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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,
October 9, 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

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

(9:30 a.m.)

JUDGE LEVENTHAL: Good morning. Please be seated. I'm going to go on the record. I'd like you to make a brief appearance. All right, the discovery conference will come to order. We'll take appearances at this time. We'll take them in any order; let's start at this table.

MR. MILLS: Your Honor, my name is Chris Mills with the firm of Slover & Loftus in Washington, and I'm appearing here on behalf of the cities of East Chicago, Hammond, Gary, and Whiting, Indiana, collectively known as the Four City Consortium.

MR. HEALEY: Good morning, Your Honor. I am Tom Healey of the firm of Oppenheimer Wolff and Donnelly, out of their Chicago office. I am here today on behalf of the Wisconsin Central Limited and the Elgin, Juliet, and Eastern Railway Company.

JUDGE LEVENTHAL: All right.

MR. UTHOFF: Good morning, Your Honor. I am Steve Uthoff with Coniglio & Uthoff and I represent Rail Bridge Terminals.

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

3 MR. HARKER: Drew Harker, Arnold & Porter,
4 for CSX.

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

7 MR. MAYO: Good morning, Your Honor.
8 George Mayo, Hogan & Hartson, on behalf of the
9 Canadian Pacific parties.

10 MS. BRUCE: Good morning, Your Honor.
11 Patricia Bruce of Zuckert, Scoutt & Rasenberger, for
12 Norfolk Southern.

13 MR. EDWARDS: Good morning, Your Honor.
14 John Edwards, Zuckert Scoutt for Norfolk Southern.

15 JUDGE LEVENTHAL: All right, very well.
16 All right, we have three different matters before us
17 this morning.

18 Off the record.

19 (Whereupon, the foregoing matter went off
20 the record at 9:33 a.m. and went back on
21 the record at 9:36 a.m.)

22 JUDGE LEVENTHAL: We have three disputes

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1 before us this morning. Taking them in any order, the
2 first one is on behalf of the Rail Bridge Terminals,
3 New Jersey Corporation. All right, I'm ready to hear
4 argument on this Motion to Compel.

5 MR. UTHOFF: Thank you, Your Honor. The
6 Motion to Compel concerns seven interrogatories. They
7 concern the structure and decisions that were made,
8 part of the shared assets area in North New Jersey, E-
9 Rail in particular, and other terminals located in
10 this shared assets area -- either geographically or
11 being operated as part of the shared assets agreement.

12 The questions we're asking for the basis
13 of the decisions to make E-Rail an NS dedicated
14 facility, make other terminals CSX dedicated
15 facilities. Some terminals were equal access and some
16 terminals were part of the shared assets agreement.

17 The only response we've received basically
18 is that all these decisions were reached through
19 negotiations. It's our opinion that that doesn't
20 answer the questions on getting to the basis on how
21 those decisions were made. We have received a
22 supplemental response on behalf of both NS and CSX.

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1 In my opinion, the only information in
2 that response is that E-rail was not chosen by CSX
3 because it didn't fit their operational needs; which
4 I think is getting more to the basis of these
5 decisions, but the remainder of the supplemental
6 response was still more of, these decisions were
7 arrived at during the course of negotiations.

8 And what we're seeking to find is how
9 these determinations were made. The answer received
10 in terms of negotiations indicates that it was more of
11 a random process, but documents reviewed and the
12 deposition transcripts reviewed, reveal for example
13 that the E-Rail facility has been earmarked to receive
14 between \$25 million and \$35 million of improvement.

15 I mean, since that is the case it's hard
16 for me to believe that the only reason why that E-Rail
17 was dedicated as an NS facility is because, well
18 that's just how it kind of fell out in negotiations.

19 I've also seen strategic planning
20 documents concerning the various aspects of the split-
21 up, and to the extent that there are reasons for
22 treating E-Rail differently from other terminals in

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1 the shared assets area, the decision to have terminals
2 as equal access and E-Rail not, I believe the
3 questions call for that information and I think we're
4 entitled to it.

5 JUDGE LEVENTHAL: All right. Who's going
6 to address it for Conrail?

7 MR. HARKER: Mr. Coburn and I will. I'll
8 lead off. First of all, may I ask a question about
9 the information that you've mentioned with respect to
10 capital improvements and the like? I take it that's
11 from work papers in the depository?

12 MR. UTHOFF: I believe that was in the
13 McClellan deposition.

14 MR. HARKER: Okay. And I'm just asking
15 for representation as to a level of confidentiality of
16 that information so that we can advise the court
17 reporter with respect to the transcript.

18 MR. UTHOFF: I couldn't tell you because
19 I didn't have the list on what was -- remained highly
20 confidential and what was not.

21 JUDGE LEVENTHAL: All right. Off the
22 record.

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1 (Whereupon, the foregoing matter went off
2 the record at 9:40 a.m. and went back on
3 the record at 9:40 a.m.)

4 JUDGE LEVENTHAL: Your Honor, the
5 transcript for Mr. McClellan is still classified as
6 highly confidential and so any information that is
7 discussed with regard to Mr. McClellan's deposition
8 would have to and continue to be, highly confidential,
9 and we would ask that the transcript of this hearing
10 be so designated.

11 JUDGE LEVENTHAL: All right. Is everybody
12 in the room entitled to be here?

13 BY ALL: Yes, Your Honor.

14 JUDGE LEVENTHAL: All right. Ms.
15 Reporter, you'll label this highly confidential.

16 MR. HARKER: Is it possible, Your Honor,
17 to just label portions of the transcript, because I'm
18 not sure the entire transcript needs to be highly
19 confidential. I don't mean to cause a logistical
20 problem and if that is a logistical problem we can --

21 JUDGE LEVENTHAL: Well, how are we going
22 to know when to apply the highly confidential?

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1 MR. EDWARDS: Your Honor, while we're
2 discussing this issue we could have the transcript
3 highly confidential and then when we move on to the
4 other issues before Your Honor we could --

5 JUDGE LEVENTHAL: Oh, is that what you
6 mean? Oh, sure.

7 MR. EDWARDS: That will work.

8 JUDGE LEVENTHAL: Oh, sure. We'll have
9 two separate transcripts: one highly confidential for
10 that portion, and then we'll advise the reporter when
11 we go on the regular transcript.

12 All right. Mr. Harker.

13 MR. HARKER: Thank you, Your Honor. Mr.
14 Uthoff mentioned the responses that the applicants
15 made to the discovery request, focusing on the
16 negotiated aspect of the process here, and that can't
17 be overstressed.

18 The determination of the shared asset
19 areas was the culmination of a lengthy and complex
20 bargaining process between Norfolk Southern and
21 Conrail. I'm sorry, I misspoke. Norfolk Southern and
22 CSX. The result of which was an appropriate balance

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1 between CSX to the benefit of both parties, both
2 railroads, and the shipping public.

3 It was a product of horse trading, of
4 compromise, of understanding. As I said, it was a
5 lengthy and complex process in which the two railroads
6 needed to allocate literally dozens of Conrail-served
7 facilities.

8 It's impossible to pick apart in any
9 detail, an individual decision in isolation when
10 you're talking about the kind of negotiation process
11 that went on. Essentially what you'd need to be able
12 to do is, months after the fact, get into the minds of
13 the negotiators as they were discussing allocation of
14 these particular properties -- or, I'm sorry, these
15 particular shippers.

16 There was really no set of criteria that
17 either party used to allocate responsibility to one
18 party or the other. Mr. Uthoff wishes there were but
19 there isn't, and in fact, he propounded some very
20 general document requests along these same lines, and
21 upon a review of our files we found nothing responsive
22 to these particular document requests -- asking about

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1 the applicant's decision-making process and so on --
2 that gives you a sense that there were no preconceived
3 notions going into the process.

4 And as I said, ultimately the result was
5 a product of a long negotiation. Both Mr. Hart for
6 CSX and Mr. McClellan for Norfolk Southern, the
7 principal negotiators, were both deposed. You will
8 recall at one point, there was some concern that Mr.
9 Hart's deposition may go for two days, and Mr. McBride
10 and Mr. Wood on behalf of their clients, sought a
11 rescheduling.

12 So obviously, this deposition, Mr. Hart's
13 deposition, was seen with a great deal of interest on
14 the part of the other parties. However, Mr. Uthoff
15 did not participate in that deposition. These two men
16 were the key negotiators of the arrangements, and it
17 was at that point that if there was going to be a
18 probing of their mental processes as to why they made
19 a particular decision one way or the other, that was
20 the time to do it.

21 Now, as to the particular circumstances of
22 E-Rail, which I would submit is really the only

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1 relevant matter before us today, I'd like to give you
2 a copy of a letter that Mr. Coburn sent to Mr. Uthoff
3 on October 7th. I'm going to give Mr. Uthoff a copy
4 of the letter.

5 And the issue with respect to E-Rail is
6 simply, why didn't CSX consider getting access to E-
7 Rail a high priority in the negotiations? Why was CSX
8 essentially willing to give Norfolk Southern sole
9 access to that facility? And that issue is
10 essentially addressed on the second page in the first
11 full paragraph.

12 And I'll just read it for the record.
13 "One factor that CSX considered was that the relative
14 efficiency of its access to a particular yard or
15 terminal facility, particularly for double-staffed,
16 intermodal, east-west traffic. One of the results of
17 these negotiations was that the E-Rail facility was
18 assigned to NS. The operational advantages enjoyed by
19 NS over CSX in accessing this facility was a very
20 important consideration."

21 So in other words, with respect to E-Rail,
22 Mr. Uthoff knows why CSX chose not to bargain for

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1 access to E-Rail; because operationally there were
2 inefficiencies and disadvantages associated with that
3 particular facility. So as to Mr. Uthoff's client,
4 knows exactly why E-Rail is not part of the shared
5 asset area.

