYSEG itself

1 propounded discovery solely for the benefit of NYSEG,
2 and in that respect it would be premature to try to
3 negotiate a deal when there's not even any official
4 discovery that had been propounded to Mr. Norton and
5 all the other applicants.

6 What this issue is about is Mr. McBride and
7 his consultants, and the data that they need to
8 conduct their study, and I believe it would benefit
9 the court if Mr. McBride explained why he needs this
10 data for his study.

11 JUDGE LEVENTHAL: Now, just a minute, you
12 know, earlier today we discussed whether or not
13 discovery requests should be made formally or
14 informally.

15 MR. MULLINS: Right.

16 JUDGE LEVENTHAL: And, we ruled in the
17 future they'll be made formally.

18 MR. MULLINS: Yes, sir.

19 JUDGE LEVENTHAL: You've raised the very
20 point that I think Mr. Norton was concerned about.
21 You came in and argued, and I said I would decide your
22 argument on the merits --

1 MR. MULLINS: Right.

2 JUDGE LEVENTHAL: -- informally, and now
3 you tell me, well, you didn't officially propound
4 interrogatories.

5 MR. MULLINS: Right.

6 JUDGE LEVENTHAL: Well, you either did or
7 you didn't. If you didn't propound interrogatories,
8 then you are out of this argument.

9 MR. MULLINS: I would argue that we
10 propounded formal discovery. Are they
11 interrogatories? No, they are not.

12 JUDGE LEVENTHAL: I used the word
13 interrogatories incorrectly. Discovery is what we
14 were talking about.

15 MR. MULLINS: Yes. What we asked for, Your
16 Honor, was that with respect to your ruling that you
17 did on behalf of Mike McBride's client, that they add
18 into the data that they are providing to Mr. McBride
19 data for NYSEG.

20 JUDGE LEVENTHAL: Mr. Mullins, I don't like
21 to interrupt you, but you are shifting ground on me.
22 You argued originally for what you wanted, which was

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1 tacked on to Mr. McBride's request.

2 MR. MULLINS: That's correct.

3 JUDGE LEVENTHAL: And, now you are telling
4 me that this isn't an official discovery. Is it or
5 isn't it?

6 MR. MULLINS: No, it is official discovery.

7 JUDGE LEVENTHAL: It is official.

8 MR. MULLINS: Yes, yes, sir.

9 JUDGE LEVENTHAL: Well, as you expressed,
10 you have to -- you have to make the argument for your
11 client. I don't think you can support Mr. McBride's
12 discovery request, because he made his discovery
13 request and I ruled upon it.

14 MR. MULLINS: Right.

15 JUDGE LEVENTHAL: He's here today for a
16 different reason, other than my basic ruling on his
17 discovery request.

18 You are here for a basic ruling on your
19 discovery request. So, I don't think that you are
20 saying, well, I'm trying to support Mr. McBride,
21 that's not sufficient for the argument before me this
22 morning. Before me, your argument was made for why

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1 you needed discovery on the three discovery requests
2 that Mr. McBride had made earlier.

3 MR. MULLINS: Right.

4 JUDGE LEVENTHAL: And, that's what we were
5 trying to dispose of.

6 MR. MULLINS: Well, okay, let me address
7 that.

8 JUDGE LEVENTHAL: All right.

9 MR. MULLINS: What we asked for in our
10 letter, Your Honor, and, perhaps, we've gotten bogged
11 down into all this formal/informal, and, you know,
12 what it is exactly economic theories, let's just go
13 back to the basics, okay, which is what we asked for
14 was that in accordance with your earlier ruling that
15 you granted Mr. McBride, which I might add was not
16 limited to just Mr. McBride's argument to prove the
17 one lump theory, and, in fact, your ruling could not
18 have been limited to just proving the one lump theory,
19 or disproving the one lump theory in this case,
20 because the only one of Mr. McBride's clients,
21 Delmarva, is the only one that truly fits into the
22 classic definition of one lump theory.

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1 And, indeed, the parties over here argued
2 that three of -- the other three clients of Mr.
3 McBride didn't fit into the one lump theory. And, you
4 ruled anyway that they should produce the information
5 for all four of the clients. But, there was only one
6 that really fit into the true definition of one lump.

7 And, indeed, if NYSEG, I believe, would
8 have been part of that request of Mr. McBride, you
9 would have added NYSEG into that data production
10 request.

11 The second reason why I believe that your
12 ruling was not limited solely to the one lump theory
13 and why it's applicable to NYSEG is because the
14 pre/post merger data, which you argued for -- that you
15 granted for the '78 to '82 period, has nothing to do
16 with the one lump theory. That had to do with the
17 pricing policies of Conrail, Norfolk Southern and CSX
18 pre and post merger.

19 Third off, the Board itself in their ruling
20 acknowledged that what Mr. McBride was asking for was
21 more information than is necessary to deal with the
22 one lump theory.

