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OCT 21 1997

SURFACE  
TRANSPORTATION BOARD

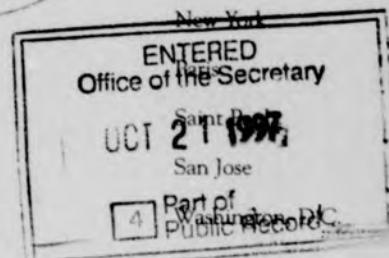
October 20, 1997



Brussels  
Chicago  
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Minneapolis

**VIA FEDERAL EXPRESS**

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, DC 20423-0001



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D  
Re: **Finance Docket No. 33388**  
**CSX Corporation and CSX Transportation, Inc.,**  
**Norfolk Southern Corporation and Norfolk**  
**Southern Railway Company -- Control and**  
**Operating Leases/Agreements -- Conrail Inc.**  
**and Consolidated Rail Corporation**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and twenty-five copies of the **Emergency Appeal of Transtar, Inc., Elgin, Joliet and Eastern Railway Company and Wisconsin Central Ltd.** (EJE-11/WC-11), dated October 20, 1997. A computer diskette containing the text of this filing in WordPerfect 5.1 format and a check in the amount of \$150, representing the appropriate fee for this filing, also are enclosed.

As shown on the certificate of service, copies of EJE-11/WC-11 have been served on all designated parties of record in this proceeding. Thank you for your assistance on this matter.

Respectfully submitted,

*Tom Healey*  
Thomas J. Healey  
Attorney for Transtar, Inc.,  
Elgin, Joliet and Eastern Railway  
Company and Wisconsin Central Ltd.

TJH:tjl

Enclosures

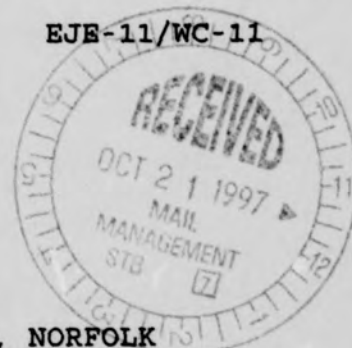
cc: Parties on Certificate of Service

182836

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

EJE-11/WC-11



FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK  
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY  
-- CONTROL AND OPERATING LEASES/AGREEMENTS --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

APPEAL OF TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY  
AND WISCONSIN CENTRAL LTD.

EXPEDITED CONSIDERATION REQUESTED

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ATTORNEYS FOR TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY AND WISCONSIN CENTRAL LTD.

Dated: October 20, 1997

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

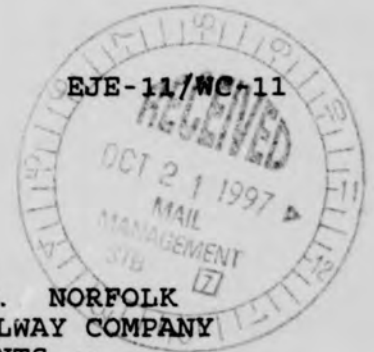
CSX CORPORATION AND CSX TRANSPORTATION, INC. NORFOLK  
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY  
-- CONTROL AND OPERATING LEASES/AGREEMENTS --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

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AND WISCONSIN CENTRAL LTD.

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 C.F.R. § 1115.1, Responsive Applicants Transtar, Inc., Elgin, Joliet and Eastern Railway Company (collectively, "EJE") and Wisconsin Central Ltd. ("WCL" and, collectively with EJE, "Appellants") respectfully appeal from the October 16, 1997 order of Administrative Law Judge Jacob Leventhal issued during the discovery conference held on that date.<sup>1</sup> After entertaining argument from counsel, Judge Leventhal concluded that the admitted 51% stock ownership interest in the Indiana Harbor Belt Railroad Company ("IHB") held by Consolidated Rail Corporation ("Conrail"), along with other indicia of ownership, did not give Conrail "control" of the IHB, as that

<sup>1</sup> Appellants bring this appeal pursuant to 49 C.F.R. § 1115.1(c), which allows an interlocutory appeal of the decision of an Administrative Law Judge where necessary to "correct a clear error of judgment or to prevent manifest injustice." See also Decision No. 6, at 7.





term is used in 49 C.F.R. § 1114.30.<sup>2</sup> Because this finding constitutes a clear error of judgment, imposes a manifest injustice on Appellants, and is unsupported by substantial evidence of record, Appellants respectfully request that the Board overturn this finding, and compel Conrail to produce responsive information currently within the possession or custody of IHB.<sup>3</sup>

#### Relevance Of IHB Information To This Proceeding

There can be little doubt that information pertaining to the operation of the IHB is relevant to this proceeding. As the Board is aware, the IHB is one of three terminal carriers in Chicago, and the one such carrier whose ownership is most directly affected in this proceeding. Currently, the IHB is owned 51% by Conrail, and 49% by Soo Line Railroad Company, d/b/a Canadian Pacific Railway ("CP/Soo"). CSX Transportation, Inc. ("CSXT") and Norfolk Southern Corporation ("NS" and, collectively with CSXT, "Applicants") have proposed that Conrail's ownership

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<sup>2</sup> 49 C.F.R. § 1114.30(a)(1) provides that in responding to a request to produce documents, a party must produce "any tangible things which are in the possession, custody or control of the party on whom the request is served." (emphasis added).

<sup>3</sup> During the October 16, 1997 discovery conference, Judge Leventhal also entered a finding that EJ&E's separate discovery requests dealing with financial data regarding the IHB and designed to facilitate a determination of the value of Conrail's shares of IHB stock (EJE-5) were premature. Appellants are not appealing that finding by Judge Leventhal. Transcript of October 16, 1997 discovery conference, attached as Exhibit 1 ("Tr."), pp. 33-34. As Appellants received an unpaginated copy of the Transcript via the Internet, and paginated the document received, consultation with the attached Transcript as to page numbers is suggested.

interest will be jointly-controlled by them subsequent to the approval of the Primary Application. Additionally, CSXT is slated to assume management and dispatching control over the IHB.

Moreover, the Applicants have made their projected changes to the IHB an important element of the Primary Application. One verified statement (a seven-page second statement submitted by John Orrison) was devoted exclusively to IHB issues. CSX/NS-19, Vol. 2A at 453. Further, the Applicants have (with little supporting detail) described generally a substantially revised IHB, which they envision as designed to facilitate Applicants' anticipated run-through interchange trains to other Class I carriers.

In order to determine the impact which these changes will have on the IHB, and more particularly the impact which these changes will have on rail carriers and shippers who depend upon the continuance of a neutral, independent IHB for intermediate switching services, Appellants have sought information from Conrail relative to the IHB's current operations. Toward that purpose, EJ&E served its Third Set of Requests To Produce Documents (EJE-8) on Applicants. A request seeking the identical information was served by WCL as WCL's Third Set of Requests To Produce Documents (WC-7). In those filings, Appellants sought information designed to generate a clear picture of the IHB's current operations, including IHB traffic tapes, density charts, IHB's current timetable, current

slow order and track speed documents, yard diagrams, signal system information, and customer contracts.<sup>4</sup>

After the close of business on October 9, 1997, Applicants served CSX/NS-99, Applicants' Initial Objections To Wisconsin Central's Third Set of Requests To Produce Discovery and CSX/NS-100, Applicants' Initial Objections to Elgin, Joliet And Eastern Railway Company's Third Set Of Requests To Produce Discovery. In those identical responses, Applicants objected to eight of the ten discovery requests propounded by Appellants, alleging that they sought "documents (which) would likely be in the possession, custody and control of IHB, which is not an Applicant in this proceeding." Specifically, Applicants stated:

To the extent that the requests call upon the Applicants to cause IHB to conduct a search for and to produce such documents they are further objectionable. The stock of IHB is owned 51% by Conrail and 49% by Soo Line Railroad, a subsidiary of Canadian Pacific Railway Company ("collectively "CP/Soo"), competitors of Applicants who are actively participating in this proceeding. IHB's day-to-day operations are not controlled by Conrail, but by its independent management, with obligations to both stockholders, Conrail and CP/Soo. A corporation is ordinarily not required to exercise dominion over its corporate affiliates, by requiring production of documents in their possession, custody or control, or by requiring their employees to appear as witnesses, unless it is shown to exercise day-to-day control over their operations. This is especially so in the context where the corporation has a bare majority stock interest and an independent party with divergent interest owns the

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<sup>4</sup> In the interest of conserving paper, we have attached to this motion as Exhibit 2 the "Applicant's Initial Objections to Wisconsin Central's Third Set of Requests to Produce Discovery" (CSX/NS-99), which contains both Appellants' requests and Applicants' objections. These requests and objections were identical to those exchanged in "Elgin, Joliet And Eastern's Third Set Of Requests To Produce Documents" (EJE-8).

balance, as here. Nothing about this proceeding or the request warrants a different rule here.

CSX/NS-99 at 4-5; CSX/NS-100 at 4-5.

After discussions attempting to resolve Applicants' objections proved fruitless, Appellants asked Judge Leventhal to resolve the issue of Conrail's control of IHB during the discovery conference held on October 16, 1997. At the conclusion of that conference, Judge Leventhal ruled that Conrail was not in "control" of the IHB for purposes of 49 C.F.R. § 1114.30 (Tr., pp. 57-58), the ruling from which Appellants now appeal.<sup>5</sup>

#### Standards For Appeal

Pursuant to 49 C.F.R. § 1115.1(c), appeals of the decision of a Board employee acting pursuant to delegated authority (such as an Administrative Law Judge) are allowed where necessary to correct a clear error of judgment or to prevent manifest injustice. Both circumstances are present here.