6 And I would submit that the disposition of
7 other facilities is simply not relevant to E-Rail.
8 Why another facility in the area was considered part
9 of the shared assets area is really not relevant to
10 why CSX chose not to bargain for access to the E-Rail
11 facility.

12 Now, I think it's important to point out
13 that E-Rail had access to one carrier before this
14 transaction -- that was Conrail. They didn't have
15 access to two carriers; they had access to one
16 carrier. And as a result of this transaction that
17 won't change. There'll be a new carrier. It will be
18 Norfolk Southern, not Conrail. But it will still only
19 be one carrier.

20 And I'm not sure yet, we haven't heard
21 yet, what E-Rail's theory of harm is here, under which
22 they're somehow going to make this discovery relevant.

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1 We haven't heard that yet; perhaps Mr. Uthoff can
2 inform us about that.

3 To the extent though, that his theory is,
4 is that they are disadvantaged because their
5 competitors are getting access to two carriers as
6 opposed to E-Rail which is only having access to one,
7 that's just simply not cognizable under Board
8 precedent.

9 I mean, the logical extension of that
10 argument, Your Honor, is that every carrier -- I'm
11 sorry, every shipper in the Northeast which had access
12 only to Conrail prior to the transaction, is now
13 entitled to have access to both Norfolk Southern and
14 CSX after the transaction. And that's clearly not --
15 there's no precedent, no authority at all for that
16 proposition within STB and ICC case law.

17 And I'll just conclude by saying that what
18 the ICC and the STB look at is preserving competition.
19 They want to preserve competition. In other words, if
20 there was a situation prior to a merger where there
21 was competition -- two carriers serving a shipper --
22 they want to assure after the transaction that that

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1 competition is preserved.

2 Their focus though, is not on protecting
3 competitors, and individual competitors, and that was
4 what E-Rail was talking about here. Thank you.

5 JUDGE LEVENTHAL: All right. Mr. Coburn.

6 MR. COBURN: I think that really sums it
7 up. I have three quick points just to add to that.
8 First, as we said in our interrogatory answer, our
9 supplemental answer, balance was an importance factor
10 in these negotiations; that is, balance between CSX
11 and NS.

12 And that part of the give-and-take was
13 that some facilities were going to go to one carrier,
14 other facilities were going to go to another carrier,
15 others again, as part of the give-and-take, were going
16 to be shared.

17 Second, we've gotten similar questions,
18 similar to the question that was put to us by Rail
19 Bridge from other parties in this case. Indianapolis
20 wants to know and their interrogatories wanted to
21 know, well why weren't they a shared area? Buffalo,
22 Niagara area; why weren't they a shared area? Some

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1 shippers have wanted to know, well why weren't -- why
2 are they outside the shared areas? The 84 Mining
3 comes to mind.

4 But we've got lots of questions along
5 these lines, and we've been very consistent in our
6 answers and very truthful and very complete in our
7 answers. The answer is, this was the product of the
8 negotiation. These were hard-driven negotiations.
9 This was the end result. We haven't had others come
10 here and say, you've got to tell us more. Some of
11 those others have gone to depositions and asked our
12 witnesses. Mr. Uthoff did not.

13 One last point just to supplement the
14 point about one carrier. They have one carrier now,
15 they'll have one carrier afterwards. The carrier
16 they'll have afterwards, NS, will have a broader reach
17 than Conrail does today. So really, they will be
18 advantaged by the transaction.

19 MR. NORTON: Your Honor, if I might. I
20 was just reminded hearing Mr. Harker, of the fact that
21 in the UP/SP case before it ruled, the fact that
22 someone was not getting an improvement in its

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1 competition that another of the competitors was
2 getting, was irrelevant. It was not a factor to be
3 considered in the assessment of the transaction. And
4 I believe they relied upon a similar ruling in the
5 BN/Santa Fe case as well.

6 JUDGE LEVENTHAL: All right, Mr. Uthoff

7 MR. UTHOFF: Two aspects of that I'd like
8 to address. The first is the letter which I received.
9 And I agree somewhat with counsel's representation
10 that as to CSX does try to answer the question, why
11 did they did not choose E-Rail. I don't think the
12 answer is quite as clear as counsel makes it out to
13 be, but I do acknowledge that this an effort towards
14 the type of information that we are looking for.

15 In terms of relevance, I've read the
16 precedent in terms of not protecting competition, but
17 we also have a very unique situation here. In terms
18 of the broad-brush picture of why shared asset areas
19 were created, I think those questions have been
20 answered, either through the work papers or
21 depositions.

22 I mean, that was a market-driven decision

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1 and the North Jersey shared assets area, according to
2 the court papers that I've seen and the depositions
3 that I've read, was one of the most important aspects
4 of this deal because of the size of the market, and
5 both carriers wanted to have access to the shippers.

6 What has happened in the situation, the
7 shared assets areas which is a novel idea to this type
8 of merger -- which is also novel; taking one railroad
9 and splitting it into two Class 1 major railroads --
10 they've taken a big, broad geographic area, created a
11 shared assets agreement for the operation of these
12 lines in that area, but accepted very few terminals in
13 that area, E-Rail being one of them.

14 On top of that, for example, one of our
15 competitors is the South Kearny Yard where APL has
16 their operations -- which was allocated to CSX. It's
17 not going to be operated as far as a shared assets
18 area, but South Kearny was given equal access to NS.

19 So there are issues as to competition, and
20 it is our opinion that those issues need to be brought
21 to the Board because of this unique situation where
22 everyone in a geographic region is being given an

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1 advantage over what they had before. You had one
2 carrier, now they have two, but very few terminals are
3 being accepted from that proposition or from that
4 agreement.

5 One of the selling points of this
6 application is that we've created these shared access
7 areas in these major markets so that all the shippers
8 can benefit. Well, if there's certain business
9 reasons or operational reasons why every terminal in
10 the area can't be equal access or can't be operated as
11 a shared access area, that's what we need to know.

12 If it was random, we need to know that
13 also. But we also need to know why the quid pro quo
14 was not being maintained, especially in relation to E-
15 Rail and our competitors, which are within
16 geographically the same area, that are being given
17 either operation as part of the shared assets area, or
18 being given equal access to both carriers.

19 And to say that the only reason that
20 happened was, oh that was a product of negotiations,
21 that doesn't get to the answer of the question of the
22 interrogatories, and so suggest that it was our duty

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1 to attend depositions, I don't believe that that is a
2 requirement to propound the interrogatories.

3 The interrogatories seek a broader range
4 of information than testing the memory of one
5 individual. To the extent that there were corporate
6 policies beyond the memory of the individual that the
7 interrogatories would pick up, and to the extent the
8 individual won't remember an answer on that day but
9 can review notes, review work papers, talk with other
10 people who were involved with the negotiations,
11 interrogatories would provide a more complete answer.

12 Not to mention in terms of the economy.
13 It seems the interrogatories might be the best way to
14 try and get this information.

15 JUDGE LEVENTHAL: But what information
16 you're looking for, Mr. Harker said that this was a
17 result of negotiations. They bargained for one point
18 as against another point. What are you looking for,
19 exactly?

20 MR. UTHOFF: We're looking --

21 JUDGE LEVENTHAL: Work papers?

22 MR. UTHOFF: There was -- at least my

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1 review of the work papers, there weren't any. There
2 weren't any free negotiation-type work papers that
3 noted, here's a list of the things we wanted to do.

4 JUDGE LEVENTHAL: Well, one minute; let's
5 find out. Are there any work papers, Mr. Coburn, Mr.
6 Harker?

7 MR. HARKER: No, Your Honor. The written
8 discovery requests that were propounded by Rail Bridge
9 requested us to search for those sorts of documents
10 and as we reported, there were no responsive document.

11 MR. UTHOFF: The only thing that I've seen
12 in terms of work papers were after the split had been
13 made. Now, to suggest that, well everything was just
14 a product of the negotiation and that's the only
15 answer, that suggests to me that there were no
16 preconceived ideas of what NS wanted or what CSX
17 wanted going into the negotiations.

18 JUDGE LEVENTHAL: But Mr. Uthoff, you have
19 a problem. Mr. Harker is representing here on the
20 record that there are no work papers. I can't order
21 him to produce work papers if he says there are none.

22 MR. UTHOFF: We're not asking for him to

1 produce work papers.

2 JUDGE LEVENTHAL: Well, what do you want
3 him to produce?

4 MR. UTHOFF: We want him to produce the
5 answers to the interrogatories that request that to
6 the extent there's information and reasons why there
7 were differences in -- reasons why certain terminals
8 were chosen to be part of the shared assets area,
9 certain terminals were chosen to have equal access,
10 certain terminals were not chosen to have equal access
11 -- to the extent there are reasons for those
12 decisions, we would like those reasons.

13 JUDGE LEVENTHAL: Well, Mr. Coburn, who's
14 going to answer that?

15 MR. COBURN: Respectfully, we have given
16 Mr. Uthoff the reasons why there was give-and-take in
17 the negotiating process, and --

18 JUDGE LEVENTHAL: Do you have any written
19 documents that would set forth your position, the
20 position of the other parties, any arguments you were
21 prepared to make in negotiations?

22 MR. COBURN: There were no work papers and

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1 the only written documents I can point Mr. Uthoff to
2 are our original and our supplemental interrogatory
3 answer.

4 MR. UTHOFF: That is also only to CSX in
5 terms of the information as to why E-Rail was not
6 chosen --

7 JUDGE LEVENTHAL: You're seeking it from
8 who else, NS?

9 MR. UTHOFF: NS.

10 JUDGE LEVENTHAL: All right. Ms. Bruce.

11 MS. BRUCE: Your Honor, that letter was
12 sent by Mr. Coburn but it was the applicant's
13 supplemental response on behalf of the applicant. And
14 just as Mr. Coburn and Mr. Harker have indicated, the
15 decision on E-Rail was the result of negotiations and
16 I think what Mr. Uthoff is asking us to do is a post-
17 mortem on those negotiations, and there was no
18 corporate policy or list of criteria that were set
19 out. It was the result of onsite bargaining of a
20 complex situation in which there was a give-and-take.

