

SURFACE TRANSPORTATION BOARD 02/05/98 FD #33388 1-29

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

Finance Docket
No. 33388

Thursday,
February 5, 1998

Washington, D.C.

The above-entitled matter came on for a
oral argument in Hearing Room 7 of the Federal
Energy Regulatory Commission, 888 First Street, N.E.
at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

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On Behalf of Wisconsin Central, Ltd.; Illinois
Central Railroad Co.; Elgin, Joliet & Eastern Railway
Co., Transal, Inc.; and I & M Rail Link, L.L.C.:

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

(9:35 a.m.)

JUDGE LEVENTHAL: The discovery conference will come to order. This is a discovery conference on the motion of APL, which I take it has not been resolved, to compel discovery, and a motion filed by Telstar, et al. to compel. We'll take appearances at this time.

MR. GITOMER: Louis Gitomer of Ball Janik appearing on behalf of APL, Limited.

MR. HEALEY: Thomas Healey of Oppenheimer, Wolff & Donnelly (Illinois) on behalf of Wisconsin Central, Limited, Illinois Central Railroad Company, Elgin, Joliet and Eastern Railway Company, Transtar, Inc., and I&M Rail Link, L.L.C.

JUDGE LEVENTHAL: You have a good memory, Mr. Healey.

(Laughter.)

MR. HEALEY: Thank you, Judge.

JUDGE LEVENTHAL: All right. Respondents?

MR. HARKER: Drew Harker with Arnold & Porter on behalf of CSX.

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1 MS. BRUCE: Good morning. Patricia Bruce,
2 Zuckert, Scoutt & Rasenberger on behalf of Norfolk
3 Southern.

4 JUDGE LEVENTHAL: Isn't Conrail involved
5 this morning?

6 MS. BRUCE: Your Honor, I'm sure Mr.
7 Norton -- he said he was coming. He must have gotten
8 delayed.

9 JUDGE LEVENTHAL: Shall we wait for him?

10 MR. GITOMER: Your Honor, I'm attempting
11 to get to Mr. Jenkins' deposition this morning, which
12 is scheduled to begin at 10:00 a.m.

13 JUDGE LEVENTHAL: Well, we have plenty of
14 time.

15 MR. GITOMER: Thank you, Your Honor.

16 JUDGE LEVENTHAL: Does your motion include
17 Conrail, Mr. Gitomer?

18 MR. GITOMER: Yes, it does, Your Honor.
19 Conrail is part of the applicant.

20 MR. HARKER: Did you file the paper for
21 today's conference?

22 MR. GITOMER: No. We continued from last

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1 week.

2 MR. HARKER: Okay. I just wanted to --

3 JUDGE LEVENTHAL: We continued from
4 last --

5 MR. HARKER: I understand, Your Honor. I
6 just wanted to be sure there was no new filing in
7 connection with today's hearing. You will recall,
8 Your Honor, that last we --

9 JUDGE LEVENTHAL: One minute. Let's go
10 off the record.

11 (Whereupon, the proceedings in the
12 foregoing matter went off the record at
13 9:37 a.m. and went back on the record at
14 9:40 a.m.)

15 JUDGE LEVENTHAL: Do you want to enter
16 your appearance, Mr. Norton?

17 MR. NORTON: Gerald Norton, Harkins
18 Cunningham, for Conrail.

19 JUDGE LEVENTHAL: All right. We'll take
20 the APL motion first. The APL motion is continued
21 from last week. During the course of the discussion
22 last week and on the transcript, Mr. Gitomer agreed

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1 that if the Commission affirmed my prior rulings that
2 were on appeal before it, he would withdraw his
3 motion. Evidently, it has had a change of heart.

4 (Laughter.)

5 MR. GITOMER: Your Honor, I believe I said
6 if the Board was clear in upholding the rulings. I
7 think the Board did lose some, and I would like to try
8 and take advantage of that. They did state that you
9 were being upheld on your rulings of January. The
10 Board also stated that you had been delegated great
11 discretion in discovery matters and, further, that
12 they felt that your decision to allow some
13 circumscribed discovery of rebuttal witnesses was
14 correct. APL believes that it is seeking
15 circumscribed discovery of certain rebuttal witnesses.