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1 NYSEG read the Board's decision, read the
2 information there, the sentence about what unexercised
3 market power, looked at your rulings, looked at the
4 fact that you had not limited it to that, to the one
5 lump theory, and NYSEG said, hey, that information
6 that you ordered on behalf of those clients is just as
7 relevant to us as it is to them.

8 The pre and post merger information, back
9 in the '78 to '82 information, and the '95 to '97
10 information. It has nothing to do with the one lump
11 theory, and I don't believe, Your Honor, that your
12 ruling was limited to just the one lump theory, and
13 that's why we joined today in Mr. McBride's request.

14 JUDGE LEVENTHAL: All right.

15 Now, I take it that you are rejecting the
16 offer made by Mr. Norton to dispose of your discovery
17 request, is that correct?

18 MR. MULLINS: At this time, yes, Your
19 Honor.

20 JUDGE LEVENTHAL: All right.

21 Let's go off the record.

22 (Whereupon, at 10:21 a.m., a discussion off

1 the record until 10:23 a.m.)

2 JUDGE LEVENTHAL: All right.

3 Are there any further arguments, I've heard
4 Mr. Mullins' argument, do you have anything further
5 you want to add, Mr. McBride?

6 MR. McBRIDE: Yes, I want to endorse what
7 he said very briefly, Your Honor, because the one lump
8 theory could not have been the rationale for the
9 extent of your ruling, because by their own admission
10 it only applied to Delmarva, and you extended it to
11 the other utilities.

12 I would submit to Your Honor respectfully,
13 after over 100 pages of argument that day, that the
14 basis for the ruling, and Your Honor did indicate in
15 the order that the record controls and not the written
16 decision, was that for plants served by Conrail those
17 shippers might be at risk of a rate increase if CSX or
18 NS takes over as the delivering carrier, or as any
19 part of the transportation for that movement.

20 And, Indianapolis Power & Light fits
21 precisely into that situation because I've limited it
22 to the plant served by Conrail, and so do New York

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1 State Electric & Gas and Niagara Mohawk, and the
2 issue, as the Board recognized, is very simple, we
3 need to see the rate and marketing information of
4 these three applicants to determine whether the
5 replacement of Conrail by CSX or NS exposes our
6 clients to rate increases. And, on that basis, I think
7 Your Honor's earlier ruling extends precisely to the
8 three utilities you have before you today.

9 JUDGE LEVENTHAL: All right.

10 Mr. Norton?

11 MR. NORTON: Your Honor, I'd just mention
12 that Mr. McBride talked about the utilities served by
13 his colleagues, but he didn't address his own clients.
14 And, of course, the Stout plant --

15 JUDGE LEVENTHAL: I'm sorry, start over, I
16 missed what you were saying.

17 MR. NORTON: Okay.

18 Mr. McBride referred to the utilities
19 represented by his colleagues at the table, but he did
20 not refer to his own plants. And, of course, the
21 Stout plant is not served by Conrail, Conrail serves
22 it only through switching through Indiana Railroad.

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1 So, his own justification doesn't apply to his own
2 request.

3 JUDGE LEVENTHAL: Well, wait a minute. And
4 then, his remarks regarding switching, he said
5 historically the Board has treated that the same as
6 being served by the railroad.

7 MR. NORTON: Well, it's not the same as
8 being sole serve, that's the whole point here. Sole
9 serve destinations on Conrail, not destinations that
10 Conrail is able to serve, because the question is
11 whether Conrail is presently exercising to the fullest
12 degree the monopoly power it may have, and is it going
13 to be -- will that happen if it's replaced. Well, it
14 doesn't have any monopoly power as to the Stout plant,
15 it gets there only through switching, and, indeed, as
16 I understand it, it doesn't -- there isn't much
17 service or much delivery to that plant via Conrail.

18 But, I think we've also seen that what --
19 the requests we are facing here are really all Mr.
20 McBride, I mean this is all in aid of Mr. Mullins
21 comment, an effort by Mr. McBride and his consultants
22 to get more of what they didn't get the last time.

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1 And, Your Honor, as to the fact that your
2 prior ruling embraced Mr. McBride's client's
3 inhibition to Delmarva, even though they didn't fit
4 the one month situation, that is not a situation --
5 that is not an aspect of the ruling that I think we
6 could really say was focused on and addressed and
7 ruled on in any way by the Board. It was an aspect of
8 it that we didn't challenge, and it was a part of the
9 case, but that I don't think means that for all
10 purposes any utility in any of the situations that
11 were involved in Mr. McBride's request is entitled to
12 invoke the same result.