21 And he's asked repeatedly for this and
22 we've told him repeatedly that there are no work

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1 papers and that this was a negotiation process. And
2 if there was a misunderstanding that that supplemental
3 response was not from Norfolk Southern, it was
4 intended to be.

5 JUDGE LEVENTHAL: Are there no memoranda
6 or any other writing indicating positions or
7 arguments?

8 MS. BRUCE: No, Your Honor, and I think
9 Mr. Uthoff's reference to what he's seen in the work
10 papers are work papers that are post-negotiation and
11 post-decision that are carrying out what was
12 negotiated, and not the lead to the negotiation but
13 the after the negotiation.

14 And that's what he's looking at -- once
15 the facility is assigned to a carrier, what they're
16 going to do in the future to improve it, to put money
17 in it, whatever it is. I think that's what he's
18 looking at and he's trying to correlate that with what
19 was done before.

20 And what was done before was, CSX and NS
21 were rivals for Conrail and then there were
22 negotiations. And in those negotiations certain things

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1 were given-and-take, and just as Mr. Harker said, it
2 was horse trading, and that's the bottom line on it,
3 I believe. I think we have supplemented our response
4 to the best that we can.

5 JUDGE LEVENTHAL: Well my point, Mr.
6 Uthoff is looking for, were there any position papers
7 written for the negotiators --

8 MS. BRUCE: No, Your Honor --

9 JUDGE LEVENTHAL: -- any agenda that they
10 went into a negotiating session with?

11 MS. BRUCE: No, Your Honor, none were.

12 MR. UTHOFF: Well, Your Honor, to say
13 there was negotiations is one thing, but to say that
14 the negotiators had no preconceived idea of what they
15 wanted to get out of the deal and the types of
16 terminals that they wanted, or the types of agreement
17 that were going to happen, I think is two different
18 things.

19 JUDGE LEVENTHAL: Well, what do you want
20 me to order them to do? They're saying here they have
21 nothing, and you're telling me you don't believe them.

22 MR. UTHOFF: Well, to make the

1 representation that, instead of just saying that there
2 was negotiations, say that McClellan on behalf of NS
3 apparently, and Hart on behalf of CSX, had no
4 preconceived idea or plan going into these
5 negotiations upon choosing which terminals would be
6 part of the shared access agreement, which weren't,
7 and which are the equal access.

8 JUDGE LEVENTHAL: All right. Let's find
9 out.

10 MS. BRUCE: Your Honor, I think that it
11 goes without saying that when the negotiators went
12 into the negotiation they wanted to get the best
13 possible deal they could for the railroads, and this
14 is what happened. I mean, it was give-and-take.
15 Maybe on day-1 they thought, you know, maybe we'll get
16 this, and day-2, maybe we'll get that.

17 But the bottom line was, it was a give-
18 and-take negotiation and each party that was
19 negotiating went in there to see what they could get
20 the most out of the deal. And that -- I think if
21 that's what you're looking for we can all say, we went
22 in to get the best we could, you know, on the division

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1 of the assets and the allocation of the lines of
2 Conrail, and this is the bottom line.

3 MR. COBURN: And just to supplement that,
4 we have said, Your Honor, that CSX took its position
5 with respect to E-Rail in light of the operational
6 difficulties of serving that facility for the CSX
7 lines that it will be acquiring from Conrail.

8 I don't think there's any secret about
9 that and we've said it in our supplemental answers.
10 So that was a consideration under which CSX decided,
11 well we'll give that one to NS; maybe we'll get
12 something else in return. It was -- that's the way
13 the bargaining went.

14 MR. UTHOFF: That's exactly the type of
15 information we're looking for, Your Honor. But that
16 only answers two of the seven questions, and it only
17 answers it on behalf of CSX. I realize that the
18 letter was on behalf of both NS and CSX, but that
19 statement only answers it on behalf of CSX.

20 JUDGE LEVENTHAL: Let's go off the record.
21 (Whereupon, the foregoing matter went off
22 the record at 10:01 a.m. and went back on

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1 the record at 10:05 a.m.)

2 JUDGE LEVENTHAL: In our off the record
3 discussion I was trying to determine whether there was
4 any specific items that counsel making the Motion
5 wished me to order the other side to produce. We
6 didn't reach any agreement on it. All right, Ms.
7 Bruce.

8 MS. BRUCE: And just for the record, I'd
9 like to say that Mr. Uthoff has requested that we
10 produce written documents and indicated that we had
11 not considered producing written documents or
12 whatever. But his document request number two
13 specifically asks us to produce all documents which
14 reflected decision or analysis thereon by applicants
15 to omit the E-Rail facility from operation under the
16 shared assets area, shared assets agreement.

17 And as to NS, we have said that NS does
18 not have any responsive documents. I believe that CSX
19 in its separate response says the same thing.

20 MR. COBURN: That's correct.

21 MS. BRUCE: So we've already indicated
22 that we've looked for responsive documents that

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1 reflect the decision or analysis used by the
2 negotiators in the decision, and that we have nothing.

3 MR. HARKER: And just -- Your Honor, just
4 to supplement that, document request number two went
5 to the E-Rail facility; document request number three
6 goes to the other facilities in the North Jersey
7 shared assets area. And I'll read it.

8 The result documents which explain or
9 reflect any decision to allocate rail terminals in the
10 North Jersey shared assets area as a dedicated NS
11 facility, dedicated CSX facility, or a facility which
12 will be allowed equal access.

13 So this covers the other facilities that
14 Mr. Uthoff is interested in. CSX responded; CSX has
15 no responsive documents.

16 MS. BRUCE: And NS was not asked that
17 question.

18 JUDGE LEVENTHAL: All right. You want us
19 to go through each interrogatory and examine it? I
20 think you have to tell me exactly what it is you want
21 me to tell them to produce, you know, and then I'll
22 consider your argument. But so far, they've said

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1 they've given you everything they have, and I don't
2 know what else there is I can order them to do.

3 MR. UTHOFF: Your Honor, I think the
4 dividing line between their answer and a complete
5 answer is, that if there were no game plan, if there
6 were no reasons why one negotiator or the other chose
7 to ask for certain terminal equal access, then to tell
8 us that.

9 All they've said right now is that the
10 final deal was the product of negotiation, which is an
11 obvious answer. Of course the final deal was a
12 product of negotiation. But for example, for E-Rail
13 which I think is responsive to our first two questions
14 --

15 JUDGE LEVENTHAL: Let's take your first
16 question. Your first interrogatory is, explain why E-
17 Rail would not be operated as part of the North Jersey
18 shared asset area. What do you want them to give you,
19 other than the answer they gave you? That it was a
20 result of arm-length negotiations?

21 MR. UTHOFF: I would like is -- if there
22 are any specific reasons why E-Rail was chosen not to

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1 be operated as part of the shared assets area, to give
2 us those reasons; or if there weren't any specific
3 reasons or that they can't remember them now, to give
4 us that representation.

5 JUDGE LEVENTHAL: All right. Mr. Harker?
6 I don't know who's arguing. Either one of you may
7 argue: Mr. Harker or Mr. Coburn. Can you answer that
8 question?

9 MR. COBURN: I think we have, Your Honor.
10 I think in our original and in our supplemental answer
11 we answered the question by explaining that there was
12 a negotiation and it was give-and-take, and for CSX
13 there was a concern about operational issues with
14 respect to E-Rail. So this is one that we gave and
15 didn't take.

16 JUDGE LEVENTHAL: Well, he's now asking
17 any specific reasons. Are there any specific reasons?

18 MR. COBURN: That I think is --

19 MR. UTHOFF: And if that's the complete
20 answer, then that's the answer. That's for CSX --

21 MR. COBURN: Operational consideration.

22 JUDGE LEVENTHAL: Okay. All right. Then

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1 how about two? Explain the basis for applicant's
2 decision to not allow equal access to the E-Rail
3 facility by both NS and CSX. Their answer had been
4 the same.

5 MR. UTHOFF: As to CSX, yes.

6 JUDGE LEVENTHAL: Mr. Coburn? Again, the
7 same?

8 MR. COBURN: It's the same. It's --

9 JUDGE LEVENTHAL: There are no specific
10 reasons?

11 MR. COBURN: There are no specific
12 reasons.

13 MR. HARKER: Other than -- Your Honor,
14 other than what we've already stated, which I think is
15 very critical -- which is that there were operational
16 disadvantages associated with the E-Rail facility that
17 made it a facility that CSX did not have high on its
18 priority list.

19 I think that is clearly answered by the
20 supplemental letter; by the October 7th letter from
21 Mr. Coburn.

22 MR. UTHOFF: The only thing that troubles

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1 me with the letter with regards to CSX, is they've
2 determined it to be one factor -- and that's a quote
3 from the letter. And if that's the only factor and
4 the factor that they can come up with now, then we'd
5 also like that representation.

6 JUDGE LEVENTHAL: All right. Let's --

7 MR. EDWARDS: Your Honor, just -- oh, I'm
8 sorry.

9 JUDGE LEVENTHAL: Let's finish with CSX.

10 MR. HARKER: No, I think, you know --

11 JUDGE LEVENTHAL: Is that the only factor?

12 MR. COBURN: I think it's the only
13 specific factor. There were these general factors of,
14 you know, the give-and-take factors, the --

15 JUDGE LEVENTHAL: You mean bargaining and
16 negotiating?

17 MR. COBURN: The bargaining and the
18 negotiation and the horse trading.

19 JUDGE LEVENTHAL: All right.

20 MR. UTHOFF: If that's as complete as it's
21 going to get then that's --

22 MR. COBURN: Yes, and the sense that, you

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1 know, obviously both carriers of equal size carriers.
2 It wasn't a situation where one carrier had a huge
3 advantage in the negotiation over the other. They
4 were both trying to reach a deal that reflected their
5 roughly equivalent bargaining power. And that led to
6 a general balance in the area.