16 JUDGE LEVENTHAL: All right.

17 MR. GITOMER: Additional information has
18 come to light that there has been a list of the
19 expiration dates of Conrail transportation contracts
20 provided to applicants CSX and Norfolk Southern by
21 Conrail. And APL believes that that list with just
22 those dates would satisfy its discovery.

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1 Thank you, Your Honor.

2 JUDGE LEVENTHAL: Mr. Norton?

3 MR. NORTON: Well, I'm a little puzzled
4 about how we've -- you know, here last time said
5 interrogatories and document requests. That's what
6 you ruled on provisionally. That's the issue that the
7 Board squarely upheld you on in saying that it had no
8 right to discovery at all with respect to documents
9 and interrogatories. And that's all there is. There
10 is no deposition request that has been served as to
11 Conrail or any other party concerning those documents.

12 So any other issue about what might be
13 obtainable through a deposition simply isn't before
14 you. It hasn't been raised, it hasn't been briefed
15 and addressed, and I'm not quite sure --

16 JUDGE LEVENTHAL: Mr. Gitomer has narrowed
17 his request very substantially. Would you consider
18 voluntarily supplying this list, which he says you
19 have already supplied to the other applicants?

20 MR. NORTON: Well, Your Honor, I think you
21 have to take a step back. One thing the Board has
22 made perfectly clear is that parties cannot submit new

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1 evidence at this point. So there is nothing he can do
2 with it. Even if -- assuming there is such a list,
3 and assuming that it's relevant, and it meets all of
4 the other criteria for discovery, relevant to what?

5 He has no further filing that he could
6 make. He can't file, so it's not relevant -- it's not
7 discovery in the aid of a further filing. He can't
8 file the document itself. The Board, in its Decisions
9 64 and 65 I think, again made clear that no evidence
10 can be filed with the brief. The only thing that can
11 be filed with a brief is a transcript of testimony at
12 a deposition of a rebuttal witness, and this isn't
13 that. So I think legally that's where we stand.

14 JUDGE LEVENTHAL: All right.

15 MR. NORTON: And I think -- and if we --
16 I mentioned the relevance point. And I talked a
17 little bit about this last week. But let's assume
18 that there is some kind of a list that has some kind
19 of aggregate information about number of contracts and
20 some information about when they expire. What does
21 that tell you, and to what end?

22 If you go back to Mr. Gitomer's argument

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1 and his motion last week, the stated purpose of this
2 discovery was to establish and confirm his supposition
3 that the provisions of the agreement relating to the
4 implementation of Section 2C of the transaction
5 agreement, which has a mechanism for dealing with the
6 allocation of Conrail contracts that are in existence
7 at a point in the future when the implementation is
8 closed -- the closing date, is not sufficient.

9 Now, this is not an issue that arises with
10 respect to APL because their contract is acknowledged.
11 It will not have expired, so it will be subject to
12 this provision, and he has no need for discovery to
13 address the issues that he would like on that basis.

14 He is trying to show that this won't have
15 much beneficial impact because the contracts that
16 Conrail had in December will have expired, and there
17 will be a shrinking pool of contracts with which to
18 cover. As I explained last week, that is taking a
19 static look at the situation. And as contracts come
20 up for expiration, something happens. They get
21 renewed in accordance with their terms. They get
22 extended.

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1 They get replaced by a new contract
2 because the business continues. And Conrail is
3 continuing to do business with these shippers pursuant
4 to contract. And if wasn't contract A that was in
5 effect in December, then when this provision takes
6 effect sometime in -- whether it's later in '98 or
7 sometime in '99, there will be some other contract in
8 effect, and the provisions will apply to that
9 contract.