<sup>5</sup>

During the October 16, 1997 discovery conference, counsel for Appellants also raised the issue of whether Applicants could be compelled to answer certain discovery requests propounded by Illinois Central Railroad ("IC") in IC-3 relating to the IHB. Although Appellants' counsel is counsel for IC in this proceeding, counsel was not appearing before Judge Leventhal to compel answers to IC's discovery requests because of a settlement agreement reached between IC and NS. However, at the time of the filing of IC-3, IC, WC and EJ&E were members of a consortium seeking divestiture of the IHB, and IC's discovery was served on behalf of all three parties, without reference to all three, in compliance with Discovery Guideline A.1., Decision No. 10, which directs the parties to avoid duplicative discovery. The issue was rendered moot by Judge Leventhal's decision that Conrail is not in control of the IHB, but Appellants request a ruling on whether Conrail should be compelled to answer all requests seeking information regarding the IHB which have been propounded by any party in this proceeding.



### Argument

That Conrail is in control of the IHB, and thus should be subject to producing documents within IHB's possession or custody, is dictated in the first instance by Conrail's 51% stock ownership interest in the IHB. Through its ownership of a majority of the IHB's stock, Conrail has the ability to control the functions of the IHB and, at a minimum, has the ability to acquire documents from the IHB.

Applicants' primary thrust in opposition to Appellants' motion was the argument (unsupported by any testimony or documentation) that Conrail "allows" the IHB to function as an autonomous entity. Thus, claim Applicants, the fact that Conrail allows the IHB to compete with it, in one example, means that Conrail has no control over the IHB.

The issue, however, is not whether Conrail actually wields its controlling powers, but whether it has such powers. Federal cases<sup>6</sup> make clear in interpreting an identical provision of the Federal Rules of Civil Procedure (Rule 34) that it is the ability to control an entity that governs resolution of this issue. "'Control' comprehends not only possession or custody, but also the right, authority, or ability to obtain documents." Comeau v. Rupp, 810 F. Supp. 1127 (D. Kan. 1992); Scott v. Arrex, Inc., 124 F.R.D. 39 (D. Conn. 1989). Conrail's argument that it allows IHB to operate independently is therefore unavailing.

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<sup>6</sup> Neither Appellants nor Applicants were able to cite Judge Leventhal to any controlling precedent issued by either the ICC or this Board regarding the definition of "control" under 49 C.F.R. 1114.30.

In addition to the stock ownership issue, Appellants also presented other evidence as to Conrail's control of the IHB. Referring to the IHB's entry in the Official Railway Guide, Appellants noted that IHB's President, Secretary, and Treasurer are all Conrail employees, who work out of Conrail's headquarters in Philadelphia, Pennsylvania. (Tr., p. 57-58). In fact, according to the Guide, the entirety of the IHB's "Executive Department" is located in Philadelphia.

Further, Appellants also cited a finding of the U.S. Court of Appeals for the Seventh Circuit, which in 1991 held that "IHB has never functioned independently of its parent (Conrail)." Winston Network, Inc. v. IHB, 944 F.2d 1351, 1354 (7th Cir. 1991). (Tr., p. 46). Additional proof of the control relationship was also cited by Appellants from an opinion issued by the Eastern District of Pennsylvania, before which Conrail introduced evidence of the close relationship between itself and the IHB, including:

- Three of IHB's corporate officers have offices in Philadelphia and conduct IHB business there;
- Three members of the IHB Board of Directors have offices in Philadelphia;
- IHB's executive meetings are conducted by telephone from Philadelphia;
- IHB makes payments to Conrail for the salary paid to the IHB's officers; for administration of IHB's pension programs, for procurement, administration and management of insurance, administration of property



taxes, and assistance with corporate tax and property accounting issues;

- IHB maintains bank accounts and certificates of deposit in Philadelphia; and
- IHB maintains its corporate seal, Articles of Incorporation, Bylaws, and Board of Directors' minutes in Philadelphia.

Conrail v. Transportation Displays, Inc., 1989 WL 29269 (E.D. Pa. 1989) (Tr., p. 46-47).

Finally, in other agency proceedings, Conrail's controlling interest in the IHB has been consistently recognized, including Decision No. 12, at 8 (NS and CSX will be "parties controlling the controlling shareholder in the Indiana Harbor Belt Railway . . . ."); Rio Grande Ind., Inc. -- Pur. & Track. -- Soo Line R. Co., 6 I.C.C.2d 854, 863 n.9 (1990) ("Conrail now owns, and will continue to own a 51 percent controlling interest in IHB"); Indiana Harbor Belt Railroad Company -- Acquisition of Line of Chicago And Western Indiana Railroad Company -- Exemption from 49 U.S.C. 11343, Finance Docket No. 31148 (ICC served September 22, 1988) at 2 ("Conrail, which controls IHB . . . .").

In response to Appellants' arguments, Applicants produced no evidence whatsoever. During the argument of their counsel, they failed to produce any person, or the affidavit or verified statement of any witness, who could testify to the facts of the Conrail-IHB relationship. They failed to dispute any of the evidence put into the record by Appellants. They

failed to provide one single court or agency ruling finding Conrail not to be in control of the IHB.

Despite Appellants' overwhelming showing of evidence, Judge Leventhal ruled that Conrail is not in control of the IHB, as that term is used in 49 C.F.R. 1114.30 (Tr., p. 57-58). Judge Leventhal's factual finding on Conrail's absence of control of the IHB, based on the non-evidentiary arguments made by Applicants' counsel as to their understanding of Conrail's handling of the IHB, was a clear error of judgment and unjustly deprived Appellants of discovery responses to which they were plainly entitled. All of the evidence presented at the hearing established Conrail's control of the IHB, from the admitted majority stock ownership to the Official Railway Guide entry to the multiple cases cited by Appellants recognizing Conrail's control of IHB. There was simply no other evidence upon which a decision could have been rendered, and yet the decision of Judge Leventhal ignored all of this evidence in finding in favor of the Applicants.

Further, Judge Leventhal's ruling imposes a manifest injustice on Appellants. Information regarding the operation of the IHB is critical to determining the impact which this transaction will have on shippers who depend on the IHB for neutral intermediate switching services. Applicants' refusal to turn over this information inhibits any reasoned inquiry into the issue. Particularly when read in light of Conrail's refusal to produce information regarding the IHB given by it to NS and/or

CSXT in the course of this proceeding<sup>7</sup>, it is clear that Applicants simply do not want to face any analysis of their plans for the IHB.

Finally, the Board should not be swayed by Applicants' contention that Appellants should be denied the information they seek because the same information could have been gained through the service of discovery requests on the IHB.<sup>8</sup> The issue is not whether the discovery could be acquired elsewhere, the issue is the Applicants' (and more particularly, Conrail's) obligation to produce the evidence. The availability of the evidence through other means does nothing to lessen Conrail's duty to produce the information.

#### Conclusion

For all of the foregoing reasons, Wisconsin Central Ltd. and the Elgin, Joliet and Eastern Railway Company respectfully request an order holding that:

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<sup>7</sup> In CR-13, Conrail refused to produce documents not previously produced relating to IHB which were provided by Conrail to the Applicants in the course of this proceeding on the basis that "the mere fact that Conrail may have provided such documents (to NS and CSXT) would not make them relevant to any issues before the Board at this time." Appellants are currently attempting to resolve this objection with Conrail.

<sup>8</sup> As the Board may note, during the course of oral argument, Judge Leventhal asked counsel for the Appellants to contact IHB's in-house counsel, Roger Serpe, to determine whether the information sought would be voluntarily produced by the IHB. After numerous conversations between counsel, IHB agreed to produce a selected amount of the information sought only upon the condition that Appellants' waive their pursuit of all of this information from Conrail, including a waiver of this appeal. Appellants declined Mr. Serpe's offer.

1. For purposes of discovery pursuant to 49 C.F.R. § 1114.30, Consolidated Rail Corporation is in "control" of the Indiana Harbor Belt Railroad Company; and

2. Conrail must respond to all discovery requests, tendered by any party to this proceeding, seeking information within the possession or custody of the IHB.

Respectfully submitted,

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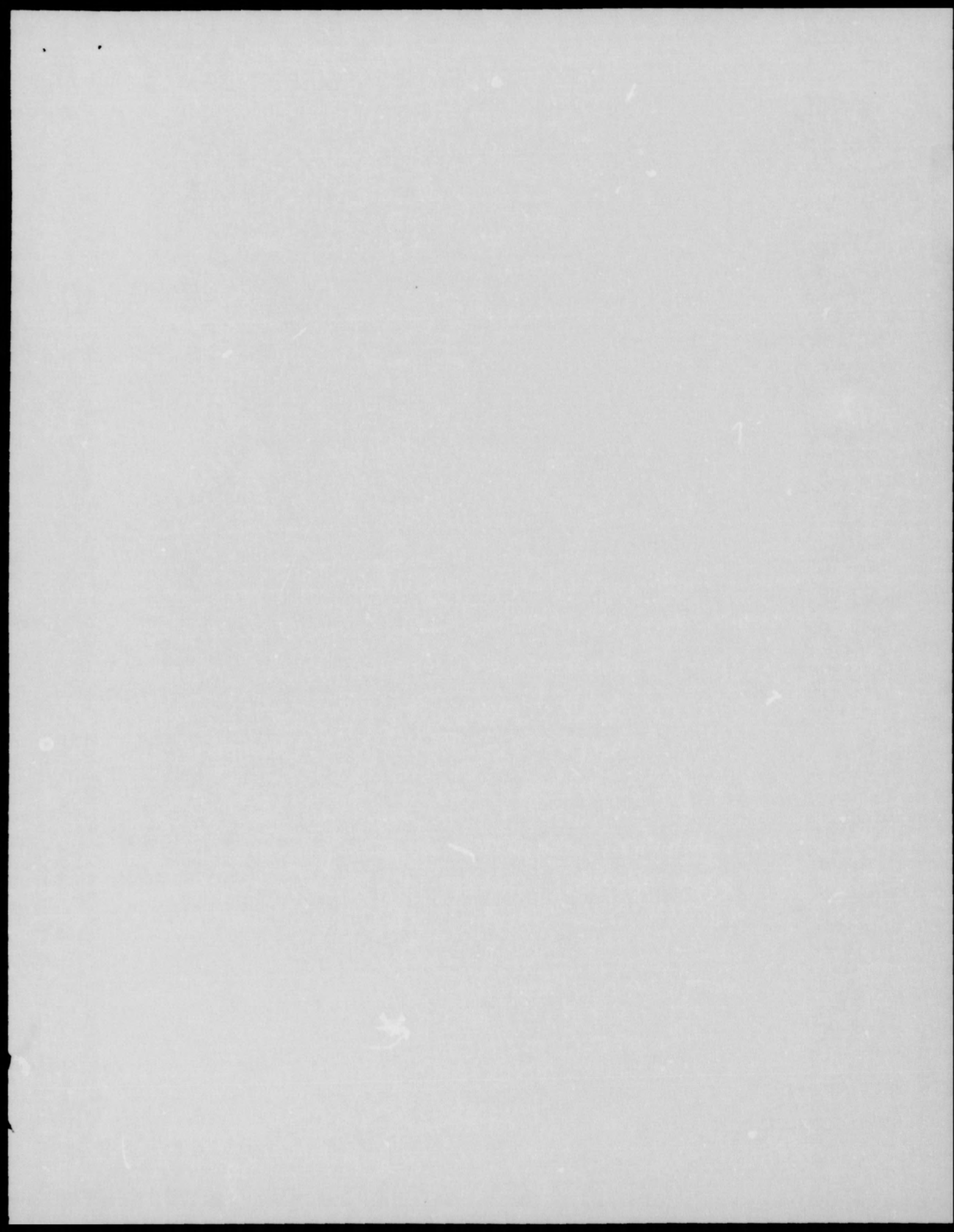
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**ATTORNEYS FOR TRANSTAR, INC.,  
ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY AND WISCONSIN CENTRAL LTD.**