7 JUDGE LEVENTHAL: All right. Mr. Edwards.

8 MR. EDWARDS: Your Honor, what's being
9 asked here, I'm not sure has a better answer than
10 we've put forth. When people get into a room to
11 basically, negotiate the allocation of a 14,000-mile
12 railroad and all the associated facilities in a short
13 period of time, there are things enunciated, things
14 thought about, positions put forth, positions brought
15 back.

16 What happens one morning may be different
17 in the afternoon because of what was said in the
18 morning. What happened in Detroit might make somebody
19 feel a little bit easier about what happens in New
20 York. The give-and-take about a specific facility,
21 and apparently what he would like -- Mr. Uthoff would
22 like us to do, is recreate the negotiation.

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1 And I don't think that that's proper,
2 especially in an interrogatory sense, and it's
3 impossible. If it could be done it's not appropriate
4 for the interrogatory, and I don't think it can be
5 done.

6 Because we're talking about intense
7 negotiations, about a railroad that -- a Class 1
8 railroad in the Northeast United States that -- I
9 mean, we can talk about the E-Rail facility and we can
10 go on to the Kearny Yard, then we can go on to that --
11 but what's the association of Kearny Yard to the
12 Monongahela, to the Detroit shared asset area, to the
13 -- you know, it just doesn't make sense to go item by
14 item and say, what was the give-and-take on this?

15 It just doesn't make sense. These people,
16 over a short period of time, negotiated a very large
17 transaction, and everything that's associated with it
18 -- everything else. And it's not appropriate to try
19 to pick apart. Mr. Uthoff wants criteria so that he
20 can argue that he needs to be in the shared assets
21 area or have equal access.

22 You know, he wasn't. His client was not.

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1 But that is not a reason for him to be able to try to
2 force us to recreate a negotiation that happened over
3 several days under intense pressure, and with a lot of
4 factors going into it. And I don't know that we
5 should be doing this.

6 JUDGE LEVENTHAL: All right. Mr. Uthoff,
7 shall we go on?

8 MR. UTHOFF: I would like to.

9 JUDGE LEVENTHAL: All right. Then we're
10 up to number four, is that right?

11 MR. UTHOFF: I think we're at number
12 three.

13 JUDGE LEVENTHAL: We're up to number
14 three? Explain the basis for applicant's decision to
15 allow portion of the Kearny Yard equal access to NS
16 and CSX.

17 MR. UTHOFF: My response is going to be
18 the same, Your Honor. I mean, to the extent that
19 concerns for NS counsel, if no one can recollect or
20 recreate those negotiations, that's the simple
21 representation that needs to be made.

22 JUDGE LEVENTHAL: All right.

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1 MR. COBURN: I think that's the
2 representation that we did make. We said that -- as
3 Mr. Edwards very eloquently said; more eloquently than
4 we said in our answer -- that this was a complex plan,
5 a series of negotiations, a web of intermingling ideas
6 and desires on each railroad's agendas, and we said
7 that. I think that's what you wanted us to say; I
8 think we said that.

9 JUDGE LEVENTHAL: Are you saying there's
10 no specific basis? There are no memoranda setting
11 forth position, no --

12 MR. COBURN: No, there are no memoranda,
13 and inquiring of our clients -- I can speak for CSX
14 and Mr. Edwards and Ms. Bruce can speak for NS -- the
15 answer that is reflected here is the answer that was
16 -- I didn't dream this up. We spoke to the clients
17 about this. This is what they tell us is the right
18 answer. It was just a web of negotiations.

19 MR. UTHOFF: Your Honor, let me give you
20 a concrete example as to why that isn't necessarily a
21 full answer. One of our chief competitors is South
22 Kearny Yards which APL operates -- or had their

1 facility at. The South Kearny Yard is a CSX facility.
2 APL is an NS customer.

3 South Kearny Yard is not being operated as
4 part of the shared assets area -- even though they are
5 part of the geographic area they're not being operated
6 as part of the shared assets agreement. But NS has
7 been allowed equal access to that yard.

8 Now, I think the representation that's
9 being made is, well there was no specific reason why
10 NS wanted equal access to that yard, but I mean, I can
11 speculate that they wanted equal access to that yard
12 because one of their big customers was located at that
13 yard. And to the extent there were these types of
14 ideas or reasons why NS would request equal access to
15 that yard as opposed to a different yard, then I think
16 we're entitled to know that.

17 And the same thing for E-Rail; the same
18 thing for the other ones that were part of the shared
19 assets agreements. They're still -- it's intense
20 negotiations and there's tradeoffs, but it's not going
21 to be a random process with the negotiators.

22 They're not just going to say, well okay,

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1 let's put all the terminals here and okay, I want this
2 one and you know, I'll throw them up in the air and
3 the ones that land on this side of the line are yours;
4 the ones that land on this side are mine. I can't
5 imagine that that was the process.

6 Maybe it was. If that's the process then
7 maybe that needs to be the response to the
8 interrogatory. But to the extent those ideas and the
9 reasons for those positions are remembered or can be
10 recreated, we're entitled to it.

11 JUDGE LEVENTHAL: All right. Ms. Bruce.

12 MS. BRUCE: Your Honor, I think it goes
13 without saying -- and I don't want NS to sound piggish
14 about it -- but NS wanted access to every yard that it
15 could get, and that's how it negotiated and this is
16 where the chips fell on that yard.

17 JUDGE LEVENTHAL: What do you want me to
18 tell them to give to you?

19 MR. UTHOFF: It's the same answer, Your
20 Honor. To the extent there were specific reasons why
21 NS or CSX requested equal access or would not allow
22 equal access, we would like to know that information.

1 JUDGE LEVENTHAL: But their answer all
2 along has been that this was a result of negotiation.
3 Each of them wanted all of it but they obviously
4 couldn't get all --

5 MR. UTHOFF: But except --

6 JUDGE LEVENTHAL: -- and they bargain --

7 MR. UTHOFF: But CSX --

8 JUDGE LEVENTHAL: Wait. Isn't that right,
9 Ms. Bruce? Is that your position?

10 MS. BRUCE: Yes, Your Honor. I don't
11 think NS or CSX went into the negotiations saying, oh
12 I'll give the other side whatever I can. I think they
13 said, I'll take whatever I can, you know, negotiate.
14 That's a corporate business person's position when
15 they go into negotiation; realizing that there will
16 have to be compromises, or to go in aiming high and
17 then you compromise. And I don't know what else we
18 can say about that.

19 MR. UTHOFF: But for example, CSX has
20 given supplemental responses that, we didn't want E-
21 Rail because we looked at it operationally and we
22 decided we didn't really want it. That's more than

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1 just going in and saying, well I want everything.

2 JUDGE LEVENTHAL: But they're saying that
3 they don't have any other specific -- they gave you,
4 wherever they had a specific reason they're saying --
5 I'm not offering for them -- but I understand them to
6 be saying if they had a specific motive or reason they
7 gave it to you.

8 MR. UTHOFF: Well, I haven't seen where
9 there has been an inquiry as to the specific reasons,
10 beyond just saying, well it was a product of
11 negotiations. Because when there was a further
12 inquiry with regard to CSX it seems, there was other
13 information that was able to be recalled.

14 JUDGE LEVENTHAL: Well, do you want them
15 to make a specific inquiry as to each of these
16 interrogatories? Is that what you're asking?

17 MR. UTHOFF: Yes. I think that is what's
18 required.

19 MR. EDWARDS: Your Honor, NS has -- we
20 stand by our answer.

21 MR. UTHOFF: Your Honor, I think what
22 needs to happen then, is that if there's a

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1 representation that an inquiry has been made and that
2 these specific questions were asked and that whoever
3 the negotiators were had no basis, that's not the same
4 thing as saying that these were the product of
5 negotiations.

6 JUDGE LEVENTHAL: No, but I think he's --

7 MS. BRUCE: Your Honor, I --

8 JUDGE LEVENTHAL: -- entitled to a
9 specific answer like that.

10 MS. BRUCE: Well, I don't think we can say
11 that there was no basis when the basis for going into
12 the negotiations was to gain access to everything we
13 -- each carrier could. I don't -- I think that is a
14 basis. I don't think we can say, we had no basis.
15 Our basis was to negotiate the best deal we could get
16 -- or each railroad's basis was to negotiate the best
17 deal they could get, and that is a basis. NS cannot
18 say there was no basis.

19 MR. COBURN: And to supplement, or to
20 reiterate what Mr. Edwards said, what we'd have to do
21 from our end is gather in a room, all of the people
22 from the CSX side, all of whom might have slightly

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1 different ideas about this even with the CSX team, and
2 inquire of each one, you know -- and that isn't our
3 obligation. Our obligation was to make a reasonable
4 inquiry of our client, which we did, as to what their
5 considerations were, and we defined where they came
6 out in this interrogatory answer, Your Honor.

7 MR. HARKER: And Your Honor, you are
8 exactly right. I mean, the proper way to get this
9 discovery -- and he had that opportunity -- was Mr.
10 Hart and Mr. McClellan were both deposed and people
11 did get into these issues with them.