13 MR. MASER: Your Honor, may I be heard
14 briefly, just to follow up what Mr. Norton said.

15 JUDGE LEVENTHAL: Yes.

16 MR. MASER: I have joined in this request
17 in the format that I did, as I said earlier, in an
18 effort to be efficient and consistent with at least the
19 spirit of the discovery guidelines, but I assure you,
20 and assure Your Honor, that Niagara Mohawk is asking
21 for this information because it believes it needs it,
22 and for coordinating property, which I think is

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1 commendable in trying to grapple with a case of this
2 size. But, this is not Mr. McBride's orchestration,
3 this is something that we are seeking, and it's the
4 same kind of information that we would otherwise have
5 sought on our own independently. We will have other
6 discovery, but we are trying to deal with this now
7 because we think it's an efficient way to do it, and
8 we need the information for the reasons I've indicated
9 earlier, Your Honor, for the merger periods, the
10 earlier periods, and the current periods, for the
11 reasons I've indicated.

12 But, if there's any notion that this is
13 something that is some kind of gamesmanship, I assure
14 the Bench that that is not the case.

15 MR. McBRIDE: If I may, Your Honor, Mr.
16 Norton misspoke. I both referred specifically to
17 Indianapolis Power & Light Company and I talked about
18 the three utilities before you, so I did address
19 Indianapolis Power & Light Company, and I'm not sure
20 why he was confused about that, but I am specifically
21 including them, and that's why we asked for the
22 discovery conference today.

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1 JUDGE LEVENTHAL: All right.

2 Mr. Maser, with regard to Niagara Mohawk,
3 did I understand Conrail at the present time is the
4 sole railroad serving your plants?

5 MR. MASER: Yes, Your Honor, both the
6 Dunkirk plant and the Huntley plant.

7 After post transaction, CSX is designated
8 as the carrier currently to serve those facilities
9 solely.

10 JUDGE LEVENTHAL: All right.

11 Well, as to New York State Electric & Gas,
12 I'm going to rule that you are entitled to get the
13 current -- discovery in the current years, from 1995
14 through the first half of 1997. That's with respect
15 to discovery requests number one, two and three.

16 All right. With regard to Niagara Mohawk,
17 again, I think that in the discovery phase of this
18 proceeding, I think I'm going to allow the same
19 discovery that I did with respect to the ACE ruling I
20 made on July 16th.

21 And, with respect to -- and, I'll make the
22 same ruling with regard to Indianapolis Power & Light

1 Company. I think with respect to the switching
2 argument -- let me ask you with respect to the
3 switching argument, Mr. McBride, do I take it Conrail
4 is not the only destination railroad?

5 MR. McBRIDE: That's correct, Indiana
6 Railroad, as counsel stated, is the other -- it has
7 direct physical access, but we have a transportation
8 contract with Conrail. We can hardly deny that
9 Conrail provides us service, and there are rates in
10 there and what have you, and that's what we are
11 concerned about, we are losing it.

12 JUDGE LEVENTHAL: All right, I'll make the
13 same ruling with respect to Indianapolis Power &
14 Light.

15 All right. And, the basis of my ruling
16 with respect to Indianapolis and Niagara Mohawk are
17 the same as I previously expressed for ACE.

18 MR. McBRIDE: Would Your Honor set firm
19 response dates?

20 JUDGE LEVENTHAL: All right.

21 What time do you need to furnish this
22 information, Mr. Norton.

1 MR. NORTON: Your Honor, I don't have a
2 precise answer on that. I would think we would be
3 able to try to meet it within the 15-day period that
4 we had as a target before.

5 JUDGE LEVENTHAL: All right.

6 MR. NORTON: And, if that's a problem,
7 we'll advise counsel.

8 MR. MASER: Your Honor, we can work that
9 out, I'm sure.

10 JUDGE LEVENTHAL: I would think you could.

11 All right, but if you don't, if you can't
12 work it out you'll come back to me.

13 All right. The second thing we had before
14 us is the redacted material. I guess that's the third
15 thing, I stand corrected.

16 All right, I heard Mr. McBride's argument.
17 Mr. Coburn.

18 MR. COBURN: Yes, Your Honor.

19 Perhaps, we should ask those who haven't
20 signed the highly confidential --

21 JUDGE LEVENTHAL: All right, well, it's up
22 to you to tell me who has to be excluded from the

1 room, anybody who hasn't signed the confidentiality
2 agreement.

3 MR. COBURN: Your Honor --

4 JUDGE LEVENTHAL: Wait, before we go, we
5 need a separate transcript for this?

6 MR. COBURN: I think that might be useful.

7 JUDGE LEVENTHAL: All right.

8 (Whereupon, the open session was concluded
9 at 10:34 a.m.)

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Before the
UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

+ + + + +

CLOSED SESSION

IN THE MATTER OF:

CSX CORPORATION & CSX TRANSPORTATION, INC.

NORFOLK SOUTHERN CORPORATION, and
NORFOLK SOUTHERN RAILWAY COMPANY

--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONTRAIL, INC. & CONSOLIDATED RAIL
CORPORATION

Finance
Docket
33388

Tuesday,

August 12, 1997

Hearing Room 4, Second Floor
888 First Street, N.E.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE JACOB LEVENTHAL,
Administrative Law Judge

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APPEARANCES (Continued):On Behalf of the Respondents:

On Behalf of American Electric Power
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Electric Company, Delmarva Power & Light
Company, Indianapolis Power & Light
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P-R-O-C-E-E-D-I-N-G-S

10:34 a.m.