10 So these numbers -- taking a snapshot at
11 a certain point in time -- don't tell you any
12 information that is relevant or useful in making the
13 argument that he is trying to make. And that is, I
14 think, a threshold problem he has, given the fact that
15 he doesn't have any right for discovery at all, and
16 the information is also confidential. So that's --

17 JUDGE LEVENTHAL: All right. Mr. Gitomer?

18 MR. GITOMER: Your Honor --

19 JUDGE LEVENTHAL: I tried my best to do
20 something for you, but --

21 MR. GITOMER: Thank you, Your Honor. APL
22 does have a deposition scheduled on Monday with Mr.

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1 Rutski of CSX. We certainly could use this
2 information as part of our questioning of Mr. Rutski.
3 And APL may schedule further depositions, although our
4 time is running out, but we may well. And this
5 information may well be useful.

6 Thank you.

7 JUDGE LEVENTHAL: All right. I find that
8 the rulings of the Board in Decision Number 64 and
9 Number 65 are controlling. They clearly hold that
10 further -- that in deposition, further written
11 discovery by commenters are not required. I'm going
12 to deny the motion of APL.

13 Off the record.

14 (Whereupon, the proceedings in the
15 foregoing matter went off the record
16 briefly at 9:45 a.m.)

17 MR. GITOMER: Your Honor, may I excuse
18 myself for the remainder of the hearing?

19 JUDGE LEVENTHAL: Yes, sure.

20 MR. GITOMER: Thank you.

21 JUDGE LEVENTHAL: All right. Now we have
22 before us the motion of Transtar, Inc., Elgin, Joliet

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1 and Eastern Railway Company, I&M Rail Link, L.L.C.,
2 Wisconsin Central, Limited, and Illinois Central
3 Railroad Company.

4 Mr. Healey, you -- well, let me say I have
5 the motion filed by Mr. Healey, and I have the answer
6 filed -- the opposition filed by the applicants.

7 Off the record.

8 (Whereupon, the proceedings in the
9 foregoing matter went off the record at
10 9:45 a.m. and went back on the record at
11 9:47 a.m.)

12 JUDGE LEVENTHAL: Mr. Healey, I have the
13 applicants' answer, and they seem to address each one
14 of your -- each part of your motion.

15 MR. HEALEY: Yes, they do, Your Honor.
16 That's correct.

17 JUDGE LEVENTHAL: You're still pushing
18 your motion?

19 MR. HEALEY: I am still pushing the
20 motion, portions of it, Judge. I think portions have
21 been resolved by Mr. Harker's letter.

22 JUDGE LEVENTHAL: All right. What do you

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1 have?

2 MR. HEALEY: Specifically, the first issue
3 -- and very briefly for the record, Mr. Orrison had
4 stated in his revised -- or rebuttal verified
5 statement rather -- a measure of time for Illinois
6 Central trains moving on a piece of CSX track. He
7 said that it was taken from documents included with
8 his statement. We didn't find it there. During his
9 deposition he said, "Oh, I think it's in my work
10 papers." We looked through the work papers and didn't
11 find it.

12 We have asked the applicants to provide us
13 with the backup data for the assessment of the time,
14 or to come in and through errata change Mr. Orrison's
15 rebuttal verified statement to remove the measure of
16 time. It would appear that the applicants are
17 agreeable to doing one of those two things. If
18 they're unable to find a measure of time, then there
19 will be appropriate errata filed.

20 Mr. Harker's associate -- that will be
21 done well before February 23, 1998. We're agreeable
22 with that resolution.

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1 JUDGE LEVENTHAL: All right. Very well.

2 MR. HEALEY: The second issue we raise in
3 our motion, Judge, is not resolved by Mr. Harker's
4 letter of February 4th.

5 Very, very briefly, the issue that we
6 raise in point number 2 on behalf of the Wisconsin
7 Central, Limited, is two charts. The charts were
8 prepared by Wisconsin Central, Limited from data
9 provided by CSX. We have been before Your Honor to
10 compel the production of certain data relating to the
11 movement of cars and switching by the BNOCT, which is
12 one of the three intermediate switch carriers in
13 Chicago.

14 Your Honor agreed with us. The applicants
15 produced the data. We selected randomly two months
16 from the data and prepared the charts. There is no
17 dispute that the data underlying the charts is highly
18 confidential. That was the designation given to it by
19 the applicants, and more particularly CSX.