12 And if Mr. Uthoff wanted to probe their
13 mindset and their decisions, he should have done it
14 under cross examination. That was his opportunity;
15 not here as a part of this interrogatory process

16 MR. UTHOFF: Your Honor, but it seems like
17 counsel has belied that argument since if it takes
18 getting several people in a room, all the negotiators
19 and ask them if they had any input on this issue, how
20 is deposing one individual going to give me that
21 answer? And to the extent on whether or not that is
22 a reasonable inquiry, if that's what it takes to

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1 answer the interrogatories then that's what it takes
2 to answer the interrogatories.

3 I haven't seen an objection -- there was
4 no objection made that this was going to be a
5 burdensome or oppressive task. But what's happened it
6 seems like, is they haven't made enough of an inquiry
7 or taken the effort to try and find out if there are
8 answers to this question, and instead have relied upon
9 just the answers -- the boilerplate answer that, you
10 know, this is just a process of negotiations and we
11 don't really know.

12 To the extent these negotiators can
13 recall, then that could be said in the
14 interrogatories, and to the extent there was no basis,
15 that can be said in the interrogatories.

16 MS. BRUCE: Your Honor -- I'm sorry, John.
17 Your Honor, both CSX and NS have made available every
18 witness that produced a verified statement in the
19 case. The operating plant people were put on,
20 everyone was put on. We had over 40 witnesses. There
21 were over 40 opportunities for Mr. Uthoff to ask his
22 questions to each one of those witnesses if he so

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1 desired.

2 And we also, after he raised an objection
3 to our answers to his request, we went back and went
4 over these again with our client. We went over them
5 the first time and we went over them the second time.
6 And I submit that if he would -- he could have asked
7 those 40 witnesses every question, any question they
8 wanted to ask, they were open to it. And he didn't
9 take advantage of that process.

10 MR. EDWARDS: And if I may supplement one
11 other thing here, it sounds like if we gave the answer
12 that Mr. Uthoff is looking for, how would it look? I
13 guess with regard to E-Rail it would be on one side
14 CSX says, operational concerns and on Norfolk Southern
15 it's, get whatever you can get -- and we got E-Rail.
16 Kearny Yard, he wants us to say APL was the factor and
17 -- or these five factors.

18 But as we've explained, it's not simply
19 getting several people together and probing their mind
20 as to what was in their mind when they walk in the
21 door the first day. This is an evolving process.
22 This is not a discussion about the division of E-Rail;

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1 it's the division of 14,000 mile's worth of track, the
2 associated facilities, what happens one day, you know,
3 affects the next day.

4 It's an evolving process; there's not a
5 static list that can be given; it's a negotiation.
6 And so the list, the answer he wants, doesn't exist.
7 If he wanted to talk about, you know, thoughts, well
8 we could have, but that's not. It's just, we can't
9 give him any better answer than we have.

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

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

15 JUDGE LEVENTHAL: All right. You want to
16 go to number four? Their answers for all of your
17 interrogatories I believe, are going to be the same.
18 And unless you can give me something more concrete
19 than you have, I have to deny your Motion to Compel.

20 MR. UTHOFF: Well, Your Honor, I think to
21 the extent the answers were changed, if they did get
22 all the negotiators together and asked them these

1 questions, where's all that information?

2 JUDGE LEVENTHAL: Well, I don't think that
3 that is a proper area for interrogatory.

4 MR. COBURN: It would be more than getting
5 the negotiators together. We'd have to recreate the
6 negotiation. We can't do that.

7 JUDGE LEVENTHAL: I can see that when you
8 have a negotiation, particularly a complex one such as
9 this, that there is give-and-take. If they had
10 memoranda I could have ordered them, and I would order
11 them, to produce them. They're saying they don't.

12 They're saying that people went into
13 negotiation without any agenda, any written agenda
14 except to get whatever they could get. I don't know
15 what I can order them to do.

16 MR. UTHOFF: I mean, to the extent that
17 that isn't a complete answer, that's my only
18 hesitation, is given the fact that how it played out
19 there had to -- you know, even though -- during the
20 negotiation someone has to say, give me, you know,
21 dockside and I'll give you this. And if there is no
22 reason for that then there is no reason for that.

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1 JUDGE LEVENTHAL: You can't do that on an
2 interrogatory. But what we'll do is, we'll go through
3 each of the other ones, we'll see if there is a
4 different answer, and at least you'll have on the
5 record that this is their answer.

6 Now, of course, this doesn't prevent you
7 from making any argument or presenting any evidence
8 that you like before the STB. They'll rule on the
9 relevance of it; they'll rule on whether you prevail
10 or don't. But on discovery, which is what we're
11 dealing with here, I don't see what it is I can order
12 them to do other than what they've already said on the
13 record.

14 MR. UTHOFF: Well, Your Honor, if Your
15 Honor is not inclined to order them to try and obtain
16 further information and to see if there are further
17 information as CSX had provided us -- or, as both
18 parties have provided us with regards to CSX's
19 position -- the only remaining response apparently is
20 going to be that it was a process of negotiations.

21 JUDGE LEVENTHAL: That has been their
22 standard response.

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1 MR. UTHOFF: I'm quite aware of that.

2 JUDGE LEVENTHAL: Why don't we put on the
3 record the rest of your interrogatories and see where
4 we go.

5 MR. UTHOFF: Are we on number --

6 JUDGE LEVENTHAL: I think we're on number
7 four now, right?

8 MR. UTHOFF: Number four requests the
9 decision to make other terminals in the shared assets
10 area equally accessible to CSX and NS.

11 JUDGE LEVENTHAL: All right. Your
12 arguments are the same?

13 MR. COBURN: Yes, Your Honor. They're the
14 same for all.

15 JUDGE LEVENTHAL: And your representation
16 on the record is that you made inquiry of your clients
17 with respect to this, and this is the answer that
18 you're giving?

19 MR. COBURN: Yes, Your Honor.

20 MR. UTHOFF: And beyond what was given,
21 there were no other specific reasons why those
22 decisions were made?

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1 MR. COBURN: That's correct, Your Honor.

2 JUDGE LEVENTHAL: All right. That's the
3 answer of CSX; NS, your answer is the same. All
4 right, number five.

5 MR. UTHOFF: Number five is the decision
6 to give CSX sole control over portions of the Kearny
7 Yard, North Jersey, and Elizabeth Port.

8 JUDGE LEVENTHAL: Your answer is exactly
9 the same as you set forth to the other four previous.
10 You have made inquiry of your clients and there's no
11 specific information other than the ones you've
12 already given?

13 MR. COBURN: That's correct, Your Honor.

14 JUDGE LEVENTHAL: All right. Number six.

15 MR. UTHOFF: And number six is the basis
16 for the applicant's decision to give NS sole control
17 over the Croxton E-Rail Yard.

18 JUDGE LEVENTHAL: The answer is the same?

19 MS. BRUCE: Yes, Your Honor.

20 MR. COBURN: Yes, Your Honor.

21 MR. HARKER: Again, though, Your Honor,
22 with respect to the E-Rail Yard --

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1 MR. UTHOFF: I believe CSX has answered --

2 MR. HARKER: That's correct.

3 JUDGE LEVENTHAL: We're including all the
4 answers you've given --

5 MR. HARKER: Fine, I just wanted to be
6 sure --

7 JUDGE LEVENTHAL: -- and in writing. All
8 right, number seven.

9 MR. UTHOFF: And once again, to explain
10 the analysis which applicants used to divide
11 responsibilities for the yards located in the North
12 Jersey shared assets areas as between those which
13 would be operated both by NS and CSX, and those which
14 wouldn't be. Same answer.

15 MR. HARKER: It's the same answer.

16 JUDGE LEVENTHAL: You're saying your
17 answer is the same as the same as interrogatory 1?

18 MR. HARKER: Yes, Your Honor.

19 MS. BRUCE: Yes.

20 JUDGE LEVENTHAL: All right. And there's
21 no other specific item -- reasons?

22 MR. HARKER: No, Your Honor.

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1 JUDGE LEVENTHAL: All right. Number
2 eight.

3 MR. UTHOFF: It was only the first seven,
4 Your Honor, that are in dispute.

5 JUDGE LEVENTHAL: Oh, I'm sorry. All
6 right. Motion to Compel then, is -- I'm going to say
7 remains moot, because you've got your answer's on the
8 record to these --

9 MR. UTHOFF: I guess it was granted by
10 immediately answered?

11 JUDGE LEVENTHAL: To the extent you didn't
12 get the answers you want, the Motion is denied. All
13 right.

14 MR. UTHOFF: Thank you, Your Honor.

15 MR. NORTON: Your Honor?

16 JUDGE LEVENTHAL: Yes.

17 MR. NORTON: Why don't we take a 5-minute
18 break?

19 JUDGE LEVENTHAL: Sure. All right. We'll
20 stand in recess five minutes.

21 (Whereupon, the foregoing matter went off
22 the record at 10:30 a.m. and went back on

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1 the record at 10:35 a.m.)

2 JUDGE LEVENTHAL: All right. Mr. Edwards,
3 is it necessary to continue the highly confidential
4 designation for this transcript?

5 MR. EDWARDS: No, Your Honor. The counsel
6 have agreed that the first part of the hearing today
7 could be public and does not requires a highly
8 confidential treatment.

9 JUDGE LEVENTHAL: All right, then. I'm
10 instructing the reporter to make the transcript, this
11 conference, a public document. All right, we'll go on
12 to the Motion of the cities of East Georgia, Indiana,
13 Hammond, Indiana, Gary, Indiana, and Whiting, Indiana.
14 Collectively we're going to call them the Four City
15 Consortium.

16 MR. NORTON: Your Honor, if I might just
17 suggest. I think it might be more efficient because
18 of the common ground, to hear both Motions first, and
19 I would respond to both at the same time.

20 JUDGE LEVENTHAL: All right. And we'll
21 also consider the Motion on behalf of Wisconsin
22 Central, Limited, and the Elgin Juliet and Eastern

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1 Railway Company to compel discovery of certain
2 information. Both parties seek discovery of the
3 Indiana Harbour Belt Railroad Company. All right.