JUDGE LEVENTHAL: We'll have a separate transcript for this in camera portion of this argument.

Mr. Coburn.

MR. COBURN: Your Honor, I hope we can resolve this quickly. I made an offer just before the hearing this morning to unredact the vast majority of the redactions that were made, and if I may I'll explain the two categories of redactions that were made.

One category consisted of very sensitive rate, and volume, and contract terms in our contract, in our transportation contracts with the utilities that Mr. McBride represents, information that Mr. McBride's client has already. They know what their contract is with us. They know what they've shipped. They know what the rates are. They have the information they need.

Our purpose in redacting it was to protect the commercial interests of our client and of his

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1 clients, so that other railroads and other utilities
2 might not see these very confidential contract terms,
3 recognizing that attorneys representing utilities,
4 attorneys representing railroads in this case also
5 represent those utilities and railroads, and I might
6 add consultants as well, in rate negotiations, and
7 there just didn't seem to be any point in letting out
8 these top secret -- I mean, to the extent railroads
9 have top secret information, this is it, just like the
10 United States Government and other governments have
11 top secret information.

12 There didn't seem to be any reason to put
13 it in the depository, even under a highly confidential
14 designation, because they have it already. That's a
15 matter that I think we can resolve, because we are
16 prepared to unredact that material, having reviewed
17 the issue one more time with the client last night,
18 and to make it available to Mr. McBride.

19 Now, whether we put -- and to his
20 consultants -- whether we put redacted or unredacted
21 information that falls into that category in the
22 depository is another matter. I would like, frankly,

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1 to reach agreement with Mr. McBride and with others
2 down the road that we would put other -- that we put
3 in the depository unredacted -- sorry, redacted
4 information, but make available to the specific
5 attorney and consultant for the specific client
6 unredacted information, so that they can make use of
7 it in the case.

8 And, to the extent down the road, if they
9 want to make use of any of this data in filings with
10 the Board, we can discuss it on a case by case basis,
11 and I'm sure we can reach a resolution.

12 But, it seemed to us that this was an
13 appropriate thing to do to protect the interests of
14 his client and of our client.

15 The second category, much smaller category,
16 of documents that were redacted were documents that
17 relate to ongoing, current negotiations between CSX
18 and some of Mr. McBride's clients for transportation
19 services. These are, as I say, negotiations that are
20 ongoing right now.

21 What we've redacted are materials that
22 would give away, let's say, reflect our negotiating

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1 strategy in those cases, and not information that we
2 understand he needs to make his case, he or his
3 consultants need to make their case.

4 It seemed to us it was appropriate to
5 redact that, because in allowing that information to
6 be known to Mr. McBride, or to his consultants, we
7 are, in effect, giving them a leg up in negotiations
8 that he or the consultants may themselves be involved
9 in, either now or down the road.

10 And, again, it's not information that we
11 felt that they need to make their case. It happens to
12 be reflected in documents that are responsive, and
13 information that is responsive to the request was not
14 withheld.

15 JUDGE LEVENTHAL: All right.

16 I take it, Mr. McBride, you have agreement
17 with respect to the highly sensitive material?

18 MR. McBRIDE: Well, this is all highly
19 sensitive, but as to the first group, is that what you
20 mean, yes, the first category, he's a reasonable man,
21 if he gives me the unredacted documents I don't have
22 an interest in what he puts in the depository at that

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1 point because I have the documents. I'm entirely
2 satisfied with that, as long as we can have the
3 understanding that they will all do that, and on an
4 ongoing basis, so I don't go down to the depository,
5 get the documents and then find out they are redacted
6 and then find out that I should have got them directly
7 and we could have dispensed with the whole problem.
8 So, if we can have that understanding, I'm in
9 agreement with it.

10 MR. MASER: Your Honor, as a point of
11 clarification in that area if I may, just to make sure
12 I'm understanding what is being proposed, the
13 information that would be, for example, provided with
14 respect to Niagara Mohawk, we would obviously be able
15 to see that, but in terms of trying to use it
16 efficiently in connection with Mr. McBride's study and
17 the Conn-Crowley-Dunbar study, are you suggesting that
18 that would not be able to be made available to them,
19 David, is that what you are saying?

20 MR. COBURN: No. Conn-Crowley and Dunbar,
21 if they are your consultants, could see it. If they
22 are his consultants, then if they are consultants for

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1 Mr. McBride's clients, then it isn't clear to me why
2 they would need to see your information. If they are
3 consultants for your clients they could see your
4 information.

