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DISCOVERY CONFERENCE

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

Finance Docket  
No. 33388

Friday,  
January 9, 1998

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 12:00 p.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL  
Administrative Law Judge

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APPEARANCES:On Behalf of Conrail:

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On Behalf of Elgin, Joliet & Eastern Railway  
Company; Transtar, Inc.; and I & M Rail Link:

THOMAS J. HEALEY, JR., ESQ.  
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P-R-O-C-E-E-D-I-N-G-S

(12:22 p.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. I'd like short appearances, please. Mr. Healey?

MR. HEALEY: Mr. Tom Healey, H-E-A-L-E-Y, on behalf of Elgin, Joliet and Eastern Railway; for Transtar, Inc.; and I & M Rail Link.

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

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

JUDGE LEVENTHAL: All right. When we left off yesterday, I think there were -- did we resolve the Document Request Number 2? I don't have the transcript.

MR. NORTON: No. Two and 3 there were --

JUDGE LEVENTHAL: Together. All right.

MR. NORTON: They're tied together.

JUDGE LEVENTHAL: And the proposition on Number 2 was that it was going to be limited to a head count of the industries. Is that correct?

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1 MR. HEALEY: I was going to identify the  
2 industries. And we were limited from January 1, '97.

3 JUDGE LEVENTHAL: Now, how about Number 3?  
4 Mr. Norton, you were to take up a proposition with  
5 your clients with respect to --

6 MR. NORTON: Well, actually, both 2 and 3  
7 were kind of interrelated.

8 JUDGE LEVENTHAL: Yes.

9 MR. NORTON: Perhaps what I should do is  
10 report what's happened since. And then I think I can  
11 outline a proposal that we would offer.

12 Mr. Healey reported back, identifying  
13 those companies on the original list of 24 where his  
14 people had reason to believe that Conrail had served  
15 them within the past year. And it turns out to be a  
16 distinct minority of the full list. So our concern  
17 about blind alleys is confounded.

18 I pass that information on. And, as I  
19 told him this morning, we really need identification  
20 of the locations that they're talking about.  
21 Apparently these are shippers that they've identified  
22 in northern Indiana. But for a number of them,

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1 they're very big companies, like Amoco, DuPont, Inland  
2 Steel. They have a number of facilities that we may  
3 serve.

4 And the way our information is set up, you  
5 have to know the facility. The most effective way to  
6 answer these questions is to be able to identify the  
7 facility and then determine information about the bids  
8 to that facility.

9 And so I asked Mr. Healey if he could  
10 follow up and give us locations that correspond to  
11 those shippers.

12 MR. HEALEY: We're in the process of doing  
13 that, Judge. Just as a point of clarification, the  
14 names that I gave you this morning were the first cut  
15 from the director of marketing, he was going to check  
16 with his staff to see if there were any others, but  
17 that was his understanding of the eight facilities  
18 that Conrail --

19 MR. NORTON: Yes.

20 MR. HEALEY: But we are undertaking to  
21 identify the exact plant locations by city or perhaps  
22 name of the plant.

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1 JUDGE LEVENTHAL: And that will resolve  
2 the issue or will it?

3 MR. NORTON: Well, I'll come to that in a  
4 minute because there are a couple of other points.  
5 One of the companies was identified as Pollution  
6 Control. we need to know whether that is the same as  
7 U.S. Pollution Control, which is the identification  
8 that we have.

9 And another company, Eaglebrook, we  
10 haven't been able to identify anything, a commodity.  
11 The location may help, but the commodity may also help  
12 our people.

13 MR. HEALEY: We'll be willing to do that,  
14 Your Honor.

15 MR. NORTON: Now, on this basis, what we  
16 would propose to do is we would go to our marketing  
17 officials responsible for the commodities involved in  
18 the locations that are identified and identify bids  
19 made in 1997 to the list of companies at the location  
20 where the contracts have been awarded and also then  
21 identified whether IHB or EJE was included in the bid.

22 Now, on the study on the same course of

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1 the same search, we would kind of identify any  
2 discrete studies that compare EJE and IHB on aspects  
3 other than cost, which we talked about yesterday.

4 And I would suggest also that, for the  
5 same reasons, we would exclude comparisons on there  
6 that would otherwise reflect terms of particular bids  
7 that would be confidential. And if that is  
8 acceptable, we would be prepared to agree to that.

9 JUDGE LEVENTHAL: That's in the same  
10 period as Number 2?

11 MR. NORTON: I'm sorry. Number 3,  
12 yesterday we limited that to the last six months.

13 JUDGE LEVENTHAL: All right. Mr. Healey?

14 MR. HEALEY: Judge, I have two concerns.  
15 And maybe it's just more explanation than anything  
16 else. I think you phrased it "discrete studies." I'm  
17 not sure I know what you mean by "discrete studies."