4 MR. MILLS: Your Honor, I'm going to
5 direct you from the Northeast to the Chicago area, and
6 in order to set the stage for the Motion to Compel I
7 need to tell you a little about the four cities and
8 their interest in this proceeding.

9 The four cities in issue are all located
10 in Northwestern Indiana and they are bounded on the
11 east by the city of Chicago and the Indiana/Illinois
12 state line. They are criss-crossed by rail lines,
13 including a number of east-west lines operated by the
14 CSX, by Norfolk Southern, by Conrail, and by the
15 Indiana Harbour Belt, or the IHB.

16 And the concern the four cities have with
17 this transaction is that the traffic may increase on
18 certain lines and may decrease on other lines, and the
19 lines that may take the increase have lots of grade
20 crossings and other problems. There may be other
21 lines including Indiana Harbour Belt lines that have
22 lots of grade separations and may be more appropriate

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1 for concentrating traffic on.

2 And the purpose of the discovery they are
3 seeking is to gain information as to the capacities of
4 those various lines so that they can determine what if
5 anything -- what relief if any they want to request
6 from the Board in their comments and requests for
7 conditions which are due on October the 21st.

8 They've taken several depositions and
9 engaged in some discovery against the applicants, but
10 so far have been able to get no direct information
11 about the Indiana Harbour Belt, and to cure that
12 problem they noticed the deposition of the General
13 Manager of the Indiana Harbour Belt, Mr. Allen.

14 As you can see from the correspondence
15 that we provided you yesterday, the applicants are
16 taking the position that they have no dominion over
17 Indiana Harbour Belt and cannot require them to -- I'm
18 not sure they said they can't require them -- but they
19 don't feel they should ask them to either produce a
20 witness for deposition or answer questions which we
21 suggested as a possible compromise position.

22 And our view is that because the IHB is

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1 owned 51 percent by Conrail, that Conrail personally
2 has a right to appoint the General Manager, has a say
3 in the dispatching rights that CSX and NS will both
4 acquire as a result of this transaction; that the
5 Board does have jurisdiction to require the appearance
6 of an IHB witness at a deposition or to answer the
7 questions.

8 I want to in particular, point Your Honor
9 to the so-called Indiana Harbour Belt, or IHB
10 agreement which is included in the application. I
11 have a copy of it if you're interested in looking at
12 it, but let me just direct you to certain parts of it.

13 There's a section in that agreement for
14 which the applicants seek approval, by the way, as
15 part of the so-called transaction agreement. But
16 there are several provisions in the agreement that
17 clearly indicate that CSX and NS are going to exercise
18 dominion and control over the IHB after the
19 transaction is consummated.

20 For example, in section 2 on page 6,
21 paragraph (b), referring to the General Manager, it
22 says that Conrail, CSX, will cause the persons

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1 selected by CSX and approved by Norfolk Southern, to
2 be elected or appointed as General Manager; that
3 Norfolk Southern on certain notice can require that a
4 different person be selected and approved or appointed
5 as a General Manager.

6 On page 7 is a reference to dispatching,
7 and the agreement says that dispatching of trainees
8 over the IHB system will continue to be the
9 responsibility of the IHB and performed locally in the
10 Chicago area, but that CSX will have the right to
11 direct the exercise by Conrail of its ownership rights
12 with respect to the dispatching.

13 And again, the Norfolk Southern can
14 request the CSX to change the dispatching of the
15 Indiana Harbour Belt. So when you look at all of
16 those elements it's pretty clear that Conrail
17 presently controls and exercises dominion over the
18 IHB, and that CSX and NS will do so by acquiring
19 Conrail's 51 percent ownership share and dividing it
20 equally between them.

21 I also want to point out that the Board
22 has determined that the IHB is an applicant carrier

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1 for purposes of the transaction. It's not entirely
2 clear to me what that status means, but I had
3 discovered yesterday that they are listed as a party
4 of record in one of the Board service lists in this
5 transaction.

6 They have not, to our knowledge, filed any
7 pleading in the case at all, so our assumption is that
8 they're a party of record merely as an applicant
9 carrier. And it is for those reasons that we have
10 asked the applicants to produce an IHB witness or
11 answer questions rather than attempting to go directly
12 to the IHB.

13 I think that summarizes our position on
14 the matter.

15 JUDGE LEVENTHAL: All right.

16 MR. HEALEY: Good morning, Your Honor.
17 Thank you. As counsel has indicated, the issue that
18 both of us have brought before you today is somewhat
19 similar, and that is whether Conrail has, through its
20 stock ownership, the ability to get discovery
21 responses from the IHB.

22 The relevance of the information we seek

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1 and the interests of our parties, of our clients, are
2 a little bit different. As a little further
3 elaboration on the situation in Chicago, Your Honor,
4 the Indiana Harbour Belt is one of three switching
5 roads which is located inside the city of Chicago city
6 limits. The IHB is currently owned 51 percent by
7 Conrail and 49 percent by CP Soo.

8 The Belt Railway of Chicago exists, and
9 although I'm not entirely sure of the ownership
10 interests there, I know that CSX does have an
11 ownership interest in it. The third terminal railroad
12 within the city of Chicago is the B&OCT -- that's the
13 Baltimore and Ohio Chicago Terminal -- and that is
14 solely owned, 100 percent by CSX.

15 Subsequent to approval of the application,
16 CSX is going to have a substantial say in the
17 operation of all three of those carriers. My clients
18 have a concern about the effect on competition that
19 situation will have in Chicago. That's an
20 unprecedented situation in Chicago.

21 And we will be seeking in our responsive
22 application, the divestiture of Conrail's 51 percent

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1 ownership interest in the Harbour into a neutral
2 entity. Quite frankly, I must be candid with Your
3 Honor, that at this time I am not certain whether that
4 neutral entity is going to be one or more of my
5 clients or whether it's going to be simply a third
6 party of the Board's choosing.

7 But in any event, we don't feel that
8 devolution of the control of even half of the Conrail
9 share with CSX is going to be a positive for
10 competition within the Chicago switching district.

11 In decision 10 in this proceeding, the
12 Board pointed out that discovery is governed by 49 CFR
13 1114, and in 49 CFR 1114.30 it does say that any party
14 may serve on any other party a request to produce and
15 permit the party making the request to inspect any
16 designated document or to inspect a copy, test, or
17 sample any tangible things which are in the
18 possession, custody, or control of the party on whom
19 the request is served.

20 If I understand the objections of Conrail
21 correctly, in essence they want to read out the phrase
22 "control" from that and simply turn over to us

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1 information and documents within Conrail's specific
2 possession or custody.

3 In looking into this matter I must admit,
4 Your Honor, I have not found a significant body of
5 Board precedents dealing with how the Board and/or its
6 predecessor, the ICC, would interpret control.

7 Fortunately, as you know the Federal cases
8 use the same standard governing discovery of
9 possession, custody, or control, and I think it's
10 clear from looking at a variety of those cases that
11 control is the legal right to obtain documents
12 requested upon demand.

13 And I could go through a variety of
14 citations playing around that same point. But the
15 essence of it is not whether a party actually
16 exercises control over the subsidiary or whether it
17 has the legal right to, or whether it has the ability
18 to. And I don't think there can be any question that
19 with 51 percent stock ownership that in fact, Conrail
20 controls the Indiana Harbour Belt.

21 Moreover, Judge, there is a specific
22 authority for the proposition that in fact, the

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1 Indiana Harbour Belt is not an independent operation
2 of Conrail: in the case Winston Network, Inc. versus
3 Indiana Harbour Belt, which can be found at 944 F.2d.
4 1351. This is a 7th Circuit case from 1991.

5 The 7th Circuit said, IHB has never
6 functioned independently of its parent -- and in
7 referring to parent it's referring to Conrail in the
8 case -- which has always, for example handled its real
9 estate contract. Now, in that case they were not
10 analyzing whether Conrail could be compelled to
11 produce discovery within the hands of the IHB.

12 The case was a little different; they were
13 analyzing a contract. But I think the point is saying
14 that some Circuit has found that the IHB is not an
15 independent entity of Conrail. In decision 12 in this
16 case in fact, the Board referred to NS and CSX as
17 partners controlling the controlling shareholder of
18 IHB. Again, the Board has recognized that in fact,
19 Conrail is in fact, in control of the Harbour.

20 Similarly, there have been other
21 proceedings where Conrail's controlled the Harbour and
22 has been referenced by the Board, and I will cite your

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1 attention to TCV, Inc. and NS Crown Services control
2 Triple Crown Services. That's in finance docket 32403
3 in a decision served November 26th of 1993.

4 Rio Grande Industries purchase and
5 trackage rates, Soo Line -- which is finance docket
6 31505. The effective date of that decision was August
7 22nd, 1990. And Indiana Harbour Belt acquisition of
8 line of Chicago and Western Indiana. That was finance
9 docket 31148 in a decision decided September 15th,
10 1988.

11 All those decisions, Judge, recognized
12 that in fact, Conrail is in control of the Indiana
13 Harbour Belt. Moreover, Judge, I think you have to
14 look at the submission of the parties to date. Within
15 the CSX operating plan there's a significant set aside
16 of material dealing with operations on the Harbour.

17 In fact, CSX has submitted a separate
18 verified statement on behalf of one of their witnesses
19 which deals specifically with the Indiana Harbour
20 Belt. And although the verified statement -- I think
21 it's about seven pages long; it's not great in length
22 -- in fact. they did feel that it was important

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1 enough, their operations on the Harbour were important
2 enough, to submit a separate verified statement.

3 And that is my argument, subject to
4 discussing the specific interrogatory requests and the
5 discovery requests we served.