20 For purposes of this motion, we're not
21 disputing that the underlying data contained on those
22 pages was highly confidential. In submitting the

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1 chart to the Board, we maintained the highly
2 confidential designation, because we had gotten the
3 information and gleaned it from highly confidential
4 sources.

5 Those sources, however, were highly
6 confidential not because of the data that is contained
7 on this chart. The sources contained rate
8 information. They contained point-specific
9 information as to the origin and destinations of
10 traffic that would allow someone looking at the data
11 to determine who the shippers were of the traffic.

12 We believe that the data, as aggregated on
13 these charts, is sufficiently aggregated, that there
14 is no confidential information contained anywhere on
15 the chart. What the charts reflect is for two months
16 taken in the year 1995, the number of rail cars moved
17 by the BNOCT in intermediate switching for the various
18 railroads listed down the left-hand column, and what
19 we were seeking to assess in the chart is how many of
20 those movements involved cars going either to or from
21 CSX. That's what the data contains there on the
22 charts.

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1 I don't see any possibility that the data
2 is commercially sensitive in any sense. It merely
3 lists the number of cars that were moved. A party
4 could stand on the roadside by the point of
5 interchange and count the number of cars moving in
6 interchange, or that the BNOCT picks up from the Santa
7 Fe or BRC, etcetera, etcetera, etcetera. There is
8 nothing confidential about the data. The data on the
9 charts should be classified as public.

10 JUDGE LEVENTHAL: Well, the applicants are
11 willing to reclassify it from highly confidential to
12 confidential. Doesn't that satisfy you?

13 MR. HEALEY: It doesn't, Judge, and there
14 is two reasons.

15 JUDGE LEVENTHAL: I'm sorry. I didn't
16 hear.

17 MR. HEALEY: It does not.

18 JUDGE LEVENTHAL: All right.

19 MR. HEALEY: It does not, and there are
20 two reasons that it does not. One, by maintaining a
21 highly confidential -- or, excuse me, by maintaining
22 a confidential designation in the data, that would

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1 prohibit the Board from referencing the numbers on
2 this chart in their final decision.

3 In fact, you're hamstringing the Board in
4 rendering its decision. The Board gets the data.

5 JUDGE LEVENTHAL: Well, wait a minute.

6 MR. HEALEY: Yes.

7 JUDGE LEVENTHAL: Why is it hamstringing
8 the Board?

9 MR. HEALEY: Because --

10 JUDGE LEVENTHAL: The Board can issue a
11 confidential decision and delete this from the public
12 decision. I don't know if the Board has done it, but
13 the process is --

14 MR. HEALEY: By my understanding, that
15 would be unprecedented in ICC or STB --

16 JUDGE LEVENTHAL: Well, there's no reason
17 why they can't do it. I assume they haven't done it
18 because they didn't find it necessary.

19 MR. HEALEY: Judge, given the number of
20 matters decided by the Interstate Commerce Commission
21 over 100-and-some years, I would find it hard to
22 believe that this would be the first time that

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1 confidential information was ever needed in order for
2 the Board to render its decision.

3 JUDGE LEVENTHAL: Have you researched it?

4 MR. HEALEY: Judge, no. I will put on the
5 record that I have not read each and every decision
6 ever issued by the Interstate Commerce Commission. I
7 will concede that point.

8 However, in my practice before the
9 Interstate Commerce Commission, and now the Surface
10 Transportation Board, I am not familiar with any time
11 when the Board has issued an opinion which included
12 confidential data redacted from a public --

13 JUDGE LEVENTHAL: Also, I use them all the
14 time in our work here at FERC, writing a decision
15 without referring to confidential material, although
16 you've considered it, and I don't see why the Board
17 can't do that.

18 MR. HEALEY: That certainly is possible.
19 Again, the issue is not whether the Board has this or
20 whether the Board can incorporate it into their
21 reasoning. It's simply whether the decision will
22 include this information.

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1 Furthermore, I think it's pretty clear
2 that any party seeking to keep information from the
3 public ought to have some reason why the information
4 should be deemed commercially sensitive or
5 proprietary. I don't see any reason here for this
6 information to be considered that.