Dated: October 20, 1997





UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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DISCOVERY CONFERENCE

CSX CORPORATION AND CSX  
TRANSPORTATION, INC., NORFOLK  
SOUTHERN CORPORATION AND NORFOLK  
SOUTHERN RAILWAY COMPANY --      - Finance Docket  
CONTROL AND OPERATING LEASES/      No. 33388  
AGREEMENTS -- CONRAIL INC. AND  
CONSOLIDATED RAIL CORPORATION --  
TRANSFER OF RAILROAD LINE BY  
NORFOLK SOUTHERN RAILWAY COMPANY  
TO CSX TRANSPORTATION, INC.

Thursday,  
October 16, 1997

Washington, D.C.

The above-entitled matter came on for a  
oral argument in Hearing Room 4 of the Federal  
Energy Regulatory Commission, 888 First Street, N.E.  
at 9:30 a.m.

BEFORE:      THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge



APPEARANCES:

On behalf of Conrail:

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AND

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On behalf of Norfolk Southern Corporation  
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APPEARANCES (continued):

On Behalf of Canadian Pacific Railway Parties:

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On Behalf of Wisconsin Central, Ltd. and Elgin,  
Joliet & Eastern:

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

(9:30 a.m.)

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

MR. HEALEY: Good morning, Your Honor. Thomas Healey, H-E-A-L-E-Y, of Oppenheimer, Wolff and Donnelly in Chicago on behalf of Wisconsin Central, Limited and the Elgin, Joliet and Eastern Railway Company.

JUDGE LEVENTHAL: Very well.

MR. COBURN: Good morning, Your Honor. David Coburn with Steptoe and Johnson for CSX.

MR. HARKER: Drew Harker, Arnold and Porter, for CSX.

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

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

MR. MAYO: Good morning, Your Honor. George Mayo, Hogan and Hartson, for Canadian Pacific parties.

JUDGE LEVENTHAL: All right. Very well. Before we get into the motion of Elgin, Joliet and Eastern Railway and Wisconsin Central, I had a letter from Mr. McBride and an answer by Mr. Norton. Is that dispute, then, resolved?

MR. NORTON: I haven't had any response to my letter.

JUDGE LEVENTHAL: Mr. McBride isn't here this morning.

MR. NORTON: Well, I don't think there's anything pending.

JUDGE LEVENTHAL: All right. We have the motion this morning of Elgin, Joliet and Eastern Railway, which we'll refer to as EJE, and Wisconsin Central Railroad we'll refer to as WC to compel discovery of Indiana Harbor Belt Railroad through Conrail.

I don't have, Mr. Healey, the interrogatories that are in question.

MR. HEALEY: Okay. I do have copies of them. They're my file copies.

JUDGE LEVENTHAL: We'll get to that in a

minute.

MR. HEALEY: Okay.

JUDGE LEVENTHAL: Now, we have I guess what I characterized at our last session as a request for a generic ruling. I understand that's really what you're asking for, Mr. Healey.

MR. HEALEY: Just very briefly, yes, Your Honor. There was a --

JUDGE LEVENTHAL: And then you want to compel responses if I rule in your favor, whether or not they have to respond.

MR. HEALEY: That's correct, Your Honor.

JUDGE LEVENTHAL: All right. So the first step we have to decide is whether Conrail is required to respond.

MR. HEALEY: That's correct, Your Honor.

JUDGE LEVENTHAL: Do we have a real issue, Mr. Norton, other than your objections to the discovery, the interrogatories per se? Indiana Harbor Railroad has responded voluntarily to certain other interrogatories put to them by the Four Cities.

MR. NORTON: That's correct.

JUDGE LEVENTHAL: Aren't they willing to do the same thing here?

MR. NORTON: But, Your Honor, I'm not in a position to speak for them. But I do understand from their counsel that they did have some discussions with Mr. Healey and they did indicate that they would be willing to try to provide him something but that what he had asked for in his request was just far too burdensome and couldn't be done in any reasonable period of time and that they couldn't agree to do that and they were willing to do something somewhere in between and they were going to do something along the lines of what they agreed for the Four Cities.

And, as I understand it, -- and we can be more specific about what was part of the conversation and what was not -- they were not able to reach agreement.

I don't think that Mr. Healey put forward some more limited portion of the discovery request that would be satisfactory. But, in any event, that is where the resolution would and should be.

We think just to take the sequence of



questions, that the request for generic ruling that it seems is one you don't even have to really get to because requests can be denied, motion denied on traditional grounds, given the scope of the request, the lack of demonstration of need.

And, as to the EJE ones, they're totally premature because they've led to an issue that may never arise and if it does arise can be addressed at a later stage in this proceeding.

So I would suggest to divert us as a way to not have to address what is a question of first impression is a substantial one for first impression.

JUDGE LEVENTHAL: That's really what I was trying to get an understanding of.

How about you, Mr. Mayo? Do you have a position on this?

MR. MAYO: Your Honor, we do have a position. And I think it's essentially the same position that Mr. Norton has just outlined. And that is that we think that the issue before Your Honor can best be resolved by focusing along the more traditional handling of discovery issues in this case

and not have to reach the issue of whether Conrail is a 51 percent owner of the IHB to be responsible for essentially providing discovery at IHB's behest.

It's our position, as you know from last week, that CP through its wholly owned subsidiary, the Soo Line Railroad, which owns 49 percent of IHB, it's our position, that it's inappropriate to seek discovery of the IHB through Conrail because it's our view that Conrail doesn't speak for IHB.

IHB is not an extension of Conrail. IHB is independent, among other things, that IHB owes a duty of loyalty to us as a substantial minority shareholder and that that duty of loyalty can only be properly addressed when IHB as IHB considers discovery requests I guess to it and that it's inappropriate, we would suggest, that Conrail be asked to, in fact, determine what IHB will produce in discovery because if it works that way, then our voice as a minority shareholder is heard.

JUDGE LEVENTHAL: Well, now, if I rule on whether or not you have to respond to the specific interrogatories, do I understand that IHB will comply?

MR. NORTON: Your Honor, I'm not in a position to make any commitments or representations. I do know that after they saw the requests, that they agreed with our assessment that these are very burdensome and expensive --

JUDGE LEVENTHAL: Yes, but suppose it's narrowed down.

MR. NORTON: -- and couldn't be done. And the real question is -- and Mr. Healey made this very clear in his appeal to the Board from your postponement of the decision. He said if he doesn't get the ruling and almost immediate responses, he can't use the materials because he has to make a filing on Monday and he has to put his cases together before that.

As a practical matter, there's just no way that IHB could respond to those document requests in that period of time unless it were to be focused on something extremely narrow and limited. And I haven't heard any proposal. I'm not sure he made any such one to IHB. And I simply can't commit to that.

MR. HEALEY: Your Honor, if I might, we're

kind of talking about my conversation with Mr. Serpe, who is the General Counsel at the IHB, in a vacuum here. I'm the only one who, as far as I know anyway, was a party to it.

Before I begin, actually, I want to confirm my filing is due Tuesday, I think. It's not due Monday. Unless somebody shortened another deadline on me, I think I've got another day for that.

Your Honor, I did speak with Mr. Serpe at your suggestion at your last conference, actually somewhat coincidentally. Mr. Serpe and I have known each other for -- well, I was about that tall, actually, and he worked for my father for many years at Illinois Central.

We did discuss this issue. We did attempt to narrow the scope of the request. Unfortunately, the offer that Mr. Serpe was able to give me was that he would produce to me the same information that he had produced to the Four Cities.

Unfortunately, the interests of the Four Cities are far different. They're concerned with traffic densities on lines in Indiana. We're

concerned about the entire Indiana Harbor Belt system.  
And Mr. Serpe wasn't able to offer me that.

And so on that basis, what he was offering me was virtually worthless to our discovery requests. I'm not even sure what he offered was responsive, quite frankly, to the requests.

JUDGE LEVENTHAL: But you have a real practical problem here. Let's say that I rule in your favor --

MR. HEALEY: Yes, sir.