6 JUDGE LEVENTHAL: All right. I guess I
7 failed to note that the discovery requests a question
8 here, made of Conrail, and with respect to the four
9 cities, I take it now you're just seeking answers to
10 your interrogatories rather than deposition, is that
11 correct?

12 MR. MILLS: Your Honor, we proposed as a
13 compromise, when counsel for Conrail first advised us
14 that they were not inclined to produce Mr. Allen for
15 a deposition, that we would be satisfied if the
16 answers to certain questions that we propounded were
17 given, and requested that the applicants through
18 Conrail's counsel, obtained those answers to those
19 questions. But the response was no, we don't feel we
20 have any obligation to do that and so they did not do
21 that.

22 But the answer to your question is, were

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1 we to get answers to those questions, and there's also
2 one document request, the four cities would be
3 satisfied and would have no need to pursue any further
4 questioning of an IHB witness in a deposition.

5 JUDGE LEVENTHAL: All right. Mr. Norton?

6 MR. NORTON: Your Honor, I have several
7 points I'd like to address, and they relate both to
8 the opening merits of the question, whether Conrail
9 should be deemed to control the IHB for purposes of
10 discovery, which is the ultimate question presented
11 here.

12 And also some questions about whether that
13 is an issue that Your Honor should be asked to or
14 should be addressing at this time, or even today. If
15 I might, I'd like to just create some background.

16 There are a couple of questions presented
17 here. There's a question about whether Conrail is
18 obliged to produced an IHB employee to a deposition at
19 the four cities' request. Mr. Healey raises the
20 question for the Elgin Juliet where he has -- he
21 didn't really get into what his request is.

22 It just says discovery request -- which we

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1 filed an objection last week -- contains an extensive
2 set of 46 very far-reaching questions calling for all
3 matter of financial and highly confidential financial
4 information of and documents of IHB,

5 All of which relates, if we understand it,
6 to his argument he's going to make that if the Board
7 approves the transaction to impose a condition
8 requiring that Conrail's 51 percent stock interest in
9 IHB be sold to someone else, and this discovery
10 request is a valuation of that stock.

11 So that's the second discovery that we're
12 talking about. With respect to the Wisconsin Central
13 I'm a little puzzled because his first set of
14 discovery requests for Wisconsin Central we haven't
15 responded to yet, and I don't think there is any
16 question in that first set that raises an issue about
17 IHB.

18 And this I think reflects a concern I have
19 about orderly procedure and whether we're really kind
20 of at the point where we should be on this issue -- at
21 the point for Your Honor to address it.

22 First, let me just take a step back with

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1 reference to IHB as a party of record. I'd like to
2 just --

3 JUDGE LEVENTHAL: Why don't we dispose of
4 one thing at a time. You're saying that with regard
5 to the Wisconsin Railroad, you haven't responded to
6 the interrogatories as yet?

7 MR. NORTON: That's correct.

8 MR. HEALEY: Your Honor, if I can address
9 that. In fact, as far as I know that was true. I
10 left my office yesterday afternoon to come here and I
11 had not seen responses yet. I would note for the
12 record that I believe the responses are late -- but we
13 have not seen responses yet, that's correct.

14 And I can actually clarify the issue, if
15 I could please -- and I think this is an important
16 point to bring up. I am here on behalf of the
17 Wisconsin Central and on behalf of the Elgin Juliet
18 and Eastern. There are EJ&E discovery responses that
19 have been objected to on the basis of the failure to
20 have control over the Indiana Harbour Belt.

21 So it's correct that the first set of
22 Wisconsin Central discovery requests do not seek

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1 information on the Indiana Harbour Belt; that in fact,
2 is correct. There are subsequent discovery requests
3 which do raise Indiana Harbour Belt issues which are
4 not yet due for a response.

5 However, one of the reasons I am here
6 Judge, is that there is also pending discovery
7 requests -- excuse me, answered discovery requests
8 that were served by the Illinois Central. Those
9 requests were served on September 12th and they were
10 answered on October 3rd.

11 Illinois Central is one of my clients and
12 I do need to give you just a minute of background to
13 explain why it's important that responses to those
14 interrogatories as to the Indiana Harbour Belt also be
15 provided.

16 Back on September 12th when that discovery
17 was served, my firm does represent the Illinois
18 Central; we represent Wisconsin Central; we represent
19 the EJ&E. And at that time those three parties had
20 come together upon their similar conclusions that in
21 fact, a competition within the Chicago switching
22 district was going to be harmed by this application,

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1 and in fact, they were all of a like mind that what
2 was needed was a divestiture of the 51 percent stock
3 interest.

4 In order to begin to develop information
5 relevant to that divestiture, we served discovery on
6 the applicants under the sub-number for the Illinois
7 Central. Subsequent to the service of that discovery,
8 Judge, the Illinois Central in fact, did come to an
9 agreement with the Norfolk Southern.

10 And as a result of their agreement with
11 the Norfolk Southern -- there's a number of fallouts
12 to that -- but the primary fallout for today's
13 purposes, I am not able to come before you and tell
14 you that on behalf of the Illinois Central I'm seeking
15 to compel answers to that discovery.

16 But what I would point out to you is that
17 in fact, the discovery was intended to provide
18 information that will be useful to all three of my
19 clients. And in fact, I think service of the
20 discovery in just one of the sub-numbers is consistent
21 with the Board's discovery rules in this case, which
22 say that -- and I do have the quote written down

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1 somewhere -- but I believe it's to the effect that
2 duplicative discovery should not be served.

3 We were faced with the situation where we
4 could have served the exact same discovery requests
5 out under all three separate headings that didn't seem
6 to comport with what the Board had set out in its
7 discovery rules. It didn't contemplate the fact that
8 in fact, we'd be serving the identical discovery
9 requests in three sub-numbers. It's repetitious, it's
10 duplicative, it serves no purpose.

11 I now find myself in the situation where,
12 because of my client's agreement I can't be before you
13 seeking answers on behalf of the Illinois Central, and
14 yet the answers that should have been given to that
15 discovery, in fact are relevant to other clients.

16 JUDGE LEVENTHAL: The relief you're
17 seeking here this morning then, is a generic ruling
18 that Conrail has control over IHB and are therefore
19 required to answer your discovery.

20 MR. HEALEY: That's a very fair statement,
21 Judge. I think I view my purpose today somewhat like
22 a proceeding for a declaratory judgment order, if you

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1 would.

2 JUDGE LEVENTHAL: All right. So we're not
3 addressing -- with regard to Mr. Healey's client --
4 we're not addressing specific answers to
5 interrogatories or objections, but just to a ruling as
6 to whether or not Conrail is obliged to furnish
7 discovery regarding IHB. Is that correct, Mr. Norton?

8 MR. NORTON: No, and that's what he has
9 now said. This causes me even more concern than I had
10 when I started, about the process that has brought us
11 to this point. Your Honor, as you well know, the
12 discovery rules and the guidelines that govern this
13 proceeding, establish the procedure for raising
14 discovery disputes.

15 And they have, since sometime in August,
16 made it very clear that the procedure for doing that
17 is on Monday, or by Monday of the week in which you
18 want a hearing on the Thursday, you have to make a
19 written, a telephone -- a written submission as to
20 request for a hearing, contact the other side, and we
21 have two days to put in a written response if we want
22 and prepare for the hearing.

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1 In this case the issue has been in the
2 air. It was raised, as Mr. Healey notes, in early
3 September, the IHB issue. There was nothing on
4 Monday. It was nothing on Tuesday. We got a letter
5 from Mr. Mills yesterday afternoon and we got a letter
6 from Mr. Healey after 5 o'clock yesterday.

7 There were no phone calls to discuss with
8 us these requests. We're the ones who are the develop
9 and the discovery party. The whole procedure has been
10 disregarded and we haven't had really, in my judgment,
11 the adequate opportunities, even abbreviated
12 opportunity that the rules and the guidelines provide
13 to address issues. And these are important issues.

14 In addition, on this particular issue, on
15 the merits of the Conrail IHB discovery issue, we're
16 not the only party that has an interest in that. IHB
17 has an interest and CP Soo also has an interest. And
18 CP Soo is represented by Mr. Mayo who, as I understand
19 it, agrees with the Conrail position, that Conrail --
20 that other parties should not be allowed to require
21 Conrail to produce documents and witnesses of IHB just
22 because it owns 51 percent.

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1 As I understand it, he was out of town
2 yesterday. He got a message to be here today to do
3 what he could, but he clearly hasn't had an
4 opportunity to be prepared to address the ultimate
5 merits, if we have to reach them.

6 What I'm suggesting -- and I'll come back
7 to the merits question -- but what I'm suggesting is
8 that the issue really is not right for decision on the
9 merits of whether Conrail has obligations to produce
10 IHB documents and witnesses; that the orderly
11 procedure should be followed. We should have an
12 opportunity. I think it's an issue where a written
13 brief would be appropriate, and resolution of that
14 question to be deferred until early next week.

15 But that's the procedural --

16 JUDGE LEVENTHAL: I don't think you have
17 to go further. Your objection is you don't think we
18 should entertain this Motion at this time because the
19 moving parties didn't follow the discovery guidelines,
20 is that right?

21 MR. NORTON: That's right.

22 JUDGE LEVENTHAL: Mr. Norton has a strong

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1 point.

2 MR. MILLS: Let me only say that the basis
3 on which we sought to depose Mr. Allen in further
4 request, was set forth in the deposition notice, and
5 the letter that was sent yesterday did not add to that
6 at all. So he has had actual notice of the position
7 and the reasoning.

8 And I suppose it's technically correct
9 that we have not put anything in writing other than
10 the requests we have made until yesterday, but he has
11 been aware of the issue for at least two weeks. He
12 was aware that we had planned to come to the Board
13 with this last week -- we attempted to work out a
14 compromise and did not.