18 MR. NORTON: Well, I mean the -- I guess  
19 it could be a range of documents. If someone  
20 scribbles down a price, a quote from one and a quote  
21 from the other, and it's somewhere in the bid file, I  
22 don't regard that as a study or the kind of comparison

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1 that we would readily know about and be expected to  
2 try to track down.

3 MR. HEALEY: Well, it focuses on cost as  
4 well. So that --

5 MR. NORTON: Well, all right. And it's  
6 something of that nature, as opposed to something that  
7 is a more focused analysis or comparison of the two.

8 JUDGE LEVENTHAL: Well, that's what the  
9 documented price had asked for, a comparison. So if  
10 there is no comparison, well, there isn't it; correct?

11 MR. HEALEY: I think the issue he's  
12 raising is a question of how formal, if you will, the  
13 study has to be. That's at least what I'm gathering  
14 from --

15 MR. NORTON: Right. This goes to the  
16 difficulties of trying to identify documents that  
17 would be responsive in the limited time that's  
18 available.

19 The people, the marketing people, we would  
20 be working with would be more likely to know about  
21 something in the nature of a study of some substance  
22 of that nature; whereas, to find anything that might

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1 be in the bid file that might be comparing the two in  
2 some respect, you have to really go search all of  
3 those bid files. And that's just feasible or  
4 realistic or reasonable within the context of this  
5 discovery request.

6 So that's the distinction we're trying to  
7 draw.

8 MR. HEALEY: Well, Judge, we are only  
9 talking about what appears to be eight facilities. We  
10 are only talking about materials that would have been  
11 generated in the past six months. I fail to see how  
12 burdensome that could be.

13 You know, we're talking about discrete  
14 studies, which to me I've got this image of a  
15 blue-covered thing with red rope binding and so on and  
16 maybe the official signature in front.

17 The request is broader than that. And,  
18 unfortunately, the more information we can get as to  
19 why Conrail would use IHB as being the better  
20 competitive option than the EJ&E, the better off  
21 everybody is going to be.

22 So if we elevate what is responsive to a

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1 level of being some sort of a formal study --

2 MR. NORTON: I don't want to get hung up  
3 on the terminology of "formal" versus something else.  
4 Let me go back. If we go to the marketing people who  
5 would know about such things and ask them if they're  
6 aware of anything and not whether there's a separate  
7 booklet or memorandum or piece of paper or however the  
8 form may be, if they're aware of it, then that would  
9 be something we would be producing.

10 But if there's something that they're not  
11 aware of but it may be lurking in the files, we're not  
12 going to have to go through all the files to --

13 MR. HEALEY: That was what I was gathering  
14 from that you were saying, that you were trying to  
15 avoid the process of going through the file. We're  
16 only talking about eight plants.

17 MR. NORTON: Well, we're talking about  
18 everything on Conrail's system.

19 MR. HEALEY: On one of those companies  
20 alone, we came up with two dozen bids. Now, I don't  
21 know to what extent they're facilities in this  
22 location, but that's just one alone. For the number,

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1 we don't even know for the possible -- for any of them  
2 how many are going to be involved.

3 JUDGE LEVENTHAL: Mr. Norton, isn't this  
4 all on a computer?

5 MR. NORTON: No.

6 MR. HEALEY: Your Honor, I think the  
7 materials from my understanding of railroad marketing  
8 departments, the things we would be looking for  
9 probably wouldn't be on a computer. They might be.  
10 But more likely than not, they'd simply be the notes  
11 of a marketing representative as to service problems  
12 with one or the other.

13 JUDGE LEVENTHAL: And where would these  
14 notes be? Are they in one file by plant name or  
15 location or --

16 MR. NORTON: Based on the experience, I  
17 would hesitate to generalize. We're talking about all  
18 commodities essentially. Different business groups  
19 will be set up in different ways. And it's very hard  
20 to speak categorically about that.

21 Another thought has occurred to me,  
22 though, which is that we don't know how many we're

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1 going to be talking about. If we could agree to a  
2 number of bids, that would end all of it because we  
3 don't know what the number is but still a reasonable  
4 number. And you could work out how it is selected,  
5 which bids get reviewed in terms of whether there are  
6 such studies.

7 That might be a way to do it as sort of a  
8 sampling process. You get some choice over what we  
9 look into. Then there's no concern that it's going to  
10 be --

11 MR. HEALEY: I actually think that may be  
12 a productive suggestion. What I'd propose we do,  
13 then, to answer Number 3 is this. You ask them if  
14 they're aware of any what you call discrete studies as  
15 to all of the plants that we believe Conrail moves  
16 traffic into. And then if you want to undertake to  
17 actually look for the more informal notes?