JUDGE LEVENTHAL: -- on the narrow question.

MR. HEALEY: Yes, Your Honor.

JUDGE LEVENTHAL: They then will file an appeal with the Commission because they, for one thing, tell me they take this very seriously, they take the issue seriously. So you have a three-day response for you to answer.

The Board has been ruling promptly, but I would judge that three days for them to rule would not be unreasonable. And your time for filing your response is gone.

MR. HEALEY: Judge, I understand that concern, and I appreciate that concern. I guess the two things that I would focus on is, first of all, as to at least some of this discovery, the issue wouldn't have come up at all had the applicants not objected in the first place. To the extent that you ruled that the objection is improper, the delay certainly isn't our fault.

Moreover, to the extent that we do get the information after the second and to the extent that we would attempt to supplement our filing on the 21st, for example, that's an issue for the Board to consider, whether we have any merits in filing a supplemental filing.

I don't think it should be Your Honor's concern. With all due respect, I think Your Honor should be concerned with the propriety of the requests Conrail --

JUDGE LEVENTHAL: I only raised it as a practical matter.

MR. HEALEY: And I understand that. Believe me, we have tossed that around quite a bit.



But I think ultimately that's an issue that's going to be decided by the Board and based on whatever we file with the information.

JUDGE LEVENTHAL: Yes, sir. Well, you have another problem. You have the same motion pending before the Board that you have before me because in your appeal, you appealed not only my refusal to bend the rules as set forth in the discovery guidelines, but also you asked for a ruling on the merits.

MR. HEALEY: I think that's correct, Judge. At this point, given the limited time that is left, we're looking for any quick avenue we can to go forward.

JUDGE LEVENTHAL: I'm going to give you a ruling. I'm not going to pass on ruling.

MR. HEALEY: I appreciate that.

JUDGE LEVENTHAL: I'm just saying, though, you have two different jurisdictions.

MR. HEALEY: I understand.

JUDGE LEVENTHAL: I'm not sure who has the last word, but I strongly suspect that it's the STB.

MR. HEALEY: I appreciate that, Your Honor.

MR. NORTON: Your Honor, just on the references to the limited time, -- we've made this point in our brief -- that is not our problem. This is something that is entirely situation.

Due to the course of conduct of Mr. Healey's clients and the way they chose to proceed, they could have started discovery three months ago, and none of this would have been a problem.

JUDGE LEVENTHAL: No, it's not your problem, Mr. Norton, and I wasn't raising it as a problem. I merely was trying to see if there's some practical way of disposing of this and having the EJE and WC obtain at least some of the discovery that they are seeking.

MR. NORTON: Well, Your Honor, on that front --

JUDGE LEVENTHAL: I might say before you go on I didn't mention for the record, I have the applicants' reply to the motions to compel, which I received via fax late yesterday, and a hard copy,

which my office received at 5:30 last night. I wasn't here after 5:00. But I did get your fax. All right.

MR. NORTON: I was just going to say that on the question of some middle ground, I don't hear Mr. Healey saying that he proposed a reasonable middle ground to IHB and wasn't willing to discuss it. What he said was that IHB offered to give them essentially what they're giving to Four Cities and that wasn't going to meet his needs.

But there's an awful long way between that and the extensive catalogue of documents that are covered by these two requests.

JUDGE LEVENTHAL: No. I understood Mr. Healey to say that he has been drawing upon his motion and that he and IHB could not reach the --

MR. NORTON: Right.

MR. HEALEY: And so that the record is clear, Judge, we did attempt to talk about some of the things that we would need, some of the more pressing cutdowns, some of the information.

And what Mr. Serpe came back with was, "Well, I will give you what I am giving the Four

Cities." and that was the final offer that I rejected.

JUDGE LEVENTHAL: All right. Why don't we treat the merits of your motion with respect to the information you're seeking and then treat the generic question after I make rulings on your specific interrogatories?

MR. HEALEY: Okay.

JUDGE LEVENTHAL: But, as I told you earlier, I don't have a copy of your interrogatories.

MR. HEALEY: Well, and, unfortunately, I'm afraid I only have one, Judge. If the applicants have more than one, they may be able to help us out here.

JUDGE LEVENTHAL: How many interrogatories are in --

MR. HEALEY: Well --

JUDGE LEVENTHAL: I think Mr. Norton only referred to two. Is that correct?

MR. NORTON: Well, there are three sets, two of which are identical. The first set in particular, the EJE first set -- Your Honor, they're listed on Pages 7 and 8 in our brief. I think that

summarizes the categories of documents that are requested.

JUDGE LEVENTHAL: You had a summary, but you didn't have the specific --

MR. NORTON: Yes.

JUDGE LEVENTHAL: Is this the whole thing that you set forth in Page 7 of your response, 7 and 8?

MR. HEALEY: Can we go off the record for a second, Judge?

JUDGE LEVENTHAL: All right. Off the record.

(Whereupon, the foregoing matter went off the record at 9:47 a.m. and went back on the record at 9:49 a.m.)

JUDGE LEVENTHAL: Let the record note the parties have furnished me with the applicants' initial objections to Elgin, Joliet and Eastern Railway Company's first set of requests to produce discovery and the applicants' initial objections to the same party's third set of requests and the applicants' initial objections to Wisconsin Central's third set of



requests to produce discovery.

MR. HEALEY: Just so the record is clear, those last two documents I believe are identical, --

JUDGE LEVENTHAL: Yes. I was about --

MR. HEALEY: -- separate parties, but they're same --

JUDGE LEVENTHAL: I was about to comment on that.

All right. Mr. Healey, do you wish to address --

MR. HEALEY: If I understand, Your Honor, we're currently going to be discussing simply the merits of whether the information sought is relevant or overly burdensome, not the issue of control.

JUDGE LEVENTHAL: That's correct. That's correct. Let's take Request Number 1, and let's put that into the record at this time. Request Number 1 is, "Please produce IHB audited financial documents or records for the past five years, including, but not limited to, balance sheets, statement of income, statement of cash flows, and statement of retained earnings, along with the footnotes, management

discussion, and analysis.

"If audited financial documents or records are not available, then an unaudited and attested compilation prepared by an independent accounting firm along with the footnotes, management discussions, and analysis, or the equipment will suffice." All right.

MR. HEALEY: Judge, -- and I may be able to shorten this up somewhat -- all of these requests in here would generally fit under the somewhat broad rubric of due diligence.

These are requests seeking to identify the IHB's financial position, the debt structure, et cetera. The applicants have made an argument that, in fact, all of this discovery is premature.

We seek the information because what our clients are requesting, what EJ&E is requesting, Wisconsin Central is requesting is the divestiture of Conrail's stock ownership in the harbor.

More than just that, Judge, we're not just pointing to the fact that there are problems with Conrail's 51 percent stock ownership going over to the applicants. We're also saying that the only way to

resolve the problems that we are raising, that we will be raising in our responsive applications, is that this stock should be divested to us. And I think that's what makes this situation a little different than some of the case proceedings that the applicants have cited to in the past.

Parties have come in, for example, and said the Southern Pacific and the Santa Fe merger, for example, there will be anti-competitive effects as a result of that merger. Therefore, they shouldn't be allowed to merge.

The ICC at the time agreed to that and ordered the holding company to divest one of the two railroads. So there was a situation where the ICC wasn't asked to determine what should be the disposition of one of the two railroads. They were merely asked to determine whether they should fit under the same house or whether they should be divided.

In this case, our case is different than that, Judge. We're not simply arguing there are competitive harms here. We're arguing there are

competitive harms. And the only way to address that is to turn this 51 percent stock ownership to us so that we can look out for the people who aren't Class 1's operating through Chicago so that we can maintain a neutral and independent Indiana Harbor Belt in order to accommodate the intermediate switching service that the IHB currently engages.

As a result of that, we need the information that we seek in here in these due diligence requests in order to properly be able to value the stock that is outstanding, 51 percent.

It's going to be rather difficult for us, quite frankly, to decide whether, in fact, we do wish to go out and make this purchase. We have no idea what that stock is worth. Applicants have turned over no documents to us indicating any value of that. And that's why we seek the information. And, as I say, they all fit generally under the same.

Now, if we could get some agreement as to some of this is obviously more burdensome than others. And I'd be happy to discuss with the applicants narrowing it down to perhaps just a few of these

categories. But I do think we need some of these categories in order to be able to put our case on.

JUDGE LEVENTHAL: I believe you said that you had discussed this with counsel for the IHB.

MR. HEALEY: I did discuss it with the counsel for the IHB, yes, and --

JUDGE LEVENTHAL: And you could reach no agreement on any part of it?

MR. HEALEY: What Mr. Serpe offered to me contained none of the financial information in here. It was simply train operation data related to lines going between the IHB's Blue Island Yard in Indiana.

JUDGE LEVENTHAL: All right. Mr. Norton?

MR. NORTON: Your Honor, I think the prematurity point is still dispositive. What he is saying is that it is best to value Conrail's interest in the IHB.

Again, if this is so urgent, they've been talking about this divestiture proposal since back in August, when they filed their notice of responsive application. They could have started a long time ago. They obviously were able to reach that decision



without having this information.

More importantly, the kind of condition that they're seeking is one that, first of all, the Board if it approves the application, it may or may not require a divestiture. If it does require a divestiture, it may or may not be to EJE and Wisconsin Central. It's only if it does all of those things that this issue becomes relevant.

And what this Board and its predecessor, the ICC, have done in similar circumstances when there are issues like this about how to twist a value or a price tag relating to a condition imposed on the approval of the transaction, is to have follow-on proceedings when you can focus on a real-live context and a definite thing that's going to happen.

A couple of examples. A very common one is requests for trackage rights as a condition of approval. There has to be a value established for the operations of those trackage rights. And it is cited in the UP-NP merger case, where the Board, the ICC there, decided to approve the transaction, to impose the condition establishing trackage rights. And a

price tag was to be established afterwards, either by negotiation or by the ICC if necessary.