7 And finally, I also think that the public
8 has a right to know.

9 JUDGE LEVENTHAL: Well, unless the author
10 has cited to me the Board's ruling in a similar -- in
11 a similar request, where they resolve any doubts as to
12 the need for confidentiality in favor of protecting
13 the asserted confidentiality, unless the opposing
14 party can show that the removal of the designation is
15 necessary for it to make its case, to argue an appeal
16 adequately, or to satisfy a statutory goal. So it
17 would seem to me that the Board puts the burden on the
18 party seeking to remove confidentiality.

19 But having said that, let me hear from Mr.
20 Harker. Are you willing to concede to Mr. Healey's
21 request at this time? Is there any reason not to make
22 this public?

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1 MR. HARKER: Yes, there is, Your Honor.
2 The information that is on here, on the chart, while
3 it's not highly confidential, remains confidential and
4 proprietary information. This is not the kind of
5 information that is generally released by the company.
6 It gives car counts, both with respect -- in the
7 aggregate as well as with respect to individual
8 carriers, and that information is not generally
9 public.

10 It certainly fits within the definition of
11 confidential information within the bounds of the
12 protective order. And if you will just hold on one
13 second -- it is confidential and propriety business
14 information. I mean, that is the definition of
15 confidential information.

16 You put your finger right on it. They
17 relied on this chart. The two charts are already in
18 their filing. They have relied on it, they argued it,
19 and the Board can do with it what it wishes. The
20 level of confidentiality is immaterial. And indeed,
21 if the Board concludes that the information is not
22 confidential, it can so rule and include it in its

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1 decision. Or, as you said, it can issue a redacted
2 decision if it chose to do that.

3 Or it could make reference to it. It
4 could say, as Mr. Healey says in his paper, that, you
5 know, they -- that the Board finds that the level of
6 involvement by the BOCT and so-called true -- what Mr.
7 Healey calls in his paper "true intermediate switching
8 business" is de minimis. And the Board could do that
9 without fear of release of any confidential
10 information, without fear of release of any of the
11 details behind these numbers.

12 So basically, what we're talking about is
13 there is no prejudice at all to Wisconsin Central or
14 to any of Mr. Healey's clients. They refer to the
15 information. And under Arizona Public Service, it is
16 clear that they had the obligation to show harm. And
17 given the fact that this is information that CSX does
18 maintain as confidential, there is no basis for coming
19 down any further than confidential.

20 And I'll say, Your Honor, that not only is
21 this the -- from the language that I cited in Arizona
22 Public Service Company, but also, Your Honor, you have

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1 had occasion once before -- this is a rare dispute.
2 CSX doesn't have its highly confidential and its
3 confidential stamp out, you know, marking things
4 indiscriminately. If it had, you would have heard
5 from people before.

6 This is the second time in this proceeding
7 in -- this proceeding now has been going on about
8 seven or eight months with respect to discovery. This
9 is only the second time you have had an issue with
10 respect to the level of confidentiality.

11 You decided the previous issue on
12 May 30th. It involved Mr. McBride. Mr. McBride also
13 sought the reduction of classification of certain
14 information from highly confidential to public. And
15 in that case, you explained to Mr. McBride that the
16 reason why you agreed with the applicants' downgrading
17 of information from highly confidential to
18 confidential in some circumstances, and in other
19 circumstances not even downgrading the information at
20 all from highly confidential, was that you didn't see
21 any prejudice.

22 With respect to the confidential

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1 information, he could share it with his client, and
2 that was sufficient for you to rule that we didn't
3 have to reduce anything below confidential. In this
4 case, apparently he didn't even have to show it to his
5 client in order to be able to make his case to the
6 Board, because it is included. As you can see, it's
7 in his rebuttal filing.

8 So based on the law of the case, as well
9 as well-established precedent, and just common sense,
10 it seems to me that Mr. Healey's motion should be
11 denied as to these two charts.

12 JUDGE LEVENTHAL: Mr. Healey, do you wish
13 to respond?

14 MR. HEALEY: Judge, thank you. Two points
15 that I would raise in response to that. First, Mr.
16 Harker again asserts that the information is
17 confidential, but in doing so he really invokes the
18 terms of the confidentiality order and claims that the
19 information is proprietary. We haven't heard any
20 reason as to why it is. We haven't heard any reason
21 as to why this information should be deemed
22 confidential by CSX.