15 If Your Honor wants to postpone it until
16 next week, you know, that's fine. We'll have to live
17 with that. But it appears to be exulting form over
18 substance, in all honesty.

19 MR. MAYO: Your Honor, If I might be
20 heard?

21 JUDGE LEVENTHAL: Yes.

22 MR. MAYO: My name is George Mayo. I'm

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1 here on behalf of Canadian Pacific parties. I came in
2 this morning and sat down on that side of the room
3 because I normally identify with that camp as opposed
4 to this camp, and Mr. Norton had to remind me that I
5 needed to change camps for the day.

6 And the reason is, as I think you probably
7 know, Canadian Pacific is a responsive applicant in
8 this case. Canadian Pacific is one of the two major
9 Canadian Railroads; the other one being Canadian
10 National, Mr. Osborn's client. Canadian Pacific has
11 two major subsidiaries in the United States: the
12 Delaware and Hudson which operates in the Northeast,
13 and the Soo Line Railroad which operate in the
14 Midwest.

15 Soo Line owns 49 percent of the Indiana
16 Harbour Belt -- the entity as to which we're
17 discussing the discovery of IHB today. I found out
18 about this after having been in Federal Court here all
19 day yesterday and arriving back at National Airport at
20 11 o'clock last night. I checked my voice mail this
21 morning and found that I was supposed to be here for
22 this hearing this morning. I scrambled around to see

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1 what I could do to get background information as it
2 pertains to the IHB.

3 We have not had time to prepare to address
4 this issue. I will tell you that it is Canadian
5 Pacific's position by virtue of Soo's 49 percent
6 ownership of the IHB, that although Conrail quite
7 clearly owns the majority of the stock of the IHB,
8 that majority ownership does not allow Conrail to
9 essentially speak on behalf of IHB or make unilateral
10 determinations as to how IHB should respond to
11 discovery requests.

12 And it is our position and will be our
13 position when we meet this issue -- which I suggest it
14 would be next week -- that any discovery request that
15 would be addressed to IHB should go directly to IHB
16 and not through Conrail. Because we think that if
17 discovery requests are addressed to Conrail in an
18 effort to obtain discovery from IHB, Canadian Pacific
19 doesn't have an opportunity to have its interests as
20 it pertains to the IHB as a separate, corporate entity
21 which observes all corporate formalities, which has
22 its own Board.

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1 Soo has representatives on the Board, Soo
2 has a voice in the management of the IHB, and for all
3 those reasons we are going to oppose the notion that
4 Conrail can be the vehicle for obtaining discovery as
5 it pertains to IHB. Thank you.

6 JUDGE LEVENTHAL: Well, the discovery
7 guidelines are more of a technical unit. As counsel
8 have appeared before me in this proceeding know that
9 I try to accommodate parties, and although it was
10 short notice to me, too, if everybody agreed, I'd be
11 perfectly willing to hear argument this morning.

12 But other than that, I think Mr. Norton's
13 position and Mr. Mayo's position is unassailable, so
14 it's something we'll have to take up next week.

15 MR. HEALEY: Your Honor, if I could ask.
16 I'm not clear exactly what it is that we didn't comply
17 with in order to properly put this --

18 JUDGE LEVENTHAL: You were supposed to
19 notice this on Monday of the week in which you want
20 the discovery conference to be held.

21 MR. HEALEY: And my understanding was that
22 this week, because the appearance today was on

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1 Thursday, my understanding from making the telephone
2 call that I have to make to initiate this, was that a
3 call on Tuesday was an acceptable call. Further, I
4 called Pat Bruce and left her a message on Tuesday
5 telling her that I was going to be here and this was
6 the matter I was going to present before you.

7 JUDGE LEVENTHAL: Well, I don't think Pat
8 Bruce has authority to decide whether or not you've
9 conformed to the discovery guidelines. Her duty is
10 administrative.

11 MR. HEALEY: Your Honor, with all due
12 respect, we are 12 days out from putting in a
13 responsive application. Now, if we have to wait
14 another six days before we even get a ruling on this
15 issue --

16 JUDGE LEVENTHAL: You know, the other side
17 has to have a right to reply.

18 MR. HEALEY: With all due respect --

19 JUDGE LEVENTHAL: -- and we're working --

20 MR. HEALEY: -- what did they think we
21 were coming here to talk about today? We've made this
22 issue clear to them. They have put forth in several

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1 discovery responses that they will not answer
2 questions on behalf on Conrail.

3 JUDGE LEVENTHAL: I considered that the
4 guidelines were adopted by the parties. I issued the
5 order adopting them but it was the parties that
6 furnished me with the order. My understanding, it was
7 on consent. I believe we did at one of our
8 conferences, as a matter of fact, and they have to
9 prevail.

10 The fact if we're working on short time,
11 everybody is. You know, I give you a ruling when you
12 come before me; I give you a ruling the very same day.
13 And then we have the 3-day period for appeal and then
14 a 3-day period to answer an appeal to the Board from
15 my rulings. Everybody's working on short time.

16 I'm going to sustain Mr. Norton's
17 objection and we'll take this up next week. However -
18 - let's go off the record for a moment.

19 (Whereupon, the foregoing matter went off
20 the record at 11:08 a.m. and went back on
21 the record at 11:10 a.m.)

22 JUDGE LEVENTHAL: In our off the record

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1 discussion I tried to see if an amicable resolution of
2 this dispute can be reached. Counsel will confer and
3 see if such a resolution can be had.

4 All right, is there anything else before
5 us this morning?

6 MR. MILLS: Your Honor, could I give you
7 a copy of the Indiana Harbour Belt agreement that I
8 referenced in my presentation? And I'll happy to get
9 a copy for the applicants as well.

10 JUDGE LEVENTHAL: All right.

11 MR. MILLS: It's part of the application
12 in Volume 8(c).

13 JUDGE LEVENTHAL: All right. Let the
14 record note that counsel has furnished me with a
15 document, "Agreement relating to contractual rights
16 and ownership interests of Consolidated Rail
17 Corporation with respect to the Indiana Harbour Belt
18 Railroad Company", and that he's furnished a copy of
19 this document to applicants. Is that correct?

20 MR. MILLS: Yes.

21 JUDGE LEVENTHAL: Then we have now,
22 without any further notice, a conference scheduled for

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1 next Thursday. If the parties decide that we don't
2 need such a conference, you'll advise my law clerk in
3 the usual manner, is that correct?

4 MR. NORTON: Your Honor, just -- next
5 Thursday -- next week is -- Monday is a holiday.

6 JUDGE LEVENTHAL: Yes, Monday is Columbus
7 Day.

8 MR. NORTON: I'm not sure whether that
9 should have a bearing on the timing of --

10 MR. MILLS: Normally they're held on
11 Wednesdays, I thought.

12 JUDGE LEVENTHAL: No, Thursday. They were
13 changed; it was originally Wednesday.

14 MR. NORTON: There may be other parties
15 who would be seeking to put things on the agenda.
16 It's a question of whether the day for notice should
17 be Tuesday, there may be a hearing on Friday next
18 week?

19 JUDGE LEVENTHAL: I'm available if --

20 MR. MILLS: Your Honor, given the time
21 crunch we're under, I think it's appropriate to go
22 forward on Tuesday -- or on Thursday, excuse me.

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1 JUDGE LEVENTHAL: All right. Why don't we
2 keep the conference date as Thursday. We'll change the
3 date of notice from Monday to Tuesday. All right?

4 MR. NORTON: Well, the other way would be
5 change it to Friday.

6 JUDGE LEVENTHAL: No --

7 MR. NORTON: For this -- people who want
8 to put something on the agenda for next Thursday
9 should give notice by the end of -- close of business
10 this Friday.

11 JUDGE LEVENTHAL: How are they going to
12 know it, though? Today is Thursday.

13 MR. NORTON: Well, we could get out a
14 notice this afternoon.

15 MR. EDWARDS: Your Honor, we could put out
16 a notice of the hearing which will be held next
17 Thursday that is now scheduled, as we normally would
18 next Monday. And include in that notice that anybody
19 wishing to bring matters before Your Honor, should do
20 so by close of business on Friday.

21 JUDGE LEVENTHAL: Do you think that's
22 fair?

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1 MR. NORTON: Well, it's not a big
2 obligation for someone to give notice that they have
3 an issue. Otherwise, it's cuts into our -- I mean, it
4 cuts down from two days to one day, our chance to
5 respond.

6 JUDGE LEVENTHAL: You do pretty well off
7 the cuff. We've been together for the past three
8 months now.

9 MR. NORTON: Win some; lose some.

10 JUDGE LEVENTHAL: Any objections to this?
11 Unfortunately, we only have two other parties here
12 now.

13 MR. COBURN: There are only a limited
14 number of parties for discovery outstanding at this
15 relatively late stage.

16 JUDGE LEVENTHAL: Are there?

17 MR. COBURN: There are several.

18 MR. MILLS: I suspect that most parties
19 are busy writing their comments at this point.

20 MR. COBURN: I'm not aware of any issues
21 percolating out there in the sense of letters that
22 would suggest that anybody's going to bring anything

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1 in --

2 JUDGE LEVENTHAL: All right. I'll go
3 along. If anybody objects I will be liberal in
4 accepting additional notices on Tuesday.

5 MR. EDWARDS: And we will, Your Honor, get
6 out the notice quickly -- today.

7 JUDGE LEVENTHAL: All right. Very well.
8 All right, then that's what we have before us. The
9 conference stands closed.

10 (Whereupon, the Discovery Conference was
11 closed at 11:14 a.m.)

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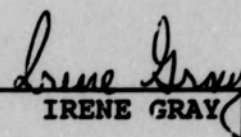
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Before: SURFACE TRANSPORTATION BOARD

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IRENE GRAY