5 MR. MASER: Well, there are levels of
6 consultancy, if that's a word. We have a consultant
7 working with us, solely for Niagara Mohawk, and we
8 haven't worked this out, in all honesty, Your Honor,
9 at this point, but standing here saying -- talking
10 about it, I would see that they would be our
11 consultants for purposes of compiling the study. So,
12 I'm sure we could work that out, but it would have to
13 be in that context, if there's going to be any kind of
14 a restriction on what can be provided, which the
15 normal rule, of course, Your Honor, is that if it's
16 highly confidential and is subject to the protective
17 order it's available to all outside counsel and all
18 outside consultants, which is why I didn't think it
19 would be a problem, and which is why I want to raise
20 it now.

21 But, if we can have an understanding, if
22 this is a fair question, Mr. Coburn, that they would

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1 be able to have access to it, in the sense that they
2 would be our consultants for purposes of that study,
3 then I guess I have no problem with it.

4 But, if that's not acceptable, then we need
5 to think about that.

6 MR. COBURN: I'm not certain, Your Honor,
7 that I have enough guidance from my own client on that
8 particular issue. I have to admit we didn't discuss
9 that permutation of possibilities here.

10 MR. MASER: It just occurred to me because
11 of the way this discussion is going.

12 MR. COBURN: No, I understand, and I think
13 it's a fair question, and one to which you are
14 entitled to an answer. I'm just not comfortable that
15 I want to give you an answer right now without having
16 consulted with my client.

17 I would say this, that if to the extent
18 your clients have retained the Crowley and Conn-Dunbar
19 groups to work on the case no issue, to the extent you
20 haven't retained them I'm not sure.

21 MR. MASER: Well, I'm sure we can work it
22 out. I raise it, Your Honor, I don't think we have a

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1 problem --

2 JUDGE LEVENTHAL: If you have a problem
3 you'll come back to me.

4 MR. PETERSON: Right, thank you, Your
5 Honor.

6 JUDGE LEVENTHAL: All right.

7 MR. McBRIDE: On the second category, the
8 problem seems to be that they are assuming the
9 protective order doesn't work. Now, if I may first
10 draw an analogy, I hope it's an apt one, when any of
11 us represents more than one client, we have an
12 attorney/client privilege with respect to that
13 particular client, and we can't share that information
14 with the next client, and the next client, unless the
15 clients are in a joint defense situation and choose to
16 share the information. It's their privilege.

17 And, lawyers have to be noble. They have
18 to have different hats for different clients and keep
19 the information separate, and we do that, and there's
20 been no showing here that I've done anything improper
21 with this information, and I can assure you
22 categorically that I will not.

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1 My clients are having to exercise a great
2 deal of faith at the moment, because they haven't
3 signed these undertakings, and they couldn't see the
4 highly confidential information even if they had.
5 That's the way it works, only the outside lawyers and
6 consultants.

7 So, the clients only know there's a lot
8 going on that they don't see, and I don't share with
9 them.

10 So now, to return to the precise problem we
11 are talking about here, the assumption seems to be
12 that if I have this highly confidential information,
13 for the purpose of putting the Conn-Dunbar-Crowley
14 study together, and working with those consultants who
15 could have also have it, that somehow inevitably it's
16 going to go back to Delmarva Power & Light, or
17 Atlantic City Electric, or Ohio Valley, or whoever
18 they are talking about that's negotiating with their
19 client, and that's what the protective order
20 specifically precludes me from doing. I'm under that
21 order, I'm not going to do that. My clients don't get
22 highly confidential information.

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1 I understand their concerns. If I weren't
2 a trustworthy person, if there was some basis for
3 believing I had violated such an order in the past,
4 you know, if I were a known leaker or whatever their
5 allegation or the assumption is here, I mean then
6 they'd have a case, I suppose, but they don't, they
7 can't cite that to you, it's never happened.

8 We don't tell clients this highly
9 confidential information, because we can't, and that's
10 the whole problem.

11 JUDGE LEVENTHAL: What do you need, if
12 there were ongoing current negotiations, and that's
13 all that's involved here, is that right?

14 MR. McBRIDE: As I understand it, I'm
15 accepting Mr. Coburn's representation that that's
16 what's in the second category.

17 JUDGE LEVENTHAL: And, that --

18 MR. McBRIDE: Because I don't know what's
19 redacted so I have to assume --

20 MR. COBURN: If I may, Your Honor, it's a
21 very small category of documents. Mr. McBride, at
22 this point probably doesn't know what documents

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1 necessarily fall into that category as opposed to the
2 first category, where we are going to lift the
3 redactions. I might suggest a sort of practical
4 solution to the issue, and by the way I'm not
5 suggesting, assuming, or alleging that he's violating
6 the protective order in any way --

7 JUDGE LEVENTHAL: I didn't think you were.

8 MR. COBURN: -- that's a red herring.

9 But, the practical solution I would suggest
10 is that we give him the unredacted copies of the first
11 category, and we see what's left, which I'm told is a
12 very small number of documents. I'll be honest with
13 you, I haven't seen them myself, but I'm told it's a
14 very small number of documents.