A similar situation arose with respect to the UP-SP merger, where there were some minority shareholder interests in one of the acquired companies. And under the law and the precedence, that has to be valued. That was a proceeding that took place after consummation of that merger in a subsequent proceeding, at which time evidence was submitted about the proper valuation of the stock.

That is exactly the situation that we're talking about here. And the standard precedent and practice is to deal with it if and when necessary. It is not something that would be dealt with as part of the approval process.

And, therefore, one of the threshold conditions for demonstrating the need for discovery is that you need it now to deal with an issue that's going to have to be addressed.

It is very highly confidential information and a very burdensome request. Decisions 34 and 42 make clear that you really have to demonstrate a

substantial need and real solid relevance to get discovery at the time you're seeking it.

And that simply hasn't been met here and can't be as these are issues that are really for down the line. And they may not even come up at all. There may be no need for this discovery at all.

As to the particulars, I don't know which ones of these requests in the first set, the financial requests, that Mr. Healey may have discussed with Mr. Serpe, but we're simply not in a position to say that we'll produce this and that. That is something that would have to involve the input of IHB.

They're the ones. It's their documents, their people who would have this burden put upon. Whether they can do it within the period of time remaining is, of course, highly problematic.

But we think fundamentally this is simply premature. And we don't have to get to assessing the burden or the relevance of the particular issues, the particular 46, which starts to cover the financial --

MR. HEALEY: If I could just very briefly, Your Honor? If I understand what counsel is saying,

he has informed the Court that, in fact, the issue of the valuation of the stock may not come up in this proceeding. I think that means that the issue of the valuation of the stock may come up in this proceeding. I think it's a flip side that is just as obvious.

In the past the Board has had several procedures where it has elected not to make that determination at this time does not mean that, in fact, they may not make this determination. And there's nothing that would prevent the Board from making the determination at this time.

Moreover, my understanding, although I must confess, Your Honor, that I'm more of a litigator than a regulator in putting together these filings, my understanding is there is a certain amount of financial data that has to be discussed in the filing that is upcoming on the 21st.

I don't know how we can discuss valuation of the IHB stock without some evidence from Conrail as to what they value the stock at.

JUDGE LEVENTHAL: But why do you need it now? Mr. Norton says that a valuation proceeding

would follow if the STB imposes this condition.

MR. HEALEY: Your Honor, if we listen carefully to what Mr. Norton says, Judge, he says in the past, the STB or the ICC has had a follow-up proceeding. And he says in this case, they may have a follow-up proceeding. There's nothing that says that they won't, in fact, determine at this time whether the stock should be turned over and the value that should be paid for the stock.

JUDGE LEVENTHAL: But if they have no financial information before them, won't they by necessity have to have a valuation proceeding if they impose this condition?

MR. HEALEY: Judge, I think the problem in looking at it that way is I think the financial information is going to help us make the case that we, in fact, are the appropriate parties by establishing that we, in fact, have the financial resources to pay for it.

I will agree with Mr. Norton that there are cases out there where the financial wranglings have been handled second. And I will agree with him



that it is possible that the Board may not raise the issue at this time. But I don't think we should be denied discovery just on the possibility as to what the Board may elect to decide and what it may not.

JUDGE LEVENTHAL: Have you read Mr. Norton's response to the motion?

MR. HEALEY: I have, Judge.

JUDGE LEVENTHAL: And on Page 5, where he sets forth the standard which the STB has proclaimed for commercially sensitive information, do you think you've met that standard?

The portion that I'm referring to for the record that the Board has said in Decisions Number 34 and 42, "Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information and its ability to generate comparable information from other sources against a likelihood of harm to the disclosing party."

MR. HEALEY: I do, Judge.

JUDGE LEVENTHAL: Have you shown a compelling need for it at this time, for the

information that you're seeking?

MR. HEALEY: Judge, I think --

JUDGE LEVENTHAL: Let me ask a preliminary question.

MR. HEALEY: Sure.

JUDGE LEVENTHAL: Isn't some of this information public information?

MR. HEALEY: I don't think that's correct. The IHB is not a publicly traded company.

JUDGE LEVENTHAL: It's not a publicly traded company.

MR. HEALEY: It's 51 percent owned by Conrail and 49 by CP-Soo. So I don't think it's publicly available.

MR. NORTON: Your Honor, if I might, I just wanted to mention we cited in our brief that leads to Decision Number 29 by the Board in this proceeding -- and at Page 3, the Board there indicated that with respect to some other potential responsive applications, that there would be further proceedings to determine matters such as the suitability of a nominee for certain traditions and other specific

trackage rights issues.

They would be resolved in a follow-up proceeding, which is just further -- this is not saying it only happens in the past. It said in this proceeding they're going to do here the same way they've done in the past.

There will be follow-up proceedings to address those issues of that nature that are contingent at this point on there being: first, an approval; and, second, a grant of the kind of condition requested.

And this is not just relying on past precedent applied to this case.

JUDGE LEVENTHAL: All right. Any further argument?

MR. HEALEY: Judge, I'm not familiar with the decision that he cites. So I really can't address it.

JUDGE LEVENTHAL: Do you want to see it? My files are getting to be pretty thick here. Here it is. Do you have it handy?

MR. HEALEY: Could I have a minute, Judge?

JUDGE LEVENTHAL: Sure.

MR. HEALEY: Thank you.

(Pause.)

MR. HEALEY: Judge, if I might, my reading of that indicates that the Board is signifying that any matters that aren't resolved in the present proceeding. It doesn't say what matters will and won't be resolved in the present proceeding.

JUDGE LEVENTHAL: I think your big problem, Mr. Healey, is that the Board does treat this highly sensitive commercial information very carefully and that you really have to show a present need for the information you're seeking in order to prevail unless you have some -- let's go off the record. Let me say this --

(Whereupon, the foregoing matter went off the record at 10:07 a.m. and went back on the record at 10:08 a.m.)

JUDGE LEVENTHAL: In our off-the-record discussion, I stated that I thought that the situation presented here this morning is a little bit different from the prior order that I issued requiring Conrail

to divulge information regarding its subsidiary.

Here we have a situation where Conrail owns 51 percent of the IHB and the Soo Railroad owns 49 percent. And the Soo has expressed its objection to release of this information.

Without my making the ruling at this point, I think that the slim difference in control of two percent differs from the situation in which I previously ordered discovery.

I said this off the record without meaning to bind myself to ruling on the generic issue before me because we agreed to reserve that until later. I was giving the parties the doubtful benefit of my other things that I'm considering.

All right. Do you have anything?

MR. HEALEY: Judge, as to the relevance of the financial documents, we're prepared to stand on the arguments we've made.

JUDGE LEVENTHAL: All right. I'll deny the motion to compel at this time on the ground that it's premature and on the ground that the moving party has not established a compelling need for this time



balanced against the confidentiality expressed by the respondents.

All right. We have the other interrogatories still meaning.

MR. HEALEY: Yes, Judge, we do.

JUDGE LEVENTHAL: Is it with the same arguments and --

MR. HEALEY: No, no. It's very different arguments, Judge.

JUDGE LEVENTHAL: All right.

MR. HEALEY: First of all, I don't believe they're nearly as burdensome. Moreover, they detail issues relevant to the operations of the Indiana Harbor Belt.

This is not the financial data that we sought in the first discovery request that you've just ruled upon. This is issues relating to how it is that the Indiana Harbor Belt operates, where it trackage is, signaling issues, rail issues, all sorts of operating-type details.

As Your Honor is most undoubtedly aware, the applicants have put in an operating plan that

substantially discusses what it intends to do with the Indiana Harbor Belt. There's a separate verified statement that addresses nothing but the Indiana Harbor Belt.

They have indicated that they're going to substantially change the operating patterns and practices of the Indiana Harbor Belt. They've indicated that post-control, they intend to force, for lack of a better word, a variety of connections to be made between the Indiana Harbor Belt and other railroads to facilitate their operations.

Clearly to the extent that they have submitted an operating plan that details the Indiana Harbor Belt, we need to know information on the operations of the Indiana Harbor Belt in order to address the feasibility of the operating plan.

JUDGE LEVENTHAL: All right. Before I hear further argument, let's take a short recess. Five minutes.

(Whereupon, the foregoing matter went off the record at 10:12 a.m. and went back on the record at 10:16 a.m.)

JUDGE LEVENTHAL: The conference will come back to order. Just so the record knows what the discussion is, the request for production is as follows, "Request Number 1. Please produce 100 percent traffic tapes for IHB.

"Request Number 2. Please produce density charts for all rail lines owned or operated by IHB. To the extent that such documents do not currently exist, please produce documents from which applicants believe such information could be most easily determined.

"Request Number 3. Please produce IHB's current timetable.

"Request Number 4. Please produce all current slow orders for IHB.

"Number 5. Please produce documents sufficient to identify the track speeds for all rail line segments owned or operated by IHB.

"Number 6. Please produce documents sufficient to identify the current capacity and configuration of and all rail connections to each rail yard owned or operated by IHB.

"Number 7. Please produce all documents sufficient to identify the type of original system utilized on each rail line segment owned or operated by IHB" and "Number 8. Please produce all contracts currently in effect between IHB and any rail shipper."

And the respondent objects to all of the requests in toto.

Now, hasn't some of this information been produced for the Four Cities?

MR. NORTON: Your Honor, I'm not sure I can answer definitively on that.

JUDGE LEVENTHAL: It seems to me some of these are similar, if not the same.

MR. NORTON: They're similar to the requests, but I'm not sure where the lines were drawn and what they ended up agreeing to. I know that I think one item that they were going to produce was track charts, which would possibly be responsive to some of these requests, but I can't be definitive about that. Mr. Healey may actually have a better idea.