18 And what I would propose to you is we take  
19 two of those facilities. And one of them should be --  
20 I think it's the Inland plant that we say Conrail  
21 works with us because IHB can't physically do what the  
22 customer needs done. And so we'd be most interested

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1 obviously in anything that Conrail would have to say  
2 comparing service and ability of EJ&E and IHB at that  
3 facility.

4 Then if we selected another large shipper  
5 to compare them to and look through that to see if  
6 there were any similar materials, I do think that  
7 would be acceptable.

8 By the way, as long as we're on the  
9 record, I think I had an incorrect citation yesterday.  
10 I think on the record I said that the list was  
11 contained in EJ&E 15. It's actually EJ&E 13.

12 JUDGE LEVENTHAL: Very well.

13 MR. NORTON: Well, Amoco is a big shipper.

14 MR. HEALEY: Why don't we do that?

15 MR. NORTON: Well, the files, as I  
16 understand it, are related to the bids. So I'm not  
17 sure the size of the shipper makes sense.

18 MR. HEALEY: Well, just assuming that  
19 there's going to be more material to review for a  
20 bigger shipper. So you're more likely to find  
21 something to compare the services.

22 I mean, some of these smaller shippers,

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1 like Eaglebrook, which you can't even identify, if you  
2 can't find it, the odds for being a comparison of the  
3 service are not going to be very good; whereas, we  
4 obviously know Amoco is over there in the chemical  
5 corridor.

6 MR. NORTON: We can't undertake to search  
7 all of the files for all Amoco bids.

8 MR. HEALEY: Well, if they're kept by just  
9 bid and we're only talking about for this purpose  
10 reviewing the bids for the six-month period, how many  
11 things can there be?

12 I mean, we're talking about an original  
13 request to look for these comparison materials for two  
14 dozen shippers since 1990. I'm willing to limit it  
15 for the comparison materials to six months. And we're  
16 willing to identify for you which ones we think  
17 Conrail moves it to.

18 And now I'm willing to cut down on the  
19 informal materials found in two shippers of my  
20 selection.

21 JUDGE LEVENTHAL: It seems reasonable.

22 MR. NORTON: Yes. I was going to just

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1 suggest maybe if we could limit it to sort of half of  
2 whatever the number is or --

3 JUDGE LEVENTHAL: Well, the problem is Mr.  
4 Healey doesn't know what the number is. Now, if he  
5 had a number, say, 100, you might be able to talk  
6 about it. But he doesn't know whether it's 100 or 10.  
7 If you cut it in half, if it's ten, you're only giving  
8 him five, which may or may not be useful to him.

9 Is that right?

10 MR. HEALEY: That's correct. I mean,  
11 again, I'm trying to be reasonable because I  
12 understand the constraints of trying to locate the  
13 information. But at the same time, we can't narrow  
14 this down so much that I don't get any information.

15 JUDGE LEVENTHAL: I think it's a very  
16 reasonable offer.

17 MR. NORTON: Your Honor, if I could make  
18 a phone call, I think it would be helpful.

19 JUDGE LEVENTHAL: All right.

20 MR. HEALEY: And I would suggest when we  
21 go off the record, I do, too, and I can start seeing  
22 if they've located some of the plants.



1 JUDGE LEVENTHAL: All right.

2 MR. NORTON: Okay. Thank you.

3 JUDGE LEVENTHAL: Stand in recess.

4 MR. HEALEY: Thank you, Judge.

5 (Whereupon, the foregoing matter went off  
6 the record at 12:39 p.m. and went back on  
7 the record at 12:55 p.m.)

8 JUDGE LEVENTHAL: Back on the record.

9 MR. NORTON: The proposal that I outlined  
10 before as modified by Mr. Healey's request to include  
11 a search under Number 3 of the Inland Steel and Amoco  
12 files of bids to those facilities, that would be  
13 acceptable.

14 JUDGE LEVENTHAL: All right.

15 MR. HEALEY: And that's acceptable to me.

16 JUDGE LEVENTHAL: Very well. All right.

17 That disposes of --

18 MR. NORTON: And I've indicated to Mr.  
19 Healey that we need location information ASAP in order  
20 to be able to proceed. And I think realistically  
21 we're talking about Tuesday morning.

22 MR. HEALEY: Go off the record?

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1 JUDGE LEVENTHAL: Go off the record.

2 (Whereupon, the foregoing matter went off  
3 the record at 12:56 p.m. and went back on  
4 the record at 12:57 p.m.)

5 JUDGE LEVENTHAL: The parties have also  
6 agreed that the information would be furnished by  
7 Tuesday, January 13th by noon. All right. That  
8 disposes of our --

9 MR. HEALEY: Thank you, Your Honor.

10 JUDGE LEVENTHAL: The conference stands  
11 closed.

12 (Whereupon, the foregoing matter was  
13 concluded at 12:57 p.m.)  
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