15 If he is concerned with the redactions on
16 those documents, those negotiating strategy documents,
17 then he calls me up and we say, let's discuss them,
18 and we try to resolve it ourselves, and if we can't we
19 come in and, perhaps, if Your Honor is prepared to
20 accept this procedure, we have an informal in camera
21 review of those documents, perhaps, in your chambers,
22 or here, whatever we decide, and resolve it right then

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1 and there, in the context of specific documents.

2 It's hard to discuss these issues in the
3 abstract, and it is a very small set of documents that
4 fall into that second category. They are relatively
5 recently prepared documents, reflecting the ongoing
6 negotiations. And, I might add that, just for the
7 benefit of everybody here, the very fact, the very
8 fact that we are negotiating with Atlantic City
9 Electric is itself highly confidential. We don't want
10 Norfolk Southern to know that, their counsel obviously
11 knows it, but that fact in and of itself is highly
12 confidential.

13 MR. McBRIDE: I grant that point. I
14 absolutely do, but my point is entirely different.

15 Your Honor will recall that you were
16 initially persuaded that I ought to have the current
17 information and documents that I was seeking under
18 this whole discovery process that began about six
19 weeks ago, and you had to be persuaded about the older
20 stuff. And, it was only when I explained to you about
21 the merger that you thought the older stuff was
22 relevant, apparently.

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1 The current information, apparently, in
2 Your Honor's view, and I think this is correct, is
3 probably the most relevant information of all, because
4 what we are concerned about is what the rate-making
5 practices are of these three carriers today, and
6 that's what he's talking about withholding, and that's
7 what my consultants need to see so that Doctor Conn
8 and the others can swear to what the impact would be
9 of replacing Conrail with either Norfolk Southern or
10 CSX in setting the rates. And so, they need to see
11 how they set rates now.

12 JUDGE LEVENTHAL: Are these negotiations
13 confidential for the parties involved?

14 MR. McBRIDE: Oh, yes, yes, Your Honor.

15 JUDGE LEVENTHAL: I mean, so that, Mr.
16 McBride -- ACE, for instance, can't divulge to Mr.
17 McBride what their negotiating position is?

18 MR. COBURN: Oh, I think they could, Your
19 Honor, I think they could --

20 JUDGE LEVENTHAL: They can tell what
21 their's is, they can't tell them what your's is, or
22 can they?

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1 MR. COBURN: No, I'm not sure of that, and
2 to the extent that ACE were to retain Mr. McBride to
3 represent them in their commercial negotiations with
4 CSX, I don't know why ACE couldn't divulge to Mr.
5 McBride what their own negotiating position is, and
6 what offers CSX might have made to them.

7 MR. MCBRIDE: That's right, and it works
8 the other way. I can represent to Your Honor that
9 throughout these documents there are representations
10 made to CSX about what clients -- the utility's view
11 of the negotiating -- of its own negotiating strategy
12 was, or how it viewed other carriers that were
13 potentially competitors, and then the railroad can
14 share that information with its outside counsel.

15 If they were to call Mr. Coburn for advice,
16 they could tell him, hey, you know, Atlantic City
17 Electric's negotiating strategy is good, bad or
18 indifferent, and he'd be entitled to that if my client
19 disclosed it to his client.

20 MR. COBURN: But, what his client doesn't
21 know is what our internal negotiating strategy is,
22 what our thinking is, in terms of our strategy with

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1 respect to the negotiations, and what we don't know is
2 what his clients internal -- and, that's what these
3 documents go to. They would let them know, they would
4 -- these documents would reveal to Mr. McBride, not to
5 his client, but to Mr. McBride and to the consultants,
6 what our current strategy is for ongoing negotiations.

7 And, he doesn't need to know that for Mr.
8 Conn, or Dunbar's or Crowley's study.

9 See, he will have seen --

10 JUDGE LEVENTHAL: Why aren't you protected
11 by the highly confidential category and the
12 guidelines, protective order?

13 MR. COBURN: Well, to the extent either Mr.
14 McBride or the small fraternity of consultants,
15 there's a small fraternity of lawyers and a small
16 fraternity of consultants, see these documents
17 relative to ongoing negotiations that they either are
18 or may in the future be called into it, it will be, I
19 suggest to you, very difficult for them, and I'm not
20 casting any dispersions here, it would be difficult
21 for any one of us to put out of your mind what you've
22 seen about the other party's internal negotiating

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1 strategy in advising your client. It's just something
2 you can't do.

3 And, I think that fact needs to be balanced
4 against the probative value and relevance of these
5 documents, and I suggest to Your Honor that if we look
6 at them document by document I think we'll be able to
7 convince you, and convince Mr. McBride, that he really
8 doesn't need them.

9 JUDGE LEVENTHAL: All right.

10 Do you want to get in on this?

11 MR. MULLINS: I do, Judge.

12 JUDGE LEVENTHAL: All right.

13 MR. MULLINS: Just to tell you from my
14 experience, which I spent six and a half years at the
15 Board, only leaving three and a half years ago, so I'm
16 kind of new to this side of the aisle, but I would say
17 that when I was at the Board, and certainly I know I
18 can't speak for the Board now, but that was the whole
19 sole purpose of the protective order, was to protect
20 these kinds of things.