JUDGE LEVENTHAL: And is that information

in the depository?

MR. NORTON: It will be when it's produced.

JUDGE LEVENTHAL: All right.

MR. HEALEY: If I can address that, Your Honor? Again, the issue that the Four Cities have addressed and have apparently reached agreement with the IHB on the production of the documents has been related solely to two rail lines that operate east from Blue Island Yard, which is very close to the Indiana-Illinois border into Indiana. Their concerns are lines in Indiana, the number of trains operating through them, potential diversions that could alleviate congestion in Hammond, by way of example.

So to the extent they are receiving any track charts or slow orders, my understanding has been it's going to relate solely to this one small piece of the harbor over in Indiana.

JUDGE LEVENTHAL: Well, wasn't IHB willing to give you the same type of information they gave the Four Cities?

MR. HEALEY: They were willing to give me



the same information that they gave the Four Cities. What they said is, "We will make available to you that same information."

And I said, "Well, that's not going to cut it, Roger, quite frankly, because you're talking about a small piece of it, the lines in Indiana. We need to know the entire IHB system." And that was never offered.

JUDGE LEVENTHAL: Well, some of these -- let's take Request Number 3, "Please produce IHB's current timetable." Is that confidential information?

MR. NORTON: Timetables I believe are confidential. These are not timetables in the usual sense that you might think of a timetable. They have a lot of proprietary information about the operations of particular track segments.

MR. HARKER: The practice of the parties, Your Honor, has been to put timetables to make them confidential. They haven't been even public when they've been produced in the past.

MR. COBURN: But not highly confidential.

MR. HEALEY: As much as it may pain me to

agree with the applicants on that point, I think I do. It's not a timetable you think of like for a passenger train. It's got much more detailed information relating to rail lines.

JUDGE LEVENTHAL: And have you specifically discussed this with counsel for the IHB?

MR. HEALEY: In my phone call yesterday, Judge, we did primarily discuss the financial information. However, we did also address some of this. And I explained to Roger why it was that we needed it.

What he said to me was, "Well, I'm going to make some of this information, as the Four Cities have asked for it, available. And I can get that over to you in short order."

Frankly, it's not of any use to me to know what one small piece of the IHB operates. Their operating plan addresses the entirety of the Indiana Harbor Belt. Therefore, we need information relating to the entirety of the Indiana Harbor Belt.

MR. NORTON: Your Honor, I think Mr. Healey is confirming what my understanding was, that

he never came back with any kind of more limited version of this request that we really needed and might work it out --

MR. HEALEY: Your Honor, I don't know. This is about the fourth time now Mr. Norton has addressed a phone call he supposedly was not a party to. I am a little frustrated by the --

JUDGE LEVENTHAL: That really doesn't matter. I'm not requiring you or any of the other parties to enter into anything voluntarily. If I'm ready to order, I'll order you to do it.

However, it seems to me that some of these items should readily be available for compromise.

MR. HEALEY: For whatever reason, Judge, they weren't.

JUDGE LEVENTHAL: Your problem here is -- and I've indicated to you off the record, and I think it's on the record -- I'm reluctant to order Conrail to produce items for IHB because of the different circumstances, which I explained a little bit earlier.

But if IHB were before me, I certainly would order them to produce some of this material.

And I think you would be in a position to argue and convince me what part of this you really need. I think you would get it, and I think you would get it if they were here without my ordering them.

I think the only item here that you might have some difficulty with would be the 100 percent traffic tapes. All the rest of --

MR. NORTON: Your Honor, I'm sorry. I didn't mean to interrupt, but I did want to make the point that it is not just operating material and information. It is highly confidential, competitive information as well, the harbor traffic being one example, all contracts with shippers being another.

IHB and Wisconsin Central and EJE are competitors. So there is more than just operating information here.

And one other point just in terms of IHB's presence or absence here today. I understand that Mr. Serpe had appearances in federal court this morning and a deposition beginning later in the morning and simply couldn't be here, even if it were necessary.

MR. HEALEY: Judge, if I might, you're --

JUDGE LEVENTHAL: Let's go off the record.

(Whereupon, the foregoing matter went off the record at 10:24 a.m. and went back on the record at 10:32 a.m.)

JUDGE LEVENTHAL: Back on the record.

Let's go into the large offer you spoke about off the record. Off the record, after various suggestions by the Judge, the parties have tentatively agreed that if Mr. Healey can arrange with Mr. Serpe on behalf of IHB to have a -- he'll attempt to dispose of these issues with Mr. Serpe. If necessary, he will attempt to set up a conference tomorrow morning.

What time, Mr. Healey, because you have a difference in time?

MR. HEALEY: Frankly, I get in very early in the morning. I can work it around whatever is convenient for Mr. Serpe, but I don't know that yet.

JUDGE LEVENTHAL: All right. Then suppose you advise my law clerk by, say, 3:00 o'clock today or --

MR. HEALEY: I will make every effort to get a hold of --



JUDGE LEVENTHAL: She leaves at 5:00 o'clock. So you have to get to her before that. We have to notify the reporting service before that.

MR. HEALEY: I have Mr. Serpe' phone number memorized, Judge. So it won't be a problem.

JUDGE LEVENTHAL: What we'll do, we'll schedule the conference tomorrow morning tentatively, say, at 10:00 o'clock. If we don't need the reporter, we will advise your office. Otherwise, I will be continuing this conference until tomorrow morning so that you will be present tomorrow morning at 10:00 o'clock.

All right. Our agreement was that we would have a telephone conference with all other parties who wish to attend here in a hearing room at the FERC. And Mr. Serpe and Mr. Healey will be in Chicago via telephone conference.

Who will set up the conference call?

MR. HEALEY: I'd be happy to, Judge, if Mr. Serpe will agree to come to my office. We can certainly arrange it and call Your Honor's chambers. No problem.

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

(Whereupon, the foregoing matter went off the record at 10:34 a.m. and went back on the record at 10:35 a.m.)

JUDGE LEVENTHAL: The parties agreed that this procedure with respect to the telephone conference is mutually agreed upon by the parties. Therefore, I'll reserve on the objections to the second set of interrogatories which I read into the record.

All right. That leaves us now with the generic issue of whether or not Conrail is required to respond to discovery requests of its subsidiary IHB. Mr. Healey, we've heard some argument on the part of --

MR. HEALEY: Yes. Judge, as Your Honor is well-aware, Conrail does own 51 percent of the Indiana Harbor Belt. That does give them a controlling interest in the operations of the harbor.

Although in the brief that the applicants have made they profess to have no control over the

Indiana Harbor Belt, what limited information I was able to determine on my own since receiving that brief indicates that, in fact, far opposite of the contrary, as Your Honor asked me before when I was before Your Honor, I had read into the record a quotation from a case called Winston Network, Inc., which is IHB at 944 Fed. 2d 1351.

In that case, the Seventh Circuit had recognized the IHB has never functioned independently of its parent -- in referring to "parent," they're referring to Conrail in that case.

In fact, I have gone back and looked at some of the other cases, Judge, that were filed by the same parties in that case in various proceedings that happened in both Illinois and Pennsylvania. And I was able to discover a variety of information regarding the relationship between the Indiana Harbor Belt and Conrail.

In fact, according to one case, a case that emanated from the Eastern District of Pennsylvania that was related to that same litigation, the court there found that Conrail pays for the

salaries of the president, secretary, and treasurer of the Indiana Harbor Belt; that Conrail pays for the administration of IHB's pension programs; that Conrail pays for the risk administration for the IHB; that Conrail pays for the procurement, administrative, and management of insurance for the IHB; Conrail pays for the administration of property tax responsibility; and Conrail is responsible for assistance with property tax and property accounting issues within the IHB.

Further, that case also recognized that the Indiana Harbor Belt's corporate seal, the articles of Incorporation, the bylaws, and the board of directors minutes were all kept, in fact, in Philadelphia, Conrail's headquarters. They were not kept in Chicago. They were not kept in the Indiana Harbor Belt facilities.

JUDGE LEVENTHAL: I missed it. What is kept in Philadelphia?

MR. HEALEY: The corporate seal, the articles of Incorporation, the bylaws, and the board of directors minutes are all kept in Philadelphia.

And I also present the Court with, which,

unfortunately, it is a faxed copy of the Indiana Harbor Belt's listing in the official railway guide, which is the book in which each railroad lists its corporate officers, et cetera.

That listing indicates that a C. W. Dickieson, D-I-C-K-I-E-S-O-N, is the President of the Indiana Harbor Belt; that W. C. Jackson is the Secretary of the Indiana Harbor Belt; and that R. D. Kondan, K-O-N-D-A-N, is the Treasurer of the Indiana Harbor Belt. Each of those gentlemen is listed as being in the Executive Department at 2001 Market Street in Philadelphia with a Philadelphia address.

If I can approach, I would hand this up to Your Honor.

JUDGE LEVENTHAL: Have you seen this?

MR. HEALEY: As I say, it is a public listing that the IHB publishes.

MR. NORTON: Thank you, Your Honor.

MR. HEALEY: In light of that evidence, Judge, we think it's clear that Conrail cannot come before you and claim that they do not have the ability to get these documents from the Indiana Harbor Belt.



If control and the regulation provide it is to mean anything, I think we've clearly demonstrated it as to Conrail's control of the Indiana Harbor Belt, and we would respectfully request a ruling indicating that Conrail, in fact, for purposes of this proceeding does control the Indiana Harbor Belt.

JUDGE LEVENTHAL: Mr. Norton?

MR. NORTON: Your Honor, taking these piece by piece, the Winston case, we don't know anything about the record that was made in that case. And it related to, as I understood from opinion, a claim in an accident that took place back in the mid 1980s.

Whether the facts that bore on the proceeding in that case are currently the facts, there's nothing to indicate that. But the operations, I don't think there's anything in that opinion that really negates the fact that IHB is operated as a separate and independent entity with two closely divided owners and Conrail having a duty to exercise its 51 percent interest with due regard for the 49

percent interest of Soo.