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1 The second point I'd raise is that in
2 making his argument as to the ability of the Board to
3 reclassify these documents on their own, and the need
4 for me to show that because I can show them to my
5 client I need to show some other prejudice, that I
6 won't reply to any document that would exist in the
7 case. If the Board is free to reclassify documents,
8 they are.

9 There is a reason why documents are
10 classified some as public, some as confidential, some
11 as highly confidential. I think there is a need for
12 the public to have this information. We haven't heard
13 any reason as to why the information should be kept
14 confidential. And, therefore, we stand on our motion.

15 JUDGE LEVENTHAL: I'm going to deny the
16 motion to reclassify this material from highly
17 confidential to public. But we will -- I will,
18 however, declassify it to -- from highly confidential
19 to confidential.

20 MR. HEALEY: Judge, may I make a
21 suggestion, please?

22 JUDGE LEVENTHAL: Yes.

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1 MR. HEALEY: To the extent that Your Honor
2 is inclined to rule as you have just said, and I have
3 no doubt you are inclined to rule that way, is there
4 some reason why the total number at the bottom has to
5 be kept confidential? The numbers in the chart
6 indicate specific traffic moved for individual
7 railroads. I don't see any reason why the total
8 number of cars moved involving CSX and not involving
9 CSX should be kept confidential.

10 JUDGE LEVENTHAL: Well, let's see. Mr.
11 Harker?

12 MR. HARKER: No. No, Your Honor. My
13 arguments would stay the same. I mean, we have moved
14 -- we have met Mr. Healey in the middle. He objected
15 to -- he asked if this information could be made
16 public. We considered the chart. We considered it in
17 total. We considered the total information as well.
18 Even the total numbers are not generally made public.
19 They are held as confidential business information by
20 the corporation.

21 And I would say the same thing with
22 respect to that, and I think your ruling would support

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1 me.

2 JUDGE LEVENTHAL: All right. My ruling
3 will remain the same. I don't find any prejudice to
4 the movement at all in this matter. The citation I
5 read into the record earlier came from the matter of
6 Arizona Public Service Company and Pacific Corp. v.
7 the Atcheson, Topeka and Santa Fe Railway Company, STB
8 Decision Number 41185, 1997, W.L. 420253 at page 2.
9 All right.

10 MR. HEALEY: Judge, if I might, one last
11 point on that. I do not have it with me today, but it
12 is my recollection that it -- in our files, as a piece
13 of public information, we do have car counts for the
14 BNOCT.

15 And I don't need any ruling or anything
16 else on this today, but I would just like to make a
17 point on the record that if I am able to show that the
18 BNOCT has made public overall general car counts, I
19 think that would severely undermine Mr. Harker's
20 argument. And to the extent I can find those and
21 locate those in public documents, I would like to come
22 back before Your Honor and readdress the issue.

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1 JUDGE LEVENTHAL: You can always come back
2 before me, Mr. Healey.

3 MR. HEALEY: Thank you.

4 JUDGE LEVENTHAL: I enjoy seeing you. You
5 argue very articulately, so it's fine having you
6 before you.

7 MR. HEALEY: Thank you, Judge.

8 Point number 3 I think has been resolved
9 by Mr. Harker. He did, in fact, provide better
10 quality copies of the documents we were looking for.
11 So that is a moot issue.

12 Issue number 4 on my motion again concerns
13 the confidentiality classification of a document.
14 This is a two-page document provided, once again,
15 after I came before Your Honor and Your Honor
16 compelled me -- the applicants to produce the
17 information to it. It is an in-house memo dated
18 August 20, 1997.

19 Can we go off the record for just a
20 second?

21 JUDGE LEVENTHAL: Yes, sure. Off the
22 record.

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1 (Whereupon, the proceedings in the
2 foregoing matter went off the record at
3 10:04 a.m. and went back on the record at
4 10:07 a.m.)
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