21 And, there is a process in place by which
22 parties who are concerned about this kind of thing can

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1 go to the Board. And, let me give you a prime
2 example. The attorneys in this case representing
3 PEPCO wanted to use some of the information that they
4 gained in this case in another case and in their
5 negotiations with another case.

6 Now, this is precisely the thing that Mr.
7 Coburn is worried about, is that consultants and
8 lawyers will try to use this in negotiations and all
9 this other stuff. They had to go to the Board and
10 request a modification of the protective order to say,
11 can we use the information that we gained in this case
12 in these other negotiations and in these other cases.
13 And, the Board said, no, you can't.

14 So, it would be an absolute violation of
15 the protective order if they tried to use the
16 information in any manner other than trying to present
17 their case to the Board. So, there is a procedure, I
18 only rise to get in on this to say, there is a
19 procedure in place, and that's what the whole purpose
20 of the protective order is for, and then if a party
21 outside of that it's an absolute violation of the
22 statute and the order.

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1 And so I, quite frankly, don't know why you
2 need to have a super secret sensitive sort of
3 category, absent what is in the protective order.
4 And, I'm concerned that that's going to come back to
5 haunt me when we are filing discovery, and we're back
6 in front of you, you know, on behalf of New York State
7 Electric & Gas, well, are we going to have the super
8 secret category, that's what the protective order is
9 about.

10 So, that's why I rise to sort of get in on
11 it.

12 MR. McBRIDE: Your Honor, I just wanted to
13 say something, Your Honor, however difficult Mr.
14 Coburn thinks my job is, I do wear more one than hat
15 and I have to remember which hat I'm wearing when I'm
16 advising clients.

17 I haven't been in these negotiations, not
18 to say that I couldn't be invited tomorrow, but I
19 haven't been there. I don't even know where Delmarva
20 stands on it. I got an after-the-fact report from
21 Atlantic City Electric, they are doing their own
22 negotiating.

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1 But, I also just wanted to say, too, with
2 all due respect to my friend, Mr. Coburn, it's simply
3 not his place to say what my consultants need to put
4 on their testimony or do their studies. He doesn't
5 know entirely what they are doing. So, for him to
6 stand up and say what they need or don't need, he's
7 simply in no position to comment on it.

8 JUDGE LEVENTHAL: All right.

9 Let's go off the record.

10 (Whereupon, at 10:53 a.m., a discussion off
11 the record until 10:57 a.m.)

12 JUDGE LEVENTHAL: Back on the record.

13 In our off-the-record discussion, I
14 indicated that I was going to follow Mr. Coburn's
15 suggestion. He will furnish the unredacted material
16 in the first category, and the second category he and
17 Mr. McBride will try to reach an agreement as to
18 whether or not any further proceeding is necessary.

19 We are now scheduling an in camera session
20 for next Thursday, what's the date of next Thursday,
21 the 20th, is that right, 19th -- what is it, 21st.

22 MR. McBRIDE: Your Honor, I apologize, but

1 there's a deposition that morning of Mr. Coburn's
2 client, and I've already announced that I'm going to
3 be there under the schedule that they've set for
4 depositions.

5 JUDGE LEVENTHAL: All right, so what date
6 would you like then?

7 MR. McBRIDE: I can do it Wednesday, if
8 Your Honor is capable of that.

9 JUDGE LEVENTHAL: That looks all right to
10 me.

11 MR. COBURN: Speaking for myself, I'm out
12 of town all of next week except for Friday. There are
13 others who I think could do it in my absence, I can't
14 speak for their schedule, though, that's my concern.

15 MR. McBRIDE: Could we tentatively say
16 Wednesday at 10:00, and then you see if you can --

17 MR. COBURN: You want to come in and
18 tentatively say Wednesday at 10:00.

19 MR. McBRIDE: -- send somebody down.

20 JUDGE LEVENTHAL: And, if you can't then we
21 can make it on Friday if you like, or Tuesday. Well,
22 Tuesday doesn't give us enough time. Tuesday I don't

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1 think -- you won't have enough time to reach any
2 agreement.

3 MR. McBRIDE: That may be true.

4 Tuesday is really the only alternative,
5 because the deposition is going to probably go two
6 days, and we have to assume that now.

7 MR. COBURN: But, that's a deposition that
8 starts on Thursday.

9 MR. McBRIDE: Right, and that's why Friday
10 we can't commit.

11 MR. COBURN: Right, but Wednesday at 10:00,
12 I think, is probably all right.

13 JUDGE LEVENTHAL: All right.

14 We'll set an in camera session next
15 Wednesday, August 20th at 10:00.

16 Mr. McBride indicated off the record that
17 he wants the record to indicate that he has not
18 assented to this procedure, but that's what I'm
19 ruling.