The fact that there are some officers -- and it's unclear whether they're more than nominal officers -- who are Conrail officers again doesn't say anything. Of course, there are directors who are Conrail directors, and there are some Soo directors.

The operations of the IHB are under the day-to-day control and management of Mr. Allen, the General Manager out in Indiana, who is an IHB employee.

The fact that engine plans or insurance, property tax matters may be handled by agreement through Conrail because it would be more efficient to do it that way is an overhead element that IHB doesn't have to bear. It doesn't really add any pertinence to the question of control in this context; likewise, the location of the corporate seal or the articles of incorporation.

These are details that could be in Chicago. They could be in Hammond. They could even be in Philadelphia. It doesn't make any substantive difference in terms of the question that Your Honor

has to address about control.

As we have indicated in our brief, the relationships between these railroads is one of both end-to-end cooperators, as most railroads are, and also competitors in many disputes. They've had disputes that have gone to arbitration. They operate over trackage rights. It operates over IHB pursuant to trackage rights agreements, just as EJE and Wisconsin Central do, CSX and NS.

They're negotiated at arm's length. These railroads operate with substantial and undisputed indicia of separateness. And this is not simply a cat's paw or alter ego or anything like that.

I think Your Honor was quite correct in distinguishing this situation from the CSX-Indiana Road one that you dealt with earlier. There was an 89 percent interest. And there's no similar indication that the minority stockholder agreed with the position that Conrail should not be deemed to have the duty or the right to force IHB to respond to discovery.

IHB has certainly sufficient independence and has shown its ability to do that. And that is the

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proper way that these matters should be addressed.

The argument of a generic ruling is one that, Your Honor, frankly, I think is not the appropriate way to go. This is a substantial and important question. It is one that the usual principles of judicial autonomy and order of adjudication is that you don't decide those kinds of questions unless and until there's an unavoidable need to do so. And we're not at that point.

So it's a question of we have a pretty clear view of how it should be decided, but we don't think it's one that you have to or should reach because it may be taken away and because the parties can resolve the remaining issues. And that is the proper way to adjudicate these matters.

I don't know whether, Sam, you had anything you wanted to add.

JUDGE LEVENTHAL: Before we get to Mr. Mayo, Mr. Healey says that Conrail pays the salaries of the president, the vice president, the treasurer. Is that correct?

MR. NORTON: Well, they are Conrail



employees. So Conrail pays their salaries. They also have a second hat in that they are the nominal president, corporate secretary, and treasurer.

JUDGE LEVENTHAL: But if Conrail ordered them to produce documents in this case, wouldn't they be obligated to do so?

MR. NORTON: That is the issue, and that is what there is not a clear answer on. If it were something -- there could be certain steps that might have to be taken before Conrail could force IHB, even through a Conrail employee, to take action. And if that action were contrary to IHB's best interests, there would be a problem in doing so.

I think the fact that they are both a Conrail employee and an IHB officer does not resolve the question. And that is the form, rather than the substance. The substance is one of independence and separateness.

JUDGE LEVENTHAL: All right. Mr. Mayo?

MR. MAYO: Just to agree with that point, I think that if they in their capacity as Conrail employees were directed to respond to discovery

requests addressed to Conrail in circumstances where the information being requested was information from the IHB, I think that they cannot respond as Conrail employees to that kind of request.

I think they have to think of themselves as acting in the capacity as officers of a totally separate corporate entity, one of a different stock ownership and one that owes duties to Soo as a minority stockholder, and that they can't respond simply to directives from Conrail.

I think it's true that the IHB is operated independently of Conrail. You need to remember that the Canadian Pacific system, including its U.S. subsidiaries, the Delaware, Hudson, and Soo, compete with Conrail.

The IHB is a very important strategic asset in the Chicago area, important both to the CP and Conrail in their competitive operations with one another. And Soo insists that the property be operated with neutrality as between Conrail and Soo. And Conrail honors that insistence.

I think you can see that the independence

of the operation and the point that Conrail makes in that they are independent employees. The general manager, who is the day-to-day manager of the entity, the corporate officers that are identified are basically figureheads and don't feature in the operations of the company on a day-to-day basis.

It owns its own equipment. It has contracts with Soo, has contracts with Conrail. It has contracts with third parties. And it deals to the world as an independent entity, and appropriately so given the ownership of the company and the fact that Soo and the CP system itself can keep economy.

JUDGE LEVENTHAL: All right. Do you have anything further?

MR. HEALEY: Yes, just very quickly, Judge. I think the applicants are missing the point. The question under the control is not whether, in fact, the Indiana Harbor Belt owns its own locomotives, has its own general manager, and operates its own crew. Clearly they do. We're not disputing that.

Applicants would put us to a standard of

control of being an alter ego, of there being a concept of, if you will, piercing the corporate veil to determine that, in fact, they're one and the same. That's not the standard for control, Judge.

The case is made clear, the federal cases anyway, which discuss the same standard in Rule 34 of the Federal Rules and Civil Procedure, that it's simply the ability of the parent to be able to get the documents from the subsidiary that defines control.

That's what the issue is here, not whether Conrail allows the IHB to operate as an independent entity or whether they keep it more closely held. It's whether they have the ability, if you will, to perhaps use a trade phrase, the "benevolent dictator" is still a dictator, nonetheless, still has the power. Whether they exercise it or not is not the key to the inquiry on whether there is control or not. The question is whether they have the ability to do that, not whether they choose to do it or not.

Your Honor has also expressed some concern about the interests of the minority shareholder in this case: the CP-Soo. I think it's clear that CSX

also had minority shareholders who also had an interest in the Indiana Railroad.

CSX undoubtedly owned a higher percentage of the Indiana Railroad. It was in the '80s, as I recall. But there were still minority shareholders who had an interest. And that did not prevent Your Honor from ultimately ruling that, in fact, those materials had to be produced.

JUDGE LEVENTHAL: I think there's a difference, though, between a minority interest of 11 percent and a minority interest of 49 percent. In the prior proceeding, the Indiana Railroad was not represented by counsel. And the minority interest did not appear and support the objection to the discovery; whereas, here we do have a minority interest appearing.

Mr. Mayo says that Conrail would be receptive to their comments regarding release of highly confidential material. I think this situation is different.

I'm going to find that with respect to the generic issue, Conrail is not required to respond to



discovery of its subsidiary IHB. However, I note for the record that IHB is a party of record in this proceeding and would be required and is within my jurisdiction to order discovery.

I think the resolution of this dispute this morning -- I ruled on the first item with the financial information. I denied that. I reserved on the second set of interrogatories, which were read into the record this morning. And our agreement or the agreement of the parties before me this morning is I will have this conference tomorrow morning with respect to IHB.

Let's go off the record.

(Whereupon, the foregoing matter went off the record briefly at 10:52 a.m.)

JUDGE LEVENTHAL: Back on the record. In our off-the-record discussion, I think I merely repeated what I did say on the record. I think that IHB is subject to my jurisdiction in this case as a discovery judge. I trust that an amicable resolution of a dispute with regard to the discovery from IHB can be resolved between IHB and the movant here.

We don't have a formal motion with respect to IHB before me, but perhaps we can take care of this tomorrow morning if there isn't an amicable resolution.

Off the record again.

(Whereupon, the foregoing matter went off the record briefly at 10:53 a.m.)

JUDGE LEVENTHAL: Back on the record.

MR. NORTON: So there's no misunderstanding, IHB -- by not saying anything, obviously we can't commit or waive any rights IHB has with respect to whether there could be a motion against them when they haven't actually been formally served on any discovery.

JUDGE LEVENTHAL: You haven't stated any opinion on it one way or another, and it's not before me.

MR. NORTON: Right.

JUDGE LEVENTHAL: I expressed my opinion, but, of course, I didn't make a ruling. I only rule on motions. I don't --

MR. NORTON: I understand.

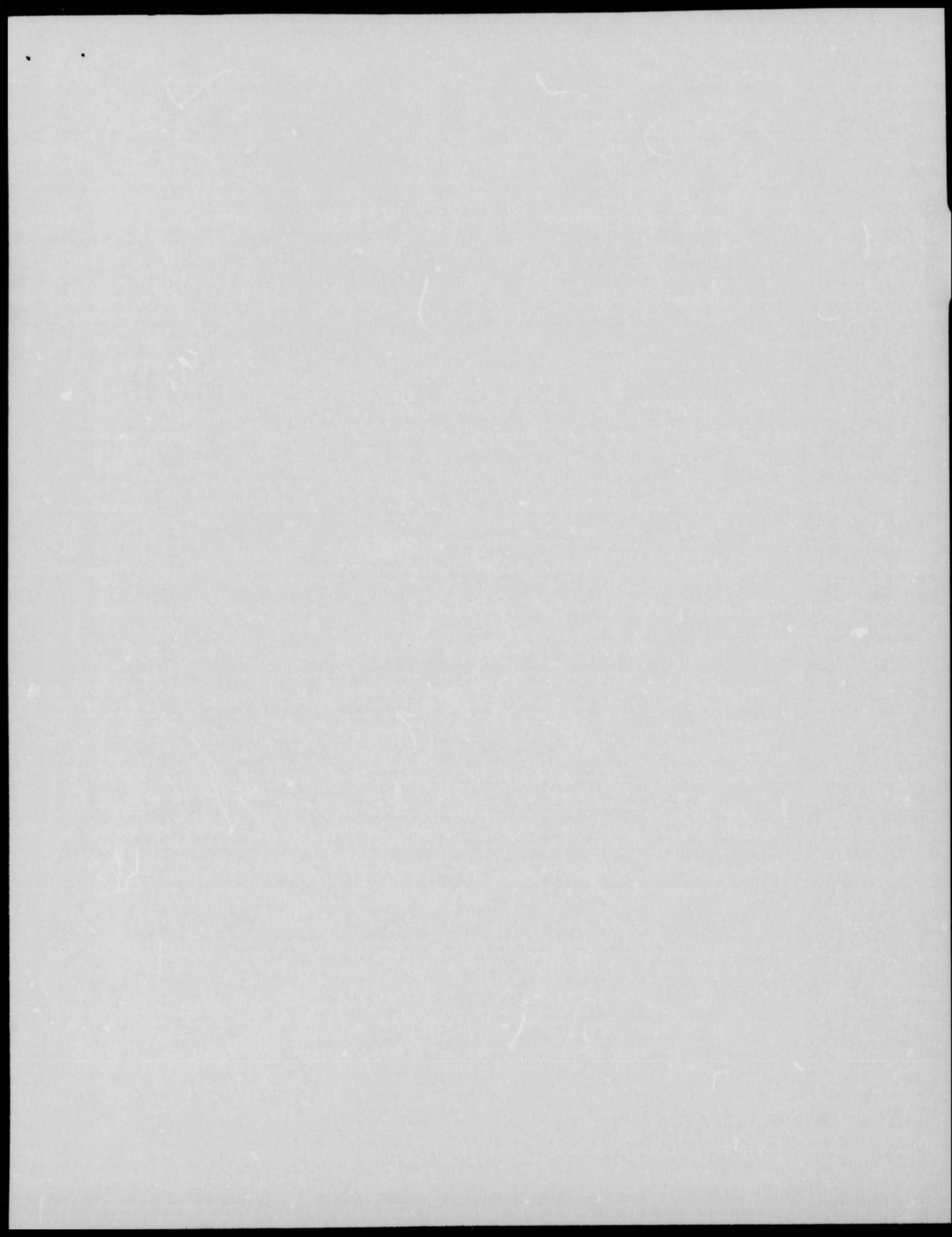
JUDGE LEVENTHAL: I'm not bound by any other silly statement I might make.

All right. Anything else before us this morning?

MR. HEALEY: No, not from me, Your Honor.

JUDGE LEVENTHAL: All right. The conference stands adjourned until tomorrow morning at 10:00 a.m.

(Whereupon, the foregoing matter was recessed at 10:54 a.m., to be reconvened on Friday, October 17, 1997 at 10:00 a.m.)



CSX/NS-99

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
-- CONTROL AND OPERATING LEASES/AGREEMENTS --  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION --

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APPLICANTS' INITIAL OBJECTIONS  
TO WISCONSIN CENTRAL'S THIRD  
SET OF REQUESTS TO PRODUCE DISCOVERY

CSX, NS, and Conrail,<sup>1</sup> collectively "Applicants," hereby assert their objections to the third set of discovery requests to Applicants served by Wisconsin Central Railroad Company ("WC" or "requester") (WC-7).

GENERAL OBJECTIONS

The following general objections are made with respect to all of the requests. Any additional specific objections are stated at the beginning of the response to each request.

1. Applicants object to production of, and are not producing, documents or information subject to the attorney-client privilege, the work product doctrine and/or the joint or common interest privilege.

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<sup>1</sup> "CSX" refers collectively to CSX Corporation and CSX Transportation, Inc.; "NS" refers collectively to Norfolk Southern Corporation and Norfolk Southern Railway Company; and "Conrail" refers collectively to Conrail Inc. and Consolidated Rail Corporation.



2. Applicants object to production of, and are not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other matter.

3. Applicants object to production of, and are not producing, public documents or information that is readily available, including but not limited to documents on public file at the Surface Transportation Board ("STB"), the Securities and Exchange Commission, or any other government agency or court, or that have appeared in newspapers or other public media.

4. Applicants object to the production of, and are not producing, draft verified statements and documents related thereto. In prior railroad consolidation proceedings, such documents have been treated by all parties as protected from production.

5. Applicants object to the production of, and are not producing, information or documents that are as readily obtainable by the requester from its own files.

6. Applicants object to the extent that the requests seek documents containing confidential or sensitive commercial information, including information subject to disclosure restrictions imposed in other proceedings or by contractual obligation to third parties, and that is of insufficient materiality to warrant production here even under a protective order.



7. Applicants object to Instructions 2-8 to the extent that they seek to impose requirements that exceed those specified in the applicable discovery rules and guidelines.

8. Applicants object to Definitions 1, 3-8 and Instructions 1-8 as unduly burdensome.

9. Applicants object to Instruction 3 of the requests to the extent it requests detailed information regarding otherwise responsive documents that fall within the scope of a privilege. Such detailed information is not necessary, and is unreasonably burdensome to provide. Such information was not required or provided in the most recent major control case, and no showing has been made here to warrant different treatment.

10. Applicants object to the requests to the extent they seek documents or information in a form not maintained by Applicants in the regular course of business or not readily available in the form requested, on the ground that such documents or information could only be developed, if at all, through unduly burdensome and oppressive special studies, which are not ordinarily required and which Applicants object to performing.

11. Applicants object to the requests as overbroad and unduly burdensome to the extent that they seek information or documents for periods prior to January 1, 1995.

12. CSX, NS and Conrail each object to any requests that seek information regarding current or future operations on, or any other plans or activities relating to, or employment on,

rail lines or properties other than those that each of them currently owns or operates, or with respect to future operations, Conrail line segments that CSX or NS, respectively, will operate at the relevant future time. The best source of information with respect to such matters is the rail carrier that owns or operates the line or property in question, or will do so at the relevant future time.

13. Applicants object to the requests insofar as they seek "all documents relating to" the matters specified, as overbroad and unduly burdensome.

14. Applicants object to the requests because they are duplicative of requests served by one or more other parties.

Requests for Production

Request No. 1:

Please produce 100% traffic tapes for IHB.

Response:

Request Nos. 1-8 are objectionable in toto. They call for Applicants to produce documents in far-reaching categories, concerning a wide range of information of Indiana Harbor Belt Railroad ("IHB"), most of which documents would likely be in the possession, custody and control of IHB itself, which is not an Applicant in this proceeding.

To the extent that the requests call upon Applicants to cause IHB to conduct a search for and to produce such documents they are further objectionable. The stock of IHB is owned 51% by Conrail and 49% by Soo Line Railroad, a subsidiary of Canadian

Pacific Railway Co. (collectively "CP/Soo"), competitors of Applicants who are actively participating in this proceeding. IHB's day-to-day operations are not controlled by Conrail, but by its independent management, with obligations to both stockholders, Conrail and CP/Soo. A corporation is ordinarily not required to exercise dominion over its corporate affiliates, by requiring production of documents in their possession, custody or control, or by requiring their employees to appear as witnesses, unless it is shown to exercise day-to-day control over their operations. This is especially so in a context where the corporation has a bare majority stock interest and an independent party with divergent interest owns the balance, as here. Nothing about this proceeding or the request warrants a different rule here.

Request No. 2:

Please produce density charts for all rail lines owned or operated by IHB. To the extent that such documents do not currently exist, please produce documents from which Applicants believe such information could be most easily determined.

Response:

See objection to Request No. 1.

Request No. 3:

Please produce IHB's current timetable.

Response:

See objection to Request No. 1.

Request No. 4:

Please produce all current slow orders for IHB.

Response:

See objection to Request No. 1.

Request No. 5:

Please produce documents sufficient to identify the track speeds for all rail line segments owned or operated by IHB.

Response:

See objection to Request No. 1.

Request No. 6:

Please produce documents sufficient to identify the current capacity and configuration of, and all rail connections to, each rail yard owned or operated by IHB.

Response:

See objection to Request No. 1.

Request No. 7:

Please produce all documents sufficient to identify the type of signal system utilized on each rail line segment owned or operated by IHB.

Response:

See objection to Request No. 1.

Request No. 8:


Please produce all contracts currently in effect between IHB and any rail shipper.

Response:

See objection to Request No. 1.

Respectfully submitted,

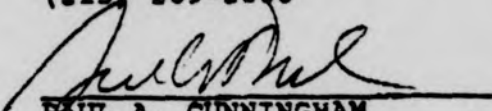
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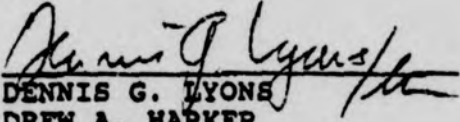
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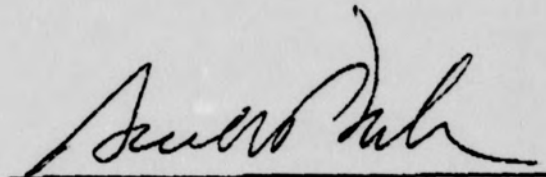
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and CSX Transportation, Inc.

October 9, 1997



CERTIFICATE OF SERVICE

I, Gerald P. Norton, certify that, on this 9th day of October, 1997, I caused a copy of the foregoing document to be served by overnight mail and/or facsimile on William C. Sippel of Oppenheimer, Wolff & Donnelly at Two Prudential Plaza, 45th Floor, 180 North Stetson Avenue, Chicago, Illinois 60601, counsel for Wisconsin Central Ltd., and by first class mail, postage prepaid, or by a more expeditious manner of delivery on all parties appearing on the restricted service list established pursuant to paragraph 3 of the Discovery Guidelines in Finance Docket No. 33388.

A handwritten signature in dark ink, appearing to read "Gerald P. Norton", is written over a horizontal line.

Gerald P. Norton

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of October, 1997, a copy of the foregoing **Appeal of Transtar, Inc., Elgin, Joliet and Eastern Railway Company and Wisconsin Central Ltd.** (EJE-11/WC-11) was served by overnight delivery upon:

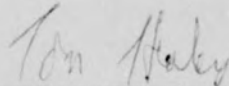
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and by first class mail, postage prepaid, without exhibits upon all designated parties of record in this proceeding.



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Thomas J. Healey