20 Does that satisfy you, Mr. McBride?

21 MR. McBRIDE: Yes, thank you, Your Honor.

22 JUDGE LEVENTHAL: Anything else anybody

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1 wants to add?

2 MR. NORTON: Your Honor, I hesitate because
3 I don't -- I may be premature on this, but I don't
4 want to be accused of sandbagging when the issue does
5 arise. I understand that there may be some -- a
6 limited number of Conrail documents that present a
7 redaction situation because they are documents
8 relating to Conrail's dealings with, as you recall,
9 Ohio Valley, one of Mr. McBride's clients which is a
10 coal company, has business serving Centerior plants in
11 the Ohio area, and that was part of what we had to
12 produce.

13 Centerior is also a party in this
14 proceeding, represented by other counsel. Conrail
15 discovered that some of the documents that were
16 unearthed in the search contained information relating
17 to Centerior's other suppliers of coal, not Ohio
18 Valley, and they are very concerned about protecting
19 that information, which is, you know, covered by, I
20 think, confidentiality agreements, and it's certainly
21 a business relationship.

22 They advised Centerior that they might have

1 to turn this information over, and Centerior said,
2 please don't because this information concerning
3 people other than Ohio Valley is competitive and
4 sensitive, Ohio Valley has been very interested in
5 getting it, and we don't think they should.

6 So, the proposal is that we would redact
7 that information, which reflects the rates and other
8 sensitive information of third parties who may be
9 competitors of Ohio Valley, serving various facilities
10 of Centerior, but it's not Conrail information. The
11 information from Conrail they would be getting as per
12 your ruling.

13 And, if this is a problem, I think Mr.
14 Maser's firm represents Centerior --

15 MR. MASER: No, we do not.

16 MR. NORTON: Oh, okay.

17 MR. COBURN: It's Slover & Loftus.

18 MR. NORTON: Okay.

19 In the meantime, we may be able to work out
20 whatever problem exists, but I just wanted everyone to
21 know that there was a follow-on possibility.

22 JUDGE LEVENTHAL: All right. Why don't you

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1 see if you can work it out. If you can't, you'll be
2 before me.

3 MR. EDWARDS: There's a possibility that
4 Norfolk Southern will have a document similar
5 situation, so we will attempt to work it out as well.

6 JUDGE LEVENTHAL: All right.

7 MR. McBRIDE: Your Honor, I just have to
8 observe, I don't understand the problem. If they give
9 me documents that pertain to some competitor of Ohio
10 Valley, but I don't give them to Ohio Valley, in other
11 words, I abide by the protective order, what's the
12 problem?

13 MR. MULLINS: That's right, Your Honor,
14 that's what the protective order is for.

15 JUDGE LEVENTHAL: Wait, we are premature on
16 that. I like to entertain argument on something I
17 actually have before me. You are asking for an
18 advisory opinion, and I hope I never fall into the
19 trap of giving an advisory opinion.

20 In the 26 years up until now, I haven't.
21 I'm going to try --

22 MR. MULLINS: Can you give us an intended

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1 ruling, and then maybe we could --

2 JUDGE LEVENTHAL: This isn't California.

3 All right. So, we're setting next
4 Wednesday.

5 Now, with that regard, I take it then the
6 date for argument on discovery, which was going to be
7 Thursday of next week, won't be Thursday of next week,
8 is that right?

9 MR. McBRIDE: It could be for somebody who
10 is not interested in that deposition.

11 JUDGE LEVENTHAL: Right, so then --

12 MR. McBRIDE: But, I'm going to be at the
13 deposition.

14 JUDGE LEVENTHAL: -- so I'm about to amend
15 the discovery guidelines, so far as that's concerned,
16 next week the ordinary discovery dispute will be on
17 Thursday.

18 MR. McBRIDE: That's right.

19 JUDGE LEVENTHAL: The in camera inspection
20 will be on Wednesday.

21 Now, the date for the argument on Thursday,
22 if we have one, is 9:30. Is that correct?

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1 MR. McBRIDE: Date for the argument on
2 Thursday?

3 JUDGE LEVENTHAL: On Thursday, 9:30.

4 MR. McBRIDE: Yes, Your Honor.

5 JUDGE LEVENTHAL: Ten o'clock on Wednesday.

6 MR. McBRIDE: Yes, Your Honor.

7 JUDGE LEVENTHAL: All right.

8 Is there anything else before me this
9 morning?

10 MR. McBRIDE: I just want to thank you for
11 your time, as always.

12 MR. NORTON: Thank you, Your Honor.

13 MR. MASER: Thank you, Your Honor.

14 JUDGE LEVENTHAL: It's always a pleasure
15 seeing you people.

16 MR. McBRIDE: We're not trying to make a
17 habit of it.

18 (Whereupon, the above-entitled matter was
19 concluded at 11:04 a.m.)
20
21